

Case Law and Precedent

Let us consider the reason of the case. For nothing is law that is not reason.¹

¹ Sir John Powell in *Coggs v Barnard* (1703) 2 Ld Raym 909, 912; 92 ER 107, 109.

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Introduction

This chapter introduces students to case law — the output of courts and tribunals. A case is a judicial decision resolving an individual dispute; however, as we will see, judicial decisions are often modelled on the way in which similar cases were decided in the past, and they may also provide a model or a precedent for how future cases will be decided. Case law, or common law, is one of the major sources of law, the other being legislation which is the focus of later chapters. Common law is the law developed by judges, usually those in superior courts and tribunals. Historically, case law was the major source of legal rules but, due to increasing government regulation of activity during the 20th and early 21st centuries, legislation in its various forms has replaced cases as the main source of Australian law. Nevertheless, the study of cases remains extremely valuable for law students; understanding case law remains an essential skill for lawyers. Even in areas governed by legislation, it is necessary to understand how that legislation has been interpreted by the courts and to be able to anticipate how courts may apply it in new disputes.

7.1

The first part of this chapter examines the structure of a case and how to break it down into its parts for the purpose of analysis. The judicial resolution of many a dispute turns upon the facts of the dispute. Parties typically present conflicting versions of what happened. However, our focus in this chapter is on the law that applies to the facts. From this perspective, a particular focus in analysing a case is the identification of the legal principle applied in the case. We will consider how courts derive legal principles from past cases, and the factors that influence whether a case may be taken as an authoritative source of law in future cases.

7.2

The remainder of the chapter begins our study of the **doctrine of precedent**, outlining its basic structure and the forces impacting upon it. This doctrine determines the weight that should be given to the legal principles applied in past cases, or precedents. The key factors are:

doctrine of precedent:
the set of principles that determines whether the law expounded in a case should be followed in later, similar cases

- the position in the court hierarchy of the court or tribunal that decided the precedent relative to the present court or tribunal;
- whether the statement of principle made by the earlier court or tribunal was necessary to the resolution of the case (a ‘ratio’) or whether it was merely a passing comment (‘obiter’);
- in a full court, the number of judges that have given support to the statement of principle.

In this chapter we consider the advantages of courts following precedents, namely predictability, efficiency and equality. However, we also consider the forces operating against a strict doctrine of precedent. Greater flexibility gives courts and tribunals the ability to seek justice in the individual case, and to respond to changes in society and community values. As we’ll see, these competing forces set up an ongoing tension between judicial conservatism and judicial activism. The operation of the doctrine in the Australian court hierarchy is examined in **Chapter 8**.

Before turning to our discussion of the mechanics of reading and analysing a case, first we look at what a case is and how case law has developed.

DEVELOPMENT OF CASE LAW

7.3 Each case represents the solution to a particular dispute between the parties about which the trial judge, or bench of appeal court judges, has made a decision. Broadly speaking, judges make decisions in order to resolve disputes. Declaring the law in order to head off future disputes is a secondary consideration. For example, if a building is damaged by blasting for a road, a court will decide who, if anyone, is to blame and what compensation the owner should be paid; the court is less concerned with making rules that will help prevent future damage to buildings although, indirectly, case law may have that effect. By contrast, it is the legislature's job to regulate blasting operations, either in statutes or, more likely, through delegated legislation, balancing the need for efficient road construction against the interests of affected property owners.

Cases might be thought of as individual building blocks, unlike legislation which has greater scope to provide a more complete framework of rules to govern a given area. When judges make decisions they are concerned primarily with the individual cases before them. But together, a series of decisions dealing with the same general topic has the effect of creating a firm legal framework. Within that framework created by various individual judicial decisions, each case represents a brick in the wall.

7.4 Consider, for example, the House of Lords decision in *Donoghue v Stevenson*² in 1932. Ms Donoghue claimed that she found the decomposed remains of a snail in a bottle of ginger beer she was drinking, and from which she suffered shock and severe gastroenteritis. The bottle had been bought by her friend so Ms Donoghue had no contract with the seller and could not sue for a breach of contract. Instead she brought an action against the manufacturer who had supplied the ginger beer. The drink was in bottles which were opaque, thus preventing anyone seeing the contents before consumption. Lord Atkin said that the only way in which the action could succeed was if Ms Donoghue could show that

[t]he manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate ... consumer from discovering by inspection any defect, is under [a] legal duty to the ultimate ... consumer to take reasonable care that the article is free from defect likely to cause injury to health.³

Study of several previous cases or 'building blocks', decided over a lengthy period, led Lord Atkin to identify the 'neighbour principle' as the key to determining whether a duty was owed.

[A]cts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that

² [1932] AC 562.

³ Ibid 578.

I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁴

Donoghue v Stevenson's neighbour principle is seen with hindsight as having been a most important building block — a keystone. But much construction work has taken place since. The implications of the neighbour principle have been worked out through subsequent cases as courts have sought to construct a coherent principled body of negligence law. As will be discussed later in this chapter, the High Court carried out quite a bit of work in this area in the latter part of the 20th century.

This kind of systematic development of legal principles by the courts was not possible until decisions started being recorded, making them available to subsequent courts. The early English Yearbooks were described in 1.25. Those were followed by the Nominate Reports and finally, in the 1860s, by the official reports put out by The Incorporated Council of Law Reporting.⁵ This body was established to publish case reports after they had been checked by the judges who made the decisions. (For more detail on law reporting, see 7.66ff and 21.14ff.) At that stage the basic principle of the doctrine of precedent became settled.

7.5

While an essential element of the common law system, the doctrine of precedent is not the only factor that influences a court in reaching a decision. As will become apparent, the context in which the decision is made and the attitudes of the judicial decision-maker can also exert influence. Clearly the common law was created by courts and it continues to develop over time. Absolute judicial conservatism is not possible. *Donoghue v Stevenson* was a major development in negligence law. The relative influence on judicial decision-making of the objective historical case-law record as against an individual judge's subjectivity and creativity is a matter of perennial debate.

Reading and analysing a case

Cases are known by the names of the people, or parties, who are in dispute. The parties might include companies or representatives of the state as well as ordinary individuals. Those involved in the initial hearing of a civil case are generally called the **plaintiff** and the **defendant**. In the title of a civil case the plaintiff's name appears first. On appeal, the name of the person bringing the appeal, the appellant, appears first in the case name. The other party in the appeal, whose name appears second, is known as the respondent. The party bringing criminal charges to trial is known the prosecution; depending upon the jurisdiction, this party may also be known as the Crown, the State or the People. The party against whom charges are brought is known as the defendant or the accused (either term is acceptable). Traditionally, in Australia, the prosecution in criminal proceedings has been considered to be acting on behalf of the Crown. The case name includes 'The Queen' or 'The King', often signified by the abbreviation *R* for *Regina* or *Rex*, depending on whether the monarch reigning at the time of the case is female or male respectively. However, in certain jurisdictions, charges are now brought in the name of the relevant state, for example, 'The State of Western Australia'. In some cases, particularly those involving children or, more

7.6

plaintiff:
the party to a
case who brings
the action: see
21.18

defendant:
the party to a
case against
whom the action
is brought:
see **21.18**

⁴ Ibid 580.

⁵ The full title now is The Incorporated Council of Law Reporting for England and Wales.

recently, refugee cases, the court may conceal a person's identity using a pseudonym, initials, random letters or numbers. For a more extensive discussion of the naming of parties and cases, see **Chapter 21**.

7.7

Case law is a major source of law. Even in areas governed by legislation, an understanding of the cases interpreting that legislation is crucial. Many cases, even those studied at the beginning of a law course, can be long and complicated. They may contain convoluted facts, complex law, and two or more judgments in which judges have used the same or different reasoning to come to the same or different conclusions. It is advisable, therefore, for students to learn, at an early point in their studies, how to read and analyse a case.

The object of the exercise should always be borne in mind when reading and analysing a case. Commonly, lawyers and law students will be seeking to identify the principle or principles for which the case is authority, and the significance of these principles in the context of other rules of law. On other occasions, however, the reader may be seeking to understand the key facts, the historical context in which the case arose, or the arguments made by each party.

7.8

Shortcuts can be taken in reading cases which are reported. Some lawyers and students simply read the 'headnote' found at the beginning of the report. The headnote is a summary of the facts of the case and the decision reached by the court. An example appears below at the beginning of the report of *Hart v Rankin*⁶ at **7.12**. While this may provide a helpful introduction to the case, headnotes can be unreliable unless they have been approved, prior to publication, by the judge or tribunal member who heard the case. If not approved, the headnotes may be neither comprehensive nor accurate as they are written by independent law reporters: see **7.66**. Much research today relies on online sources which will often not contain a headnote, making it imperative for readers to be able to identify the key issues and principles for themselves.

7.9

When reading long cases, it is helpful to note, for later use, page or paragraph references to particular points of interest. In cases where there are several judgments, the name of the judge (or judges, if more than one joined, or agreed with, a judgment) should also be noted. If a case does not appear particularly important to the reader it may be sufficient to note only the following information:

- (a) citation;
- (b) court, including whether single judge, Full Court or Court of Appeal;
- (c) brief statement of material facts;
- (d) ground(s) of appeal and/or issue(s) to be decided;
- (e) reason(s) for decision, including principle(s) of law; and
- (f) decision.

Where there are multiple grounds of appeal and/or issues to be decided, steps (d)–(f) will need to be repeated for each ground or issue.

If a detailed analysis is required, it may be necessary to note a wider range of matters, including some or all of the following:

- (a) citation;
- (b) court, including whether single judge, Full Court or Court of Appeal;

⁶ [1979] WAR 144.

- (c) brief statement of material facts;
- (d) procedural history;
- (e) grounds for appeal and/or issues to be decided;
- (f) summary of court's analysis of law;
- (g) principle of law to be applied;
- (h) description of how law was applied to the facts;
- (i) decision;
- (j) orders made by the court; and
- (k) any features of the case suggesting that it should be viewed in its social or cultural context.

Steps (f)–(i) will need to be repeated for each issue that the court discusses. And where the decision includes more than one judgment, these steps may need to be repeated for those issues on which there is a divergence of opinion. Matters (e), (g), (h) and (i) correspond with the steps in the **IRAC** methodology (discussed further in **Chapters 16 and 22**).

IRAC:
an acronym for
the case analysis
method **I**sue;
Rule; **A**pplication;
Conclusion

UNDERTAKING AN ANALYSIS

Here we provide an example of a case analysis in accordance with the more detailed method. The decision is extracted below in a slightly edited form, with marginal labels identifying the parts of the decision corresponding with the various points of analysis. This is followed by a brief discussion of each step.

7.10

Warringah Properties Pty Ltd v Babij [2006] NSWSC 702

Supreme Court of New South Wales

a

Malpass AsJ

10, 14 July 2006

Claim for restoration of dividing fence — destroyed by deliberate act — distinction between fence and retaining wall — fence may have other functions — legislative changes — intention of the legislature — indemnity costs and leave.

JUDGMENT

[1] The Plaintiff and the Defendants are respectively the owners of adjoining properties. It now seems to be common ground that what has been described as a sandstone structure ('the structure') stood (at least in a rough sense) upon the common boundary between the two properties. The dispute that has ensued between the parties came into being when the Plaintiff demolished the structure on or about 10 May 2005. The active participant on the part of the Plaintiff was the late Mr Humphreys (a director and licensed builder).

[2] The Court has been told that the Plaintiff acquired its property in or about 2003. It has also been told that the property was acquired for the purposes of redevelopment. The Defendants have lived in their property for many years.

[3] The Court has before it photographs of the common boundary area prior to demolition. It also has a photograph of that area subsequent to demolition. I shall briefly

endeavour to describe in a general sense the boundary area. A rocky outcrop stood on the Plaintiff's property adjacent to the common boundary. The height of the outcrop is variable. The common boundary is about 14.5 metres in length. The structure extended along the whole length of the common boundary. Looking from the property of the Defendants, at least in part the structure had a height of about 2 metres. Looking from the rocky outcrop on the Plaintiff's property, at least in part the sandstone structure was about waist high. There was also some wire mesh with stakes on the top of the structure. The Plaintiff has contended that there was fill on its property between the rocky outcrop and the structure and that it was about 1 metre high (this was a matter in issue between the parties). The height of the fill was lower than the height of the structure and was not observable from the property of the Defendants.

[4] The Plaintiff obtained development approval. Without notice to the Defendants, it proceeded to effect demolition of the sandstone structure and says that it also removed the fill. It is said that it was necessary to demolish the structure and remove the fill to enable the construction of a driveway on the Plaintiff's property (the driveway being part of the redevelopment). At that time (and for a period thereafter) it was contended by the Plaintiff that the structure was on its property. The late Mr Humphreys gave evidence to that effect.

[5] Subsequent to the demolition, also without consultation with the Defendants, the Plaintiff erected a paling fence on the common boundary. This replacement fence was not accepted as a satisfactory replacement by the Defendants. During pre-litigation correspondence, the Plaintiff came to take the stance that the sandstone structure was a retaining wall and not a dividing fence (it was then being contended that it retained the fill).

[6] The Defendants brought proceedings in the Local Court seeking relief pursuant to s 8 of the *Dividing Fences Act 1991* (the 'Act'). It provides a remedy for restoration costs where a dividing fence has been damaged or destroyed by a negligent or deliberate act.

[7] A contested hearing took place between the parties (it lasted about 2 days). The principal issue was whether or not the structure was a retaining wall or a dividing fence. The Defendants were successful in the proceedings and the Plaintiff was ordered to pay the sum of \$26,000.00. It was also ordered to pay costs on an indemnity basis.

[8] The Plaintiff has brought an appeal to this Court against both orders. It alleges that there has been error in point of law. It requires a grant of leave to challenge the costs order.

[9] The hearing of these proceedings took place on 10 July 2006. Again, the principal issue between the parties was whether or not the structure was a retaining wall or a dividing fence.

[10] The Act affords the relief that was sought by the Defendants in relation to the restoration of a dividing fence. Section 3 of the Act contains definitions of 'dividing fence' and 'fence'. The definition of 'fence' excludes inter alia a 'retaining wall'. Section 3 does not define a 'retaining wall'. Some assistance as to the meaning to be given to those words may be found in what was said in and what was referred to in *Kontikis & Anor v Schreiner & Ors* (1989) 16 NSWLR 706.

[11] The Act introduced other provisions which were different to those previously found in its predecessor (the *Dividing Fences Act 1951* (the '1951 Act')). Sections 7 and

c

g

d

e

f

13 thereof (which required contribution in equal proportions) have been replaced by different provisions (see *inter alia* ss 7 and 14(c)). Liability to contribute in equal proportions is only applicable where the standard of the dividing fence is not greater than the standard for a sufficient dividing fence. The Act now allows the making of orders determining the manner in which contributions for fencing work are to be apportioned or re-apportioned. These changes would appear to have been motivated by observations made in *Kontikis*.

f

[12] *Kontikis* was decided whilst the 1951 Act was still in force. What was decided therein has been seen to be of relevance to the definition of 'fence' that was introduced into the Act. It would seem that a 'retaining wall' was expressly excluded so that the definition would accord with the position at common law (the exclusion of a retaining wall did not appear in the 1951 Act). In that case the Court gave consideration to a brick wall and held it was retaining wall and not a dividing fence within the meaning of the 1951 Act.

[13] The definitions of 'dividing fence' and 'fence' are as follows:

"dividing fence" means a fence separating the land of adjoining owners, whether on the common boundary of adjoining lands or on a line other than the common boundary.

"fence" means a structure, ditch or embankment, or a hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the whole of the boundary separating the land of adjoining owners, and includes:

- (a) any gate, cattlegrid or apparatus necessary for the operation of the fence, and
- (b) any natural or artificial watercourse which separates the land of adjoining owners, and
- (c) any foundation or support necessary for the support and maintenance of the fence,

but does not include a retaining wall or a wall which is part of a house, garage or other building.'

g

[14] The definition of 'fence' can be seen to be one of great width. Save for the exclusions, it would appear to be contemplated to pick up *inter alia* any structure that has the characteristics of enclosing or bounding land. A 'fence' satisfies the statutory requirements of a 'dividing fence' if it separates the land of adjoining owners. The concept of separation has been said to have a functional connotation.

[15] There has been attack on the expression of reasoning process by the Magistrate (Mr George LCM). In my view, in this case, it is unnecessary to embark on an analysis of his expression of reasoning process. I consider that any demonstrated error would not assist the Plaintiff.

h

[16] There is little historical evidence pertaining to the structure (it had been in existence for a very long time). As a consequence, there is a lack of express evidence as to the purpose of its construction. However, what evidence there is compellingly demonstrates that it meets the statutory requirements of both a 'fence' and of a 'dividing fence'. The structure was at least roughly situated on the common boundary. It extended along the whole boundary. Further, it can be observed that it was a structure that was higher than the fill. It had the characteristics of enclosing or bounding land. It also separated the two properties and performed the function of a dividing fence.

[17] In the previous paragraph I have mentioned certain of the material that the Magistrate had before him. The mention was not intended to be exhaustive. I consider that not only was the result reached by him reasonably open on the material, it was the correct result.

(h)

[18] It was correct to reach the result that the structure was a 'fence' within the meaning of the Act and not a 'retaining wall'. It was also correct to reach the result that the structure was a 'dividing fence' within the meaning of the Act.

[19] The Plaintiff's case is dependent on evidence that there was fill behind the structure on the Plaintiff's property and that it was performing some retaining function in relation to that fill. In my view, even assuming that to be the case, it does not seem to me to be determinative in the circumstances of this case.

[20] The question of what is a 'retaining wall' has been little argued. No definition was presented by counsel. There are dictionary meanings. They are to the effect of it being a wall built to hold back or support material (including earth and water).

[21] There may be overlapping of purposes. Apart from being erected to perform the purpose of a separating structure, a 'fence' may also serve other functions (such as a function to provide support). In the determination of the question of whether a particular structure is a 'fence' it can be expected that each case will turn on its own circumstances (with regard being had inter alia to matters of physical characteristics and function). Even if a fence has a support function, the Court is not precluded from finding that it was a 'fence' (see *Kontikis* pp 711–712). I do not consider that it was intended by the legislature that a structure necessarily fell outside the Act merely because it provided some support or other function.

(f)

(g)

[22] Questions concerning onus (relating to the burden to prove that the structure either was or was not a retaining wall) were agitated during the hearing. The questions were not fully argued. They do not have to be decided in this case and are better left for another day.

(h)

[23] In addition to what has already been said, I am not satisfied that there was any error in the awarding of costs on an indemnity basis. It seems to me that the Magistrate was entitled to form strong views as to the conduct of the Plaintiff and to take that conduct into account when dealing with the questions of costs. The Plaintiff had deliberately acted without notice to demolish the structure so that it would not impede its redevelopment. Thereafter it obstructed the restoration of an appropriate dividing fence on the specious bases that the structure had been a retaining wall on its own property. It needlessly put the Defendants to the not inconsiderable expense of propounding defended proceedings to obtain the relief that they were entitled to under the Act. Apart from the absence of manifest error, there is a lack of any other features which would attract the granting of leave.

(i)

[24] In conclusion, it can be said that the Plaintiff had the onus in this appeal to demonstrate error in point of law and that such error justified the disturbing of the decisions made by the Magistrate. In my view, the Plaintiff failed dismally to discharge that onus.

[25] The Summons is dismissed. Save for the costs of a Notice of Motion the Plaintiff is to pay the costs of the proceedings. The costs of that Notice of Motion which was brought to obtain an order for security for costs are presently reserved and can be dealt with by **Registrar** Howe in due course.

The following provides guidance as to how one might undertake an analysis in accordance with the more detailed paradigm given in **7.9**.

7.11

registrar:

an official who maintains records, in this instance for a court

a Citation, including name of case:

This is fairly straightforward. It is the citation for the case, found at the start of the case report in this example:

Warringah Properties Pty Ltd v Babij [2006] NSWSC 702

Like many cases today, while not reported in an official law report series this case is available online. The type of citation used is referred to as a ‘medium neutral citation’ (MNC). The citation starts with the names of the parties in italics; 2006 is the year of judgment; NSWSC abbreviates the court name (New South Wales Supreme Court) and 702 is the case number (it was the 702nd case decided in 2006 by the New South Wales Supreme Court). The number at the start of each paragraph in the judgment is a paragraph number. When a case is cited by its MNC, paragraph numbers in square brackets — for example, [23] — are used as **pinpoint references** to identify precisely where information can be found, rather than using page numbers as for a law report. See further in **Chapter 21** on citing law reports in general.

pinpoint reference:
a reference to a specific page, paragraph, footnote or other section of a source

b Court, including single judge, Full Court or Court of Appeal:

The court in which the case is heard is also usually straightforward. The information is found at the start of the published decision. This is a decision of Associate Justice Malpass — which may be written Malpass AsJ — of the Supreme Court of New South Wales. Among other things, Associate Justices hear applications that arise before trials, conduct certain civil trials and hear appeals from the Local Court, as in this case.

c Brief statement of material facts:

Case reports may contain many facts, not all of which are material. Generally speaking, facts are ‘material’ when they are crucial to the decision made by the court; that is, they are the facts upon which the decision is based. Which facts are material is often apparent from the relevant legislation. In other cases, this may only become apparent once the judgment has been read and the principles of law identified. In some cases, whether facts are material may remain a little unclear.

In the above extract, not all the facts are material. For example, it is not relevant to the outcome that the defendant had lived on the property ‘for many years’: at [2]. An initial statement of material facts follows.

The plaintiff and defendant were owners of adjoining properties separated by a structure along the shared boundary of the properties. Due to the different elevations of the properties the structure was about two metres high from the

defendant's perspective and waist high from the plaintiff's. The plaintiff claims there was fill on its side of the structure. Without notice to the defendant, the plaintiff had demolished the structure and subsequently erected, also without notice, a palisade fence.

Actually, the presence of fill turned out to be immaterial in this case: see at [19], [21] and the discussion below at (f), (g) and (h).

It should be noted that in many cases, particularly at first instance, the law is relatively clear-cut and it is the material facts that are in dispute. If a reader's interest in a decision is its factual reasoning rather than its legal reasoning, a different (non-legal) form of analysis will be called for. Further, in some cases, it may be principles of procedural or evidence law that are in dispute as they have a crucial bearing on the court's fact-finding. In such cases, with a little modification, the present form of analysis may be applied.

(d) Procedural history:

The procedural history records the steps taken in the proceeding prior to the hearing. This should include a review of the earlier decisions, if any, by the trial court and lower appeal court. If the case is being heard for the first time — that is, 'at first instance' — there will be only one entry. For cases that are on appeal, as here, there could be several earlier decisions. This material can usually be found in the headnote. The procedural history in this example would be:

This is a case on appeal to the Supreme Court of New South Wales from a decision of the Local Court of New South Wales in which the defendant (in the appeal) (Babij) was awarded \$26,000 in restoration costs under s 8 of the *Dividing Fences Act 1991* (NSW): at [6]–[7].

Students may be puzzled as to why Malpass AsJ observes that '[t]he Defendants brought proceedings in the Local Court' (emphasis added): at [6]. Ordinarily the party commencing proceedings is the plaintiff. However, the term 'defendant' here refers to the parties' position in the appeal. Malpass AsJ notes that '[t]he Plaintiff has brought an appeal to this Court': at [8]. It is more common for the parties in an appeal to be termed appellant and respondent but appeals from the Local Court to the Supreme Court are commenced by summons, and the party commencing proceedings is termed the plaintiff.

(e) Grounds for appeal and/or issues to be decided:

The issue to be decided is the question or questions on which the court must rule. The issue may be one of law or of fact, or whether a particular rule or principle applies to the facts. For example, who, if anyone, was negligent? What is the meaning of a statutory provision? On appeal, the court must determine whether the grounds of appeal are made out. In first-instance judgments, as mentioned above, the issue is often purely factual. On appeal the questions may be ones of law only, with the appellant arguing that the trial court misstated the law. More commonly,⁷ appeal courts are presented with issues combining law and fact, the appellant arguing that

⁷ *Ruddock v Taylor* (2005) 222 CLR 612, 627.

the trial judge misinterpreted and misapplied the law. For further discussion of the fact/law distinction, see **6.54ff**.

In *Warringah Properties Pty Ltd v Babij* there were two grounds of appeal, both a mixture of fact and law. The first was that the primary judge had erred in law in determining that the structure was a ‘dividing fence’ rather than a ‘retaining wall’. The second was that the primary judge erred in awarding costs on an ‘indemnity basis’, ruling that the plaintiff should pay not only **party/party costs** as is usually the case, but also **solicitor/client costs**: at [8]. The awarding of indemnity costs generally reflects the court’s disapproval of the way the losing party has conducted its case.

f Summary of court’s analysis of law:

Law students and lawyers tend to be most interested in appeal decisions where difficult issues of law have been resolved. In such cases, courts consider primary sources of law (legislation and past cases), possibly some secondary commentaries, and the parties’ competing submissions in order to arrive at the correct principle(s) of law to be applied in the instant case. In order to understand the court’s reasoning, it is helpful for students and lawyers to summarise the court’s discussion of legal authorities, whether case law or statute, and whether these were followed, disapproved or distinguished.

In this particular case, the legal questions that were analysed were ones of statutory interpretation; ‘what was the meaning of “retaining wall”?’: at [9]. Malpass AsJ considered the legislative definitions of ‘fence’ and ‘dividing fence’ in s 3 of the *Dividing Fences Act 1991* (NSW) (as it then was). The Court stated that the definition of ‘fence’ was ‘of great width’ and would ‘pick up inter alia any structure that has the characteristics of enclosing or bounding land’ and that a fence would be a dividing fence if it functionally ‘separates the land of adjoining owners’: at [13]. The Court then turned to the question of what constitutes a ‘retaining wall’, noting that there was no definition in the Act: at [10]. Dictionary meanings defined retaining wall as a structure ‘built to hold back or support material’: at [20]. The Court applied *Kontikis v Schreiner*⁸ decided under the former *Dividing Fences Act 1951*, concluding that even if a fence has an additional support function, that did not preclude it from being a fence: at [21].

g Principle of law to be applied:

The principle of law to be applied is arrived at by the legal analysis summarised above in (f). If the law is in dispute, the analysis can run into the statement of principle. How the principle applies to the facts is discussed in (h).

Under s 8 of the *Dividing Fences Act 1991*, a party is entitled to restoration costs where a ‘dividing fence’ has been damaged or destroyed by a negligent or deliberate act: at [6]. Whether a structure is a fence or ‘retaining wall’ is to be determined on a case-by-case basis through the application of s 3 of the Act. Thus, a fence would include any structure that has the characteristics of ‘enclosing or bounding land’ and a fence would be a dividing fence if it functionally ‘separates the land of adjoining owners’: at [13], [21]. The fact that a fence may also provide support does not

party/party costs:
the costs of conducting the litigation, including court fees and the solicitor’s costs; the courts have devised a scale of fees of what is fair and reasonable, which are paid generally by the unsuccessful party to the successful party to the litigation as part of the settlement of the case

solicitor/client costs:
the professional fees of a solicitor for their services; these are usually more generous than party/party costs and include fees for work done and expenses such as barristers’ fees, search fees, fees for reports and photocopying

⁸ (1989) 16 NSWLR 706.

preclude it from being a fence: at [21]. Note that the effect of s 8 was not analysed by the Court, but merely stated, whereas the definitions of 'dividing fence' and 'retaining wall' were subject to some discussion.

The Court did not analyse the law as to the awarding of costs but stated that the conduct of the parties was to be taken into account in determining an award: at [23].

(h) Description of how law applied to the facts:

Having identified the material facts and the applicable legal principles, it becomes possible to resolve the dispute by applying the law to the facts. This step may be fairly mechanical, or it may require judgement and discretion, depending on the law's level of abstraction. (Consider for example, judgments of whether conduct is 'reasonable' or 'offensive'.) It is this application that produces the decision, given in (i) below.

In the first ground of appeal here, the Court concluded that the structure was a 'dividing fence' within s 3 as it ran along the whole common boundary and was higher than the fill. It therefore bounded the land, separating the two properties, and was not erected only as a retaining wall to contain the fill: at [16].

As to the second ground of appeal, that of costs on an indemnity basis, the Court concluded there had been no error by the lower court as the plaintiff had deliberately destroyed the fence, obstructed the restoration of an appropriate fence on a 'specious' basis, and 'needlessly' put the defendants through the costs of embarking on the present litigation: at [23]. The lower court's disapproval was reflected in the grant of **indemnity costs**.

indemnity costs:
all costs incurred
provided they are
reasonable

(i) Decision:

In this step, the outcome of the application of the facts to the law is recorded. For example, was the plaintiff negligent and, if so, what damages should be awarded? The decision will often be briefer than the application of the law or analysis of the law at (i) and (g). If the case is an appeal, then the decision will be to dismiss or uphold the appeal, with various consequent orders.

In this case, the Court determined that the plaintiff had failed to demonstrate an error of law and dismissed the summons, thus upholding the original decision of the Local Court: at [24].

(j) Order made by the court:

The orders made by the court can usually be found at the very end of the judgment. They record the legal consequences ordered by the court following its decision. In this case they can be described as follows:

Summons dismissed with the plaintiff to pay costs.

(k) Social or cultural context:

Not all judgments will contain material worthy of note in this step. Other cases, however, will convey statements or attitudes reflective of the social or cultural context in which the judgment was given. For example, cases may reflect views on, among other things, gender roles, race, the environment or societal values in existence at the time the judgment was delivered.

This case does not contain any notable features in this regard.

As a point of interest, the legislation that was discussed in this case was subsequently amended in 2008 so that s 3 now reads:

“fence” means a structure, ditch or embankment, or a hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the whole of the boundary separating the land of adjoining owners, and includes:

- (a) any gate, cattleguard or apparatus necessary for the operation of the fence, and
- (b) any natural or artificial watercourse which separates the land of adjoining owners, and
- (c) any foundation or support necessary for the support and maintenance of the fence,

but does not include a retaining wall (except as provided by paragraph (c)) or a wall which is part of a house, garage or other building.

In line with *Warringah Properties Pty Ltd v Babij* this definition envisages that a ‘retaining wall’ may be subsumed in the statutory notion of ‘fence’. While the legislative language of course differs from that in the judgment, this may be taken as an endorsement of that decision. It appears the case would be decided the same way under today’s law.

EXERCISE 7: ANALYSING A CASE

Analyse the case which follows in accordance with the less detailed of the two methods provided in 7.9 above.

7.12



Hart v Rankin [1979] WAR 144

Supreme Court of Western Australia

Burt CJ

15, 30 September 1977

Criminal law and procedure — Driving offence — Motor vehicle — Driver — Whether person in charge of motor car under tow driving a motor vehicle — Road Traffic Act 1974–1978 ss 49(1), 5(1).

Transport — Motor vehicle — Driver — Whether person in charge of motor car under tow driving motor vehicle — Road Traffic Act 1974–1978 ss 49(1), 5(1).

Criminal law and procedure — Sentence — Sentences imposed for three offences occurring over comparatively short period of time — Whether sentences should be cumulative — Question of degree — Whether total period of imprisonment excessive.

The appellant was charged upon each of three complaints that he had driven a motor vehicle on a road whilst not being the holder of a driver’s licence contrary to the provisions of s 49(1)(a) of the *Road Traffic Act 1974–1978*. He was convicted of each charge upon his plea of guilty. He had made three journeys in his car between 4.30 in the afternoon and 6.30 the following morning. On the last occasion he sat in the driver’s seat of his car and steered it while under tow. He appealed against his conviction in respect of the last offence contending that his car was not a motor vehicle within the meaning of the Act and that he was not driving it. The justices had

sentenced him to 12 months' imprisonment in respect of each charge and ordered that the sentences be served cumulatively and fixed a minimum term of six months. The appellant appealed against the sentences imposed by the justices on the ground, *inter alia*, that the sentences should not have been made cumulative.

Held: (1) Upon the proper construction of s 49(1) of the *Road Traffic Act 1974–1978* the appellant drove a motor vehicle at the material time, because:—

- (a) the car was a motor vehicle as defined by s 5(1) and remained a motor vehicle notwithstanding that at the material time it was under tow and was unable to propel itself as it was designed to do;
- (b) while the verb 'to drive' was not defined by the *Road Traffic Act*, the appellant was the driver of the motor vehicle as defined by s 5(1) of the Act since he was in fact in control of the motor vehicle although it was under tow.

R v MacDonagh [1974] 2 WLR 529 at 531; [1974] 2 All ER 257 at 259, applied.

Wallace v Major [1946] 2 All ER 87; *Caughey v Spacek* [1968] VR 600 and *McGrath v Cooper* [1976] VR 535, distinguished.

(2) The sentences imposed by the justices in respect of each offence should have been made concurrent because the offences occurred over three fairly short journeys over a comparatively short period of time and in addition the total period of imprisonment of three years was excessive.

JG Picton-Warlow, for the appellant. *GF Scott*, for the respondent.

Cur adv vult

Other cases cited: *R v Roberts* [1965] 1 QB 85; *Murphy, Davidson & Ward v Watson* [1975] WAR 23; *R v Shaw* [1975] RTR 161; *Alberts v Pethick* (Appeal No 19 of 1976).

Burt CJ. ... The appellant who is a person of Aboriginal descent within the meaning of the *Aboriginal Affairs Planning Authority Act 1972*, was charged upon each of three complaints that he had driven a motor vehicle on a road whilst not being the holder of a driver's licence. Each charge was laid under s 49(1)(a) of the *Road Traffic Act*. He pleaded guilty to each charge and in each case he was convicted on his plea. Upon it appearing that he was at all times a person who was disqualified from holding a licence (s 49(2) of the *Road Traffic Act*) the sentence as noted on the record of court proceedings was in each case: 'Imp. in first instance: Twelve months' imprisonment. Accumulative Minimum six months before being eligible for parole.'

The appellant complains that the sentence passed upon each conviction was excessive in the circumstances and he appeals against his conviction on one of the three complaints — Complaint No 55 of 1977.

Appeal against conviction: Upon the appellant pleading guilty upon his conviction the prosecuting sergeant stated the facts to the presiding justices. From what was said it appears that at about 4.30 on the afternoon of 5 May 1977 the appellant drove his car from the Williams Native Reserve along the Williams-Narrogin Road to the Williams Hotel. He did that again at about 9.45 on the evening of that day. It seems that his car then ran out of petrol or broke down and reading between the lines it was left at the hotel overnight. At about 6.30 on the following morning the appellant had his car towed back to the reserve. The appellant was then sitting in the driver's seat and

steering it. That was the act of 'driving' which was relied upon for the purposes of the third charge.

The appellant by his order to review challenges his conviction upon that charge for three reasons.

He says in the first place that the justices ought not to have accepted his plea of guilty because they 'did not satisfy themselves that he [the appellant] was capable of understanding the nature of the charge', the proposition being that by reason of s 49 of the *Aboriginal Affairs Planning Authority Act* the justices could not accept a plea of guilty until they had so satisfied themselves. This ground was not pressed. Section 49 of the Act requires that a plea of guilty entered by a person of Aboriginal descent be not admitted 'where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want of comprehension of the nature of the circumstances alleged, or of the proceedings, is or was not capable of understanding that plea of guilty ...' It is not suggested that it did so appear to the court nor is it suggested that an 'examination' of the appellant would have led to its so appearing. That ground, in my opinion, is without substance.

The next ground taken is that from the statement of facts as given by the prosecuting sergeant it appears that what the appellant was driving, if he was driving, at the material time was not a 'motor vehicle'. A 'motor vehicle' is defined by the *Road Traffic Act* to mean, 'a self-propelled vehicle that is not operated on rail; and the expression includes a trailer, semitrailer or caravan while attached to the motor vehicle'. At the material time the vehicle was not 'self-propelled'. It was being towed. Therefore, the appellant contends, it was not at the material time a 'motor vehicle'. One answer to that might be to say that while it was being towed it was a 'trailer' and hence within the definition of 'motor vehicle'. The answer, however, which I would give would be to say that the definition is describing and defining a thing in terms of its functional design and not with reference to the way it is performing at any particular time. A conventional motor car is, I think, a 'motor vehicle' as defined and it remains a motor vehicle notwithstanding the fact, if it be the fact, that it has run out of petrol, or has a flat battery, or for some other such reason is unable at the time to propel itself as it was designed to do.

Then and finally it is said that the appellant did not at the material time 'drive' the motor vehicle. The verb 'to drive' is not defined by the Act but the noun 'driver' is. That word is defined to mean, 'Any person driving, or in control of, a vehicle or animal'. From that it is, I think, reasonable to say that to be in control of the vehicle is to drive it. I was referred to the decision of the Divisional Court in *Wallace v Major* [1946] 2 All ER 87, as an authority which it is said denies that conclusion. That was a case arising under and decided upon the construction of the *Road Traffic (Driving Offences) Act 1936* (UK) and upon the regulations made under that Act. As such it cannot be an authority which controls the answer to the present question which in the terms of the local legislation is, as it seems to me, a simple question of fact, the question being whether a person steering and, so far as he can, by the application of brakes controlling the speed of a vehicle which is being towed by another, can be said to be in control of the towed vehicle. I think, although the question I know has been otherwise answered although upon different legislation — see *Caughey v Spacek* [1968] VR 600, and *McGrath v Cooper* [1976] VR 535 — that robust common sense, which seems commonly to be resorted to in this area of the law, would require one to answer the question in the affirmative. I would, with respect, accept as being applicable to the local statute

the remarks appearing in the reasons of the Court of Appeal in *R v MacDonagh* [1974] 2 WLR 529 at 531; [1974] 2 All ER 257 at 259: 'There are an infinite number of ways in which a person may control the movement of the motor vehicle, apart from the orthodox one of sitting in the driving seat and using the engine for propulsion. He may be coasting down a hill with the gears in neutral and the engine switched off; he may be steering a vehicle which is being towed by another. As has already been pointed out, he may be sitting in the driving seat while others push, or half sitting in the driving seat but keeping one foot on the road in order to induce the car to move'. To say that a person in the position of the appellant in this case was not in control of his vehicle would seem to me to be saying that if he were not there his vehicle would nevertheless obediently follow the tow with proper tension on the tow rope. I would deny that as a question of fact. To achieve that result requires that the towed vehicle be steered and its speed controlled and the person who is doing those things, I think, is in control of that vehicle. It is, as I have said, a question of fact: see *Tyler v Whatmore* [1976] RTR 83.

In the instant case the appellant pleaded guilty and, in my opinion, and in the terms of s 197(1)(a) of the *Justices Act*, 'in the circumstances of the case there are (no) reasons which are sufficient to show that the decision of the justices in convicting the person ... should be reviewed' ...

The appellant also appeals from the sentence passed upon him in each case. The threshold question here is to find out what the sentence was. It has on all sides been assumed that the total sentence with respect to the three convictions was imprisonment for three years — one year in each case cumulative — with a minimum of 18 months to be served before being eligible for parole — six months in each case cumulative. I do not think that this is so. By s 37(3) of the *Offenders Probation and Parole Act*: 'Where a person is before a Court to be sentenced upon convictions of two or more offences that Court, notwithstanding that it sentences the person to be imprisoned in respect of all or any of those offences for which he is convicted and has then to be sentenced, shall not fix a minimum term in respect of each of the offences for which he is sentenced to be imprisoned but if the Court is of the opinion that a minimum term should be fixed in respect of those offences, it shall fix a minimum term in respect of the aggregate period of imprisonment the person shall be liable to serve under all the sentences then imposed'. To read the sentences as noted so as to extract from them three minimum terms each of six months made cumulative one upon the other requires that the word 'accumulative' as there appearing should apply both to the finite and the minimum term. That is not what the notation says and to read it in that way assumes that the justices were unaware of the provisions of s 37(3) of the Act. For these reasons it would seem to me to be more reasonable to say that the effect of the three sentences was that the appellant was sentenced to imprisonment for three years with a minimum of six months to be served before being eligible for parole.

The appellant says that the period of 12 months' imprisonment was in each case excessive in the circumstances. It was the maximum sentence which could be imposed upon him, but bearing in mind that the appellant had been convicted on nine previous occasions of driving a motor car without a licence I do not think that he can complain about that. Whether it was right to make each the second and third sentence cumulative upon the first is, however, another matter. The convictions show the offences occurred in the course of three fairly short journeys and over a comparatively short period of time. It is not a situation to which it is easy to apply established notions. If a man drives his car for, say, one mile and then stops, gets

out and buys a packet of cigarettes and then re-enters his car and drives on, has he committed two offences or one offence, and if two, then should the punishments imposed for each be made cumulative? It is, of course a matter of degree but I think that if it can in broad terms be said that the appellant was using his car on a particular day including, on the facts of this case, his driving on the following morning, then the proper punishment should not be made to depend on the number of stops and starts. So judged this case could be said to be near the borderline, but when one considers the total period of imprisonment ordered — three years — then that, in my opinion, confirms the view that each period of imprisonment ought to have been made concurrent.

In my opinion: —

- (1) The appeal against conviction on charge No 55 of 1977 should be dismissed.
- (2) The period of imprisonment imposed in each case should not be reduced but each should be served concurrently with the other.
- (3) The period to be served before being eligible for parole being a period fixed in respect of the time to be served under all the sentences should be six months.

To this extent the appeals are allowed and there will be orders accordingly.

Solicitors for the appellant: *Aboriginal Legal Service*.

Solicitor for the respondent: *State Crown Solicitor*.

RODNEY GREAVES

Doctrine of precedent or *stare decisis*

This chapter is concerned with finding statements of law in past cases. Past cases provide precedents which may be binding in some subsequent cases. As will be seen, extracting a principle of law from a precedent is often not straightforward. One issue is that, in judicial decisions, statements of law are not provided according to a single fixed set of words. This is a significant difference between judicial decisions and legislation. Sometimes the principles of law that have been applied in a case are not explicitly stated in the decision at all; those principles are merely implicit in the judgments. In other cases, although the judge may quite specifically state the rule being applied, this might be done more than once — each time in a different form of words. The difficulty is compounded where an appeal court's decision flows from several different judgments, each containing one or more statements of the rule. When interpreting a case, therefore, it is often possible to state the rule for which it is authority in different ways. This is one reason why case law rules are more flexible than statutory provisions, but frequently less certain. Although the meaning of legislation is sometimes unclear, at least the rule is expressed in a single form of words.

7.13

Other issues also arise in applying the doctrine of precedent. The effect of the doctrine is that, when deciding cases, courts have regard to past decisions in which the law and the facts are similar. The relative weight or authority of a case, however, may vary and this too is determined by the doctrine of precedent. Nearly all legal systems (including civil law systems) rely on the authority of precedent, although with differing

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stare decisis:
the doctrine
of binding
precedent

7.15

ratio decidendi:
the reason for
a decision in a
case; the judge's
decision on the
material facts

7.16

degrees of formality and strictness. Countries that derive their legal systems from the English common law are said to employ the principle of **stare decisis**, which literally translates as 'to stand on what has been decided'. This is quite a strict approach to precedent. According to Cross and Harris, the orthodox interpretation of *stare decisis* is to 'keep to the *rationes decidendi* of past cases'.⁹ 'Rationes decidendi' is the plural of **ratio decidendi** which means the reason for the decision. A later court may, in some situations, be strictly bound by the rationes of past cases.

There is ongoing debate about the extent to which, in any given situation, the doctrine of precedent allows a court discretion as to the principle to be applied in the present case. The doctrine of precedent itself draws a distinction between precedents that are strictly 'binding' and those which are merely 'persuasive'. Where a precedent is strictly binding, the present court must apply it, even if it views the principles laid down as wrong, unwise or harmful. Where a precedent is persuasive, the present court may be able to avoid applying those principles. However, the fact that the present court simply disagrees with those principles may not provide sufficient reason to depart from the precedent. There is flexibility in the doctrine of precedent, and often courts can avoid following precedents they disagree with. Nevertheless, it is not uncommon to find judges expressing their 'judicial regrets' about the law they are compelled to apply.¹⁰

The general rules of the doctrine of precedent in common law systems can be summarised as follows:

- each court is bound by decisions of courts higher in its hierarchy;
- a decision of a court in a different hierarchy or lower in the same hierarchy may be persuasive but is not binding;
- a court is not bound by its own past decisions but will depart from them with reluctance;
- only the *ratio decidendi* of a case is binding;
- *obiter dicta* ('remarks in passing', see 7.45ff below) are not considered binding but may be persuasive; and
- precedents do not lose their force by lapse of time.

Further, it is axiomatic that only propositions of law will be viewed as *rationes decidendi*. Conclusions of fact by a superior tribunal or court in the judicial hierarchy do not bind an inferior tribunal or court, especially in different proceedings.¹¹

⁹ Rupert Cross and JW Harris, *Precedent in English Law* (Oxford University Press, 4th ed, 1991) 100.

¹⁰ Ibid 36.

¹¹ Contrast s 25B of the *Dust Diseases Tribunal Act 1989* (NSW) which may be viewed as extending the doctrine of precedent to certain findings of fact. Section 25B(1) provides '(1) Issues of a general nature determined in proceedings before the Tribunal (including proceedings on an appeal from the Tribunal) may not be relitigated or reargued in other proceedings before the Tribunal without the leave of the Tribunal, whether or not the proceedings are between the same parties.' This extension may be viewed as being based on three considerations. First, very similar issues arise in many of the cases before the Tribunal, eg whether exposure to a particular level of asbestos dust causes mesothelioma. Second, the consideration of these issues turns on expensive and time-consuming expert evidence. Third, given the aggressively fatal nature of dust diseases once they take hold, it can be a race against time for the Tribunal to decide before the sufferer of the disease succumbs: see, eg, (*Re Mowbray*) *Brambles Holdings Ltd v British American Tobacco Australia Services Ltd* (No 6) [2006] NSWDDT 7.

These rules and the concepts on which they are based are discussed in the remainder of this chapter. They are revisited in **Chapter 8**, which takes a closer look at how they operate in the context of Australia's federal system of interrelated court hierarchies.

RATIONALE OF THE DOCTRINE OF PRECEDENT

Branson and Finkelstein JJ explained the doctrine of *stare decisis* in *Telstra Corporation v Telcoar*.^{7.17}

The doctrine of *stare decisis* takes its name from the Latin phrase '*stare decisis et non quieta movere*' which translates as 'stand by the thing decided and do not disturb the calm'. It is a doctrine based on policy. The rationale for the doctrine can be grouped into four categories: certainty, equality, efficiency and the appearance of justice. *Stare decisis* promotes certainty because the law is then able to furnish a clear guide for the conduct of individuals. Citizens are able to arrange their affairs with confidence knowing that the law that will be applied to them in future will be the same as is currently applied. The doctrine achieves equality by treating like cases alike. *Stare decisis* promotes efficiency. Once a court has determined an issue, subsequent courts need not expend the time and resources to reconsider it. Finally, *stare decisis* promotes the appearance of justice by creating impartial rules of law not dependent upon the personal views or biases of a particular judge. It achieves this result by impersonal and reasoned judgments.¹²

Further, as Kirby P explained in *X v Almagnetized Television Services Pty Ltd [No 2]*, '[t]he binding authority of precedent is related to political organisations of a country's courts and to the power of a court to reverse the decision of another lower in the judicial hierarchy'.¹³ Decisions of a higher court are binding on lower courts in the same hierarchy because, on appeal, the higher court would have the power to overrule decisions of the lower courts. Also, the judges in the higher courts have greater seniority and are presumably more learned.

It is only the ratio from a previous case higher in the same court hierarchy that is binding. The explanation for the ratio, but not **obiter dicta** (singular: *obiter dictum*), being binding is that a court takes greater care in stating a rule that forms a reason for its decision than it does in making a passing remark. In addition, judges may be reluctant to make definitive pronouncements on the hypothetical situations discussed in obiter. At the same time, it is recognised that it is not always easy to distinguish between the ratio and an *obiter dictum*: see **7.45ff**.

Precedents are used in many areas other than the legal system. In deciding an issue, decision-making bodies of all kinds will consider previous decisions in relation to similar issues and will be aware they are setting an example for the future. The doctrine as applied in the common law system is a refined and formalised example of normal decision-making.

obiter dicta:
a legal principle expounded by a judge which is not necessary for the judge's decision in the case

7.18

HIERARCHY OF COURTS

Since the common law doctrine of precedent is premised on the hierarchical structure of the court system, the different elements of the hierarchy, and how they relate to one

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¹² (2000) 102 FCR 595, 602. See also Dyson Heydon, 'How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?' (2009) 9 *Oxford University Commonwealth Law Journal* 1, 9–13 ('How Far?').

¹³ (1987) 9 NSWLR 575, 584.

another, must be considered. The same basic court hierarchy is found in all common law **jurisdictions** (in the territorial sense); however, differences of detail exist. A description of the main features of the Australian and several other common law court hierarchies is given in **Essential Legal Toolkit A** at the end of the book.

7.20

jurisdiction: has dual meanings:
(a) the territory over which legal power extends: eg Queensland, the Commonwealth, or Australia; (b) the function and the extent of the authority of a court or tribunal in relation to the matter before it

7.21

To take New South Wales as an example, there are essentially five levels in the hierarchy. At the bottom level is the Local Court presided over by magistrates. Next is the District Court, which is presided over by District Court judges. Then the Supreme Court, which is presided over by Supreme Court Justices. Above that are the Court of Appeal and the Court of Criminal Appeal, which are usually made up of benches of senior Justices, including the Chief Justice, President of the Court of Appeal, and Justices of Appeal. And finally, above all is the High Court of Australia. These are the courts with general **jurisdiction** (in the sense of a court's functions and authority). There are, in addition, specialist courts such as the Drug Court and the Industrial Court, and a range of tribunals. It should also be noted that the High Court is actually a federal court that plays an important role in the interpretation, application and development of New South Wales law.

7.22

Most courts above the lowest level have both original and appellate jurisdiction (in the second sense). To say that a court is exercising its original jurisdiction means that it is hearing a case at first instance. There may have been pre-trial hearings dealing with case management issues (see **Chapter 6**); however, this is the first time matters of substance have been considered. Conversely, appellate jurisdiction, as the name suggests, is where a court is hearing an appeal against a decision of a court (or tribunal) lower in the hierarchy. For example, in New South Wales, while the District Courts and the Supreme Court have some appellate jurisdiction, the term 'intermediate appeal court' ordinarily refers to the Court of Appeal and Court of Criminal Appeal. These intermediate appeal courts specialise in civil and criminal law respectively. All the other general courts have both civil and criminal jurisdiction.

Some of the complexities relating to the doctrine of precedent that are raised by tribunals and the interrelation of state and federal court hierarchies are discussed in the next chapter. The important thing to note for present purposes is that the court hierarchy plays two important interrelated functions. First, it establishes avenues of appeal, and, second, it determines which precedents are strictly binding. Because appellate courts have the power to reverse the decisions of lower courts, lower courts should follow the law as stated by the appellate courts. Where a lower court fails to follow the precedent of an appellate court, the lower court is liable to be reprimanded and pulled sharply back into line.

*Reich v Client Server Professionals of Australia Pty Ltd ('Reich')*¹⁴ provides an illustration. *Reich* concerned litigation being conducted in the Industrial Relations Commission of New South Wales in Court Session, a specialist court. The Full Bench was considering an appeal from a first-instance decision in which Maidment J avoided following a previous decision of the Full Bench. Maidment J had considered the Full Bench precedent but treated it dismissively, favouring an earlier line of authority. In *Reich* the Full Bench said of Maidment J:

His Honour was, of course, not sitting as a member of an appeal bench but as a trial judge and, as such, bound by decisions of Full Benches of this Court and of its predecessors. The

¹⁴ (2000) 49 NSWLR 551 ('Reich').

policy reasons for that situation are so obvious one hesitates to state them. However, they are helpfully set out, both in terms of principle and of policy, in a decision of the former Industrial Commission in Court Session in *Re Hospital Employees Pharmacists (State) Award* [1979] AR (NSW) 348 at 350–351 where the Full Bench ... said:

‘It was the duty of the chairman to follow a decision of the Commission which was directly in point. The scheme of the Act provides for the Commission to exercise a supervisory appellate jurisdiction concerning decisions of the conciliation committees. A failure at committee level to follow decisions of the Commission is conducive to the bringing of appeals and the inevitable delay in finalizing industrial claims which an appeal causes. The present case provides an example. The principle involved is aptly stated by Stephen J in *Viro v The Queen* (1978) 141 CLR 88 at 129 in these terms:

“The first duty of a court is to administer justice according to law. However in the case of an inferior court operating within a system where the doctrine of precedent applies, the existence of authority binding upon it determines for it what it must understand to be the law. It must accept the law to be as the precedent authority has declared it to be, whatever may be its own inclinations in the matter. The sanction implicit in the doctrine of precedent is simple and effective; if an inferior court fails to observe the doctrine the superior court will correct its decision on appeal. Thus the existence of an appeal is inherent in and essential to the doctrine.”

Apart from such consideration, any failure at committee level to follow decisions of the Commission can only impair the consistency and uniformity in decisions of the various tribunals constituted by the Act which has always been seen as desirable. The decision of Dey J was not only binding on the committee but, in our view, was also correct.¹⁵

Lower courts can be in a particularly difficult position where a binding precedent makes no sense to them. In 1995 in *Pfennig v The Queen* ('Pfennig')¹⁶ the High Court established an admissibility test for evidence of a criminal defendant's other misconduct (also known as similar fact, propensity or tendency evidence) which trial courts and intermediate appeal courts had a great deal of trouble making sense of. On its face, the test was virtually impossible to satisfy.¹⁷ Legislatures intervened ‘to lower the threshold for admissibility of similar fact evidence by abolishing ... the ... *Pfennig* test’.¹⁸ In time, only Queensland was left struggling with the common *Pfennig* test. In *R v O'Keefe* ('O'Keefe')¹⁹ the Queensland Court of Appeal developed a workaround which came to be adopted by Queensland criminal courts. In a criminal case before the District Court of Queensland, the trial judge followed O'Keefe, admitting evidence of the defendant's other alleged victims, leading to his conviction on a series of sexual

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¹⁵ Ibid [53].

¹⁶ (1995) 182 CLR 461.

¹⁷ *R v W* [1998] 2 Qd R 531, 537, 533–4; *R v Vinh Le* [2000] NSWCCA 49 [116].

¹⁸ *Velkoski v The Queen* ('Velkoski') 45 VR 680 [58]. The legislative responses were *Crimes Act 1958* (Vic) s 398A (introduced 1997); *Evidence Act 1906* (WA) s 31A (inserted 2004); and *Evidence Act 1929* (SA) s 34S (inserted 2011). Apart from Queensland, the other jurisdictions adopted the *Uniform Evidence Law* ('UEL'), ss 97, 98 and 101 of which have been held to depart from *Pfennig*: *R v Ellis* (2003) 58 NSWLR 700. The UEL legislation is: *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic). The UEL test, itself, has been described as ‘exceedingly complex and extraordinarily difficult to apply’: *Velkoski* [33].

¹⁹ [2000] 1 Qd R 564 ('O'Keefe').

assaults. This approach and the convictions were upheld by the Queensland Court of Appeal.²⁰ However, the defendant then appealed to the High Court which, in *Phillips v The Queen* ('*Phillips*')²¹ in a unanimous judgment held:

The trial judge from time to time referred to *Pfennig v The Queen*. But he did not apply the tests stated in that case. Rather he followed the agreement of counsel and applied the tests advanced in *R v O'Keefe*. The Queensland Court of Appeal in *R v O'Keefe* said that the tests it stated were the 'only sensible resolution' of passages in *Pfennig v The Queen* which were not as 'workable' as the views expressed by minority judges, revealed 'fundamental difficulty' and 'artificiality', were 'rather perplexing', had led to 'the expression and application of different tests' in state courts and had a 'dubious pedigree'.

It must be said at once that it is for this court alone to determine whether one of its previous decisions is to be departed from or overruled. Of course, in criminal cases it is often necessary for trial judges and Courts of Criminal Appeal to elaborate upon rulings of this court; to gather together rules expressed in several cases; to apply rules to different facts and sometimes to reconsider rules affected by later legislation. Within spaces left by the binding determinations of this court, trial judges and intermediate courts retain their proper functions. However, these do not extend to varying, qualifying or ignoring a rule established by a decision of this court. Such a rule is binding on all courts and judges in the Australian judicature.

...

The tests advanced in *O'Keefe* are expressed differently. Because they are expressed differently it cannot be assumed that in every case they would operate identically to the tests expressed in *Pfennig*. Indeed, much that is said in the reasons in *O'Keefe* might be read as suggesting that the tests propounded there were intended to have a different operation from those stated in *Pfennig*. These are reasons enough to conclude that the *O'Keefe* tests should not be adopted or applied. Intermediate and trial courts must continue to apply *Pfennig*.²²

These observations prompted one commentator to suggest that the High Court was treating its decisions 'like sacred texts', an approach which 'would threaten to ossify the common law, rather than allowing its development'.²³ The next time the issue reached the High Court, it was noted that *Phillips* had become 'one of the most criticised decisions of the High Court of all time'.²⁴

IDENTIFYING THE RATIO DECIDENDI

7.24

Courts are bound by the precedents of courts higher in the court hierarchy. However, only the ratio decidendi in a case (the legal reason for the decision) — that is, the pronouncement of legal principle necessary for the judge's decision on the established facts of the case — is binding. Arriving at a statement of the ratio is not always straightforward. A number of difficulties may arise, for example:

- It may be difficult to determine whether the principle of law was in contention in the earlier case, a requirement for the principle to form a ratio in the strict legal sense.

²⁰ *R v PS* [2004] QCA 347.

²¹ (2006) 225 CLR 303 ('*Phillips*').

²² *Ibid* [59]–[60], [64] (citations omitted).

²³ Jeremy Gans, 'Similar Facts after *Phillips*' (2006) 30 *Criminal Law Journal* 224, 237.

²⁴ *Stubley v Western Australia* [2010] HCATrans 269 (20 October 2010).

- It may be possible to state a ratio at a higher or lower level of generality, broadening its operation or distinguishing it, respectively.
- There may be no majority in favour of a particular ratio.
- It may be difficult to distinguish the ratio from the obiter dicta.

There may be overlap between these issues and the list is not exhaustive. Each of these problems will be considered in turn.



Rules in contention

The expression *ratio decidendi* can be translated as ‘reason for deciding’. Rationes are most commonly distinguished from obiter dicta, passing remarks which are not necessary to the resolution of the case and which are not binding on lower courts: see 7.19ff. But not every statement of law leading to the decision will constitute a ratio. The legal principle must have been in contention. In many cases, particularly at first instance, the law will not be in issue. The parties may disagree only about the facts. As McHugh J said in the High Court:

7.25

This Court has no business in determining issues upon which the parties agree ... If a point is not in dispute in a case, the decision lays down no legal rule concerning that issue. ... The case can have no wider *ratio decidendi* than what was in issue in the case. Its precedent effect is limited to the issues.²⁵

A non-contentious rule that the court adopts and applies will not be viewed as a ratio. To constitute a ratio there must be a “ruling on a point of law” rather than a “statement of a rule of law”.²⁶ The rationale for this is that if the issue was in

²⁵ *Coleman v Power* (2004) 220 CLR 1, 44–5; see also *Bell Lawyers Pty Ltd v Pentelow* (2019) 372 ALR 555 [28].

²⁶ Cross and Harris (n 9), quoting from Neil MacCormick, ‘Why Cases Have *Rationes* and What These Are’, in L Goldstein (ed), *Precedent in Law* (Clarendon Press, 1987) 179.

contention the parties will have presented competing arguments and the court will have been required to make a ruling. The court will have given the matter its full consideration with the benefit of the argument of counsel. In *Miliangos v George Frank (Textiles) Ltd*,²⁷ Lord Simon noted that ‘a judgment in undefended proceedings or a decision on an uncontested issue tends to have less authority than one given after argument on both sides’.²⁸

7.26 *Taylor v Rudaks*²⁹ illustrates this point. The trial judge, Mansfield J, reached a view on the meaning of s 588M of the *Corporations Act 2001* (Cth). He then added:

In reaching that conclusion, I have not overlooked the observation [supporting a different interpretation] of Hill J in *Commonwealth Bank of Australia v Paola* [2005] FCA 855 at [25], upon which senior counsel for the trustee relied. ... [T]hat view was not expressed after the benefit of argument on the matter. It does not form part of the *ratio decidendi* of the decision. It is not a view which his Honour reached after the opportunity of considering the decisions to which I have referred or the analysis of the precise wording of s 588M. I accordingly do not think that the decision obliges me to reach a conclusion different from that I have reached; nor that I should do so.³⁰

Heydon J made a similar point in *Tabet v Gett*:

The consciousness of parties and their legal representatives that the outcome of a debate about the correctness of contested propositions of law is decisively important to the interests of those parties often greatly assists the sharpness and quality of that debate. ... [T]he efficacy of a debate does not depend only on whether the participants in the debate have that consciousness. The efficacy of its resolution depends on the court sharing that consciousness and being assisted by that consciousness.³¹

Level of generality and distinguishing

7.27 Courts are tasked with deciding the case before them. As such, courts may make statements of principle at a very low level of generality: ‘given these facts, this result follows’. Such statements are of limited usefulness for subsequent cases. Statements at a higher level of generality can encompass a wider range of factual circumstances.

In *Donoghue v Stevenson*, the House of Lords held that the manufacturer of an opaque bottle of ginger beer could be liable to the consumer if, before the bottle was sealed, the ginger beer was contaminated by the remains of a snail and the consumer became ill as a result of drinking it. A rule stated in terms of these concrete facts would not be particularly useful. Decomposed snails in ginger ale bottles are rare events. Such a specific rule would not be binding, for example, where a snail was in a can of Coca-Cola. It is unclear, however, why the rule should not apply. Arguably, as a matter of principle, the rule should apply, at the least, to all food and drink which is packaged or manufactured in such a way as to prevent inspection prior to consumption. It should extend, for example, to a cockroach in a Mars bar. But why limit it to food and drink? Why not extend

²⁷ [1976] AC 443.

²⁸ Ibid 478; quoted with approval in *CSR Ltd v Eddy* (2005) 226 CLR 1 [14].

²⁹ (2007) 245 ALR 91.

³⁰ Ibid 101–2.

³¹ (2010) 240 CLR 537, 574.

manufacturer's liability to all situations where the end-user is injured as the foreseeable result of a hidden defect?

Actually, as noted above at 7.4, Lord Atkin expressed the principle at a much higher level of generality. His 'neighbour principle' provided a basis for negligence law generally. 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour', where 'neighbour' is defined to include 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.³²

Care must be taken in drawing a general principle from an individual decision.
Many cases, to a greater or lesser degree, 'turn on their own facts'. In *Nagle v Rottnest Island Authority*³³ the plaintiff was injured by concealed rocks while diving into waters off Rottnest Island. The High Court held the public authority liable for failing to warn of the dangers of concealed rocks for those diving. Subsequently, in *Vairy v Wyong Shire Council*, Gleeson CJ and Kirby J observed:

The proper use of precedent is to identify the legal principles to apply to facts as found. Decided cases may give guidance in identifying the issues to be resolved, and the correct legal approach to the resolution of those issues. But a conclusion that reasonableness required a warning sign of a certain kind in one place is not authority for a conclusion about the need for a similar warning sign in another place. The decision of this Court in *Nagle v Rottnest Island Authority* is not authority for the proposition that the coastline of Australia should be ringed with signs warning of the danger of invisible rocks. That was a decision about the legal principles relevant to the existence of a duty of care. The majority also held that the primary judge had been correct to find a breach of duty. That was a conclusion of fact, turning upon the circumstances of the particular case. The decision in *Nagle* did not establish that reasonableness requires a warning sign in all places where there are submerged rocks, any more than the decision in *Romeo v Conservation Commission (NT)* established that reasonableness never requires a warning sign at the top of a cliff.³⁴

A judge may hold that the facts of an earlier case, providing a potential precedent, are materially different from the present facts and that, accordingly, the principle applied in that case is not applicable to the present case. Construing a precedent relatively narrowly, so that it does not have application to the present case — or 'distinguishing' the precedent — can be a useful technique. It provides a court a means of avoiding unwelcome precedents, potentially developing the law in a useful way. At the extreme, the authority of an unpopular precedent may be confined to those very rare cases with identical facts. 'In this way the tooth of time will eat away an ancient precedent, and gradually deprive it of all authority and validity.'³⁵

The technique of distinguishing precedents can be illustrated in *Thornton v Shoe Lane Parking Ltd ('Thornton')*.³⁶ The English Court of Appeal had to decide whether the plaintiff was bound by a clause excluding liability, which appeared on a ticket automatically issued

7.28

7.29

³² Ibid 580.

³³ (1993) 223 CLR 486.

³⁴ (2005) 223 CLR 422, 422 [3].

³⁵ John W Salmond, 'The Theory of Judicial Precedents' (1900) 16 *Law Quarterly Review* 376, 383, quoted in *PGA v The Queen* (2012) 245 CLR 355 [24] ('PGA').

³⁶ [1971] 2 QB 163.

as the plaintiff drove into the defendant's car park. It was argued that the case was the latest in a line of cases in which the customer received the ticket from a human operator. In these earlier cases the issue of the ticket was regarded as an offer by the company. By taking the ticket without objection the customer was deemed to have accepted the offer, thus forming a contract and becoming bound by the conditions printed on the ticket. In *Thornton*, however, the Court distinguished those earlier cases on their facts:

None of those cases has any application to a ticket which is issued by an automatic machine. The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved.³⁷

[T]he really distinguishing feature of this case is the fact that the ticket on which reliance is placed was issued out of an automatic machine ... [I]n all the previous so-called 'ticket cases' the ticket has been proffered by a human hand, and there has always been at least the notional opportunity for the customer to say — if he did not like the conditions — 'I do not like your conditions: I will not have this ticket'. But in the case of a ticket which is proffered by an automatic machine there is something quite irrevocable about the process.³⁸

7.30

This technique may even be open where the precedent contains a statement of principle that, on its face, covers the present case. There may be some flexibility because it is not expected that judges will 'state a rule with the completeness of a statutory draftsman'.³⁹ *Attorney-General (NSW) v Mundey ('Mundey')*⁴⁰ provides an example. Immediately following the conviction of two of his fellow unionists for criminal damage in connection with an anti-apartheid protest, Mr Mundey, in response to questions from a journalist, criticised the decision and described the judge as 'racist'. The Attorney-General argued that this constituted a contempt on the basis that it was calculated, or tended, to obstruct the administration of justice, namely a possible appeal or retrial. The Attorney-General relied on a statement by the Full Court of the Supreme Court in an earlier case, *Ex parte Attorney-General; Re Truth & Sportsman Ltd*:

It seems obvious to this Court that *any statements or comment* dealing with the case and propounding views as to its proper determination are calculated to obstruct, or to tend to obstruct, the administration of justice and to make the task of the court entertaining the appeal both difficult and embarrassing.⁴¹

Hope JA, the single judge of the Supreme Court hearing the contempt proceedings in *Mundey*, suggested:

With respect to the members of the court, it seems to me that this statement is too wide. It appears to have been based on statements appearing in the judgments of Humphreys and Oliver JJ in *R v Davies; Ex parte Delbert-Evans* but a later court of five judges, presided over by Lord Parker CJ, has held that these statements were too wide or should be read down: *R v Duffy; Ex parte Nash*.⁴²

³⁷ Ibid 169 (Lord Denning MR).

³⁸ Ibid 174 (Willmer J).

³⁹ Heydon (n 12) 19.

⁴⁰ [1972] 2 NSWLR 887 ('Mundey').

⁴¹ *Ex parte Attorney-General; Re Truth & Sportsman Ltd* [1961] SR (NSW) 484, 496, cited in *Mundey* (n 40) 901.

⁴² *Mundey* (n 40) 901–2. The internal references are *R v Davies* [1945] 1 KB 435, 444, 445 and *R v Duffy* [1960] 2 QB 188.

Consideration of *R v Duffy* and other authorities led Hope JA to prefer a narrower test, requiring an ‘intention’ or a ‘real risk’⁴³ that the course of justice would be interfered with. In the present case, Hope JA noted that Mr Mundey made the statements spontaneously in answer to questions by a journalist, and that the broadcasting of the statements was done by a media outlet without any connection to Mr Mundey.⁴⁴

It should be noted that the broader statement of law in *Ex parte Attorney-General; Re Truth & Sportsman Ltd* was made in a judgment of a higher court in the same court hierarchy. Hope JA was, therefore, very careful in his treatment of it. He distinguished the facts of that case. The statements under consideration in that case were part of a deliberate campaign by a newspaper to vilify a criminal defendant and to provoke public condemnation of the ‘totally inadequate’ sentence he had received following conviction. Hope JA indicated, having regard to those facts, that the statement of the Full Court was broader than it needed to be, and was, therefore, obiter dicta.⁴⁵ However, if the statement of the Full Court was binding, Hope JA indicated that the present defendant’s conduct would constitute only a ‘technical contempt’ and would warrant no penalty.⁴⁶

Trial judges who seek to distinguish and avoid higher court precedent should have in mind how the higher court will look at their decision on appeal. In *Reich*, the Industrial Relations Commission decision discussed above at 7.22, Maidment J at trial considered Full Bench authority

in the light of that which Lord Halsbury said in *Quinn v Leathem* (‘*Quinn*’):

‘... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found;’

and:

‘... a case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to flow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.’⁴⁷

However, on appeal the Full Bench indicated that the reliance on *Quinn* was inappropriate, and Maidment J had failed to distinguish the earlier Full Bench authority on sound grounds. The Full Bench quoted from a classic jurisprudential work by a respected judge of the United States, Benjamin Cardozo.

I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical, just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another.

‘If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was

7.31

7.32

⁴³ *Mundey* (n 40) 903–4.

⁴⁴ *Ibid* 904.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*.

⁴⁷ *Reich* (n 14) [35] quoting *Quinn v Leathem* [1901] AC 459, 506 (‘*Quinn*’).

decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights'.

Everyone feels the force of this sentiment when two cases are the same. Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.⁴⁸

The Full Bench added:

The approach of Cardozo J not only illustrates the limitations upon the approach in *Quinn v Leathem* but also serves to emphasise the important policy considerations involved in following precedent, particularly in precedent being followed by single judges sitting at trial or first instance, considerations which go to the very legitimacy of the legal system itself. The need to maintain consistency in the law, even when a Full Bench or Full Court is considering or reconsidering earlier decisions has been stated many times.⁴⁹

Finding a ratio among diverging majority judgments

7.33

Cases at appellate level are often decided by a panel of judges, usually three at the intermediate level, such as the New South Wales Court of Appeal or the Full Court of the Federal Court. When such a court is reconsidering one of its own decisions, five judges may be empanelled: see 8.22. In the High Court, there are usually five or seven judges sitting. Often a court will deliver a single unanimous judgment, or there may be a single majority judgment.⁵⁰ However, it is not uncommon, in appellate decisions, for a number of different judgments to be delivered. As a ratio decidendi is a proposition with which a majority of the court has agreed, it may be necessary to determine, by a head count, what the majority thought were the relevant principles of law applicable to the case. Even when each judge comes to the same conclusion it may be the result of different reasoning or the application of different legal principles. In these circumstances it may be difficult to discern one or more rationes which gained majority support. A court bound by such a decision may conclude that all that is binding is a narrow proposition constructed from the material facts of the earlier case, together with the court's conclusion.

7.34

The High Court was presented with this situation in *Jones v Bartlett ('Jones')*.⁵¹ The plaintiff had been injured visiting his parents, who leased their home from the defendant landlord. In *Jones*, Gummow and Hayne JJ, considering the earlier case of *Northern Sandblasting Pty Ltd v Harris ('Northern Sandblasting')*,⁵² stated that

Northern Sandblasting is authority for the rejection in Australia of the rule in *Cavalier v Pope* [which recognised landlord's immunity], and ... the existence of some duty [by the landlord] to the plaintiff [entrant] ... There was disagreement in *Northern Sandblasting* as to the nature and extent of that duty in the circumstances of the case.

The four members of the court (Brennan CJ, Toohey, Gaudron and McHugh JJ) comprising the majority in favour of the order dismissing the appeal were divided as to

⁴⁸ B N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 32–4, quoting from W G Miller, *The Data of Jurisprudence* (W Green & Sons, 1903), 335.

⁴⁹ *Reich* (n 14) [55].

⁵⁰ A single majority judgment may be co-authored by the majority judges, or written by a single judge with other majority judges very briefly expressing their agreement.

⁵¹ (2000) 205 CLR 166 ('Jones').

⁵² (1997) 188 CLR 313 ('Northern Sandblasting').

the ground upon which that order should be made. Toohey J and McHugh J relied upon breach of a non-delegable duty of care, but the other members of the majority and those justices who would have allowed the appeal rejected the submission that such a duty had arisen. Brennan CJ and Gaudron J both relied upon breach of a duty of care which involved the need for a pre-letting inspection, but they did not express the point in the same terms. Toohey J said that there were ‘real difficulties’ in the way of a case based upon a failure to inspect. McHugh J did not deal with this point. The justices in the minority, Dawson J, Gummow J and Kirby J, were of a view contrary to that of Brennan CJ and Gaudron J.

Northern Sandblasting thus is an example of a decision of an ultimate appellate court in which there is no majority in favour of either of the two grounds for decision. Further, as regards the non-delegable duty ground, all members of the court dealt with it and a majority was against it; of those judges who dealt with the other ground for decision, a majority of them was against it.

The authority of a decision reached in this way for later cases in trial courts and intermediate courts of appeal is a matter of debate. ...

One view is that, in such an instance, there is no discernible *ratio decidendi*, so that the later court is free to decide the legal issues for itself and to adopt any reasoning which appears to it to be correct so long as that reasoning supports ‘the actual decision’ in the earlier case. ... [I]n *Dickenson’s Arcade Pty Ltd v Tasmania*, Barwick CJ said that, if there was ‘no reason for decision common to the majority of the Justices’, a decision of this Court was ‘authority only in relation to the statutory and factual situation it resolved and in relation to a case which has, if not precisely, at least substantially and indistinguishably the same statutory and factual situation’. Thus, the Chief Justice would have rejected as an adequate foundation a ground accepted only by a majority within the majority supporting the order made by the Court.

...

It is unnecessary to resolve these problems in this Court in the present case. This is so for two reasons. First, this Court is not necessarily bound by its previous decisions; a difference between the reasons of the justices constituting the majority in an earlier decision may justify departure from that decision. If there be difficulty in detecting and isolating the propositions of law which provided the grounds for a decision, this Court should not strain to construct a precedent from which it may then be asked to depart. Secondly, there is force in the statement that ‘from the realistic point of view, we are not sure of the *ratio* of a decision until we can discover its reception and its treatment by subsequent cases’. The present litigation illustrates the point.⁵³

In *Re Tyler; Ex parte Foley*,⁵⁴ the Full Bench of the High Court had to consider the authority of two of its own previous decisions — *Re Tracey; Ex parte Ryan* (‘*Re Tracey*’)⁵⁵ and *Re Nolan; Ex parte Young* (‘*Re Nolan*’)⁵⁶ — in which there had been differing reasoning of the majority justices. McHugh J said of these decisions:

7.35

The divergent reasoning of the majority judges in *Re Tracey* and *Re Nolan* means that neither of those cases has a *ratio decidendi*. But that does not mean that the doctrine of *stare decisis* has no relevance or that the decisions in those cases have no authority as precedents. Because it is impossible to extract a *ratio decidendi* from either of the two cases, each decision is authority only for what it decided. ...

⁵³ *Jones* (n 51) 223–5 [200]–[207] (citations omitted).

⁵⁴ (1994) 181 CLR 18 (‘*Tyler*’).

⁵⁵ (1989) 166 CLR 518.

⁵⁶ (1991) 172 CLR 460.

[T]he true rule is that a court, bound by a previous decision whose *ratio decidendi* is not discernible, is bound to apply that decision when the circumstances of the instant case ‘are not reasonably distinguishable from those which gave rise to the decision’.⁵⁷

Equally divided courts

7.36 Equally divided courts present difficulties for the doctrine of precedent similar to those of divergent majority judgments, discussed in the previous section. When judges disagree, the decision of the majority prevails. Normally, the possibility of a court being equally divided is avoided by ensuring that an odd number of judges sits on each case. Sometimes, however, an equally divided court cannot be avoided, as, for example, when one of the judges dies during the hearing. When this happens, two questions arise. The first, more immediate issue concerns the outcome of the case. The second question concerns the authority of such a decision.

7.37 The first issue, identifying the decision of the court, is resolved by provisions in the relevant statutes. For example, s 23(2) of the *Judiciary Act 1903* (Cth) deals with the possibility of an equally divided Full Bench of the High Court:

[W]hen the Justices sitting as a Full Court are divided in opinion as to the decision to be given on any question, the question shall be decided according to the decision of the majority, if there is a majority but if the Court is equally divided in opinion —

- (a) in the case where a decision of a Justice of the High Court (whether acting as a Justice of the High Court or in some other capacity), a decision of the Supreme Court of a State or Territory or a Judge of such a Court, a decision of the Federal Court of Australia or a Judge of that Court or a decision of the Family Court of Australia or a Judge of that Court is called in question by appeal or otherwise, the decision appealed from shall be affirmed; and
- (b) in any other case, the opinion of the Chief Justice, or if he is absent the opinion of the Senior Justice present, shall prevail.

Corresponding principles apply where the Full Court of either the Federal Court or the Family Court is equally divided.⁵⁸

7.38 The rules that resolve equal divisions in Full Courts of state and territory Supreme Courts are quite diverse.

- If the New South Wales Court of Appeal is equally divided, the decision is in accordance with the opinion of the Chief Justice or other Judge of Appeal presiding.⁵⁹
- In Queensland the decision of the Court of Appeal is in accordance with the opinion of the most senior judge.⁶⁰
- In Tasmania, in the case of an appeal from a judge who is not sitting as a member of the Full Court which hears the appeal, the decision appealed from is affirmed, unless the judge whose decision is appealed from indicates a wish that the appeal be determined without reference to the decision, in which event the opinion of the Chief Justice or senior judge present shall prevail. In any other case, the

⁵⁷ *Tyler* (n 54) 37.

⁵⁸ *Federal Court of Australia Act 1976* (Cth) s 16; *Family Law Act 1975* (Cth) s 30.

⁵⁹ *Supreme Court Act 1970* (NSW) s 45.

⁶⁰ *Supreme Court of Queensland Act 1991* (Qld) s 42.

opinion of the Chief Justice or senior judge present shall prevail.⁶¹ In Tasmanian criminal appeals, if the Court of Criminal Appeal is divided, the decision is in accordance with the decision of the Chief Justice or senior judge.⁶²

- In Victoria the decision is in accordance with the opinion of the senior judge of appeal then present unless the appeal is heard by a Full Court constituted by two judges, in which event it must be reheard by a Court of Appeal of more than two judges.⁶³
- In Western Australia, the solution adopted is the same as that in Victoria, except that if an appeal is heard by a Full Court constituted by two judges the decision appealed from stands, unless the appeal is directed to be reheard by a Full Court of no fewer than three judges.⁶⁴
- In South Australia there is no statutory provision dealing with the possibility of an equally divided Full Court of the Supreme Court.
- In the Australian Capital Territory, in the case of an equally divided court, the appeal is to be reheard.⁶⁵
- In the Northern Territory, the decision is in accordance with that of the senior judge.⁶⁶

Statutory provisions such as these do not always provide a satisfactory identification of the decision that should be reached where the court cannot agree. An interesting illustration is provided by *Skulander v Willoughby City Council*.⁶⁷ The appellant pedestrian was injured when she collided with an object protruding from a wall; she sued the council in negligence. The trial judge held that the council owed no duty and found for the defendant. On appeal the New South Wales Court of Appeal held that the council owed a duty, but the Court then split three ways. Mason P held that the council had not breached its duty. Beazley JA held that the council had been negligent but damages should be reduced by 20% due to the plaintiff's contributory negligence. Basten JA also held that the council had been negligent but that damages should be reduced by 50% due to the plaintiff's contributory negligence.

7.39

In a passage agreed to by the other members, Mason P considered a number of possibilities as to how their disagreement could be resolved. If the Court is 'equally divided' in the terms of s 45(2) of the *Supreme Court Act 1970* (NSW), then the presiding judge's decision should prevail. Mason P noted that this 'would lead to the exquisite but troubling outcome that my dissenting opinion [that the defendant was not in breach] revives and swells into the judgment of the Court'.⁶⁸ Mason P expressed 'doubts as to whether a court whose members each propose discrepant orders is necessarily "equally divided"'⁶⁹ and went on to consider other options.

⁶¹ *Supreme Court Civil Procedure Act 1932* (Tas) s 15(9).

⁶² *Criminal Code Act 1924* (Tas) sch, s 400(2).

⁶³ *Supreme Court Act 1986* (Vic) s 12.

⁶⁴ *Supreme Court Act 1935* (WA) s 62.

⁶⁵ *Supreme Court Act 1933* (ACT) s 37L(3).

⁶⁶ *Supreme Court Act 1979* (NT) s 23.

⁶⁷ (2007) 73 NSWLR 44 ('*Skulander*').

⁶⁸ *Ibid* 47 [51] (Mason P).

⁶⁹ *Ibid* 47 [53].

7.40 The option of allowing the judgment below to stand would also have the disadvantage of resolving the matter effectively in favour of the dissenting appeal judgment. Moreover, it ‘would affirm a judgment in the court below that rests upon reasoning disfavoured by each member of this Court’.⁷⁰ A further option was to apply the convention noted by McHugh JA in *O'Brien v Tanning Research Laboratories Inc*,⁷¹ namely that the junior judge (in this case Basten JA) should withdraw their proposed orders, and join with those proposed by the senior judge.⁷² But Basten JA had not indicated his willingness to withdraw and, again, this would have the effect of endorsing the dissenting judgment of Mason P.

Mason P then considered the approach developed by his predecessor, Kirby P, over a number of cases. In *CES v Super Clinics (Australia) Pty Ltd* Kirby P suggested:

In earlier times, differences of this kind were resolved by the principle of seniority of judicial appointment. In these more enlightened times, a more rational principle has been adopted by this Court. It seeks to express (and in its orders to reflect) the majority consensus of reasoning.⁷³

Mason P said that he ‘remain[ed] to be convinced that deference to seniority is a badge of “unenlightened” times or that a rule of last resort whereby the junior judge defers to the senior has necessarily reached its use-by date’.⁷⁴ However, he still thought it most appropriate to seek ‘what Kirby P described as “the majority consensus of reasoning” and “the highest common denominator of rational agreement”’.⁷⁵ He expressed a little discomfort that this required him to ‘assume factual propositions that I positively deny’,⁷⁶ namely that the defendant was in breach. Nevertheless, he proceeded on that basis and ultimately joined with Basten JA to favour liability with a 50% reduction in damages for the plaintiff’s contributory negligence.

7.41 Another tricky issue regarding determining the decision of an equally divided court arose in the recent High Court appeal, *Perara-Cathcart v The Queen* (‘*Perara-Cathcart*’).⁷⁷ The defendant was convicted by a jury of rape and threaten to kill. He appealed to the South Australian Supreme Court on the basis that the trial judge had not properly directed the jury on the use of evidence of other discreditable conduct of the defendant. The Full Court considered the appeal; a majority of 2:1 held that there had been a misdirection. This then raised a further question for the majority under s 353 of the *Criminal Law Consolidation Act 1929* (SA) (‘*CLC Act*’),⁷⁸ whether the appeal should nevertheless be dismissed under ‘the proviso’. This provides that ‘the Full Court may, notwithstanding that it is of the opinion that the point raised in an appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred’.⁷⁹ On this question, two judges each went a different way. The appeal

⁷⁰ *Ibid* 48–9 [58].

⁷¹ (1988) 14 NSWLR 601, 641.

⁷² *Skulander* (n 67) 49 [59].

⁷³ (1995) 38 NSWLR 47, 79 (‘*CES v Super Clinics*’).

⁷⁴ *Skulander* (n 67) 51 [74].

⁷⁵ *Ibid* quoting from, respectively, *CES v Super Clinics* (n 73) 79 and *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189, 200.

⁷⁶ *Skulander* (n 67) 51 [74].

⁷⁷ (2017) 260 CLR 595 (‘*Perara-Cathcart*’).

⁷⁸ The provision has since been moved, without significant change, to *Criminal Procedure Act 1921* (SA) s 158.

⁷⁹ Then *Criminal Law Consolidation Act 1929* (SA) s 353(1), now *Criminal Procedure Act 1921* (SA) s 158(2).

was then dismissed since two of the three judges had found against the defendant: one judge found there had been no error at trial, and one judge found that, while there had been an error, the proviso applied and the appeal should be dismissed nevertheless.

The defendant then appealed to the High Court, arguing that the appeal to the South Australian Full Court should have been upheld because a majority had not found that the proviso applied; that is, a majority had not held that despite the error, there had been no substantial miscarriage of justice. This required the High Court to consider s 349 of the *CLC Act*, which provides: ‘The determination of any question before the Full Court under this Act shall be according to the opinion of the majority of the members of the Court hearing the case.’⁸⁰ A majority of the High Court upheld the defendant’s argument on this point.⁸¹ Section 349 should have been applied to the two questions in turn: first, whether there had been a misdirection; and second, whether, notwithstanding the misdirection, there was no substantial miscarriage of justice. Since a majority had not resolved the second question in the prosecution’s favour, the proviso should not have been applied. The majority rejected the proposition that “any question” [in s 349] before the Full Court is, always and only, the single question whether the appeal should or should not be allowed.⁸² Gageler J dissented, holding that ‘the “question” to which s 349 of the *CLC Act* refers … is the question as to what order the Full Court should make. The “determination of any question before the Full Court” occurs through the making of an order by the Full Court’.⁸³ A majority of two judges of the Full Court agreed that the appeal should be dismissed, therefore the appeal should be dismissed. It does not matter that their reasoning in arriving at this conclusion differed.

While a majority of the High Court upheld the defendant’s argument as to the interpretation of s 349 of the *CLC Act*, a differently constituted majority also held that there had been no misdirection. On this basis the defendant’s appeal was dismissed.

This leaves the second question raised by equally divided courts. What authority do the decisions carry as precedents? As Gageler J noted in *Perara-Cathcart*, there are significant differences between the two questions. One is addressed by a rule, the other by a principle.

7.42

The decision-making rule applied to produce the order of a multi-member court in a case in which there is disagreement between its members is different in timing, concept and purpose from the principle applied in an attempt to extract a ratio decidendi from the reasons for decision of the members of that court in that case. The decision-making rule is applied at the time of decision. The rule is directed to ensuring an outcome in the case. When triggered by disagreement, the rule applies to produce a result. The principle is applied subsequently and in retrospect. The principle is directed to the ideal of ensuring that cases are decided consistently through time. The principle cannot be expected always to achieve that ideal. Every case must have an outcome, but not every case need have a ratio decidendi.⁸⁴

This question of the authority of a decision of an equally divided court arose in *Re Wakim; Ex parte McNally* (‘Wakim’).⁸⁵ In this case the High Court considered a challenge

⁸⁰ Now *Criminal Procedure Act 1921* (SA) s 152.

⁸¹ *Perara-Cathcart* (n 77) [38] (Kiefel, Bell and Keane JJ); see also [129] (Nettle J).

⁸² *Ibid* [40].

⁸³ *Ibid* [83]; see also [144] (Gordon J).

⁸⁴ *Ibid* [75].

⁸⁵ (1999) 198 CLR 511 (‘Wakim’).

to the validity of cross-vesting legislation. That legislation, enacted in 1987, enables matters which would previously have been within the sole jurisdiction of the courts of the Commonwealth, or of one of the states or territories, to be dealt with in the courts of any Australian jurisdiction. A previous challenge, in *Gould v Brown*,⁸⁶ had been unsuccessful but the High Court had been equally divided. In *Wakim*, Gummow and Hayne JJ said:

Stating the question as whether the Court should reconsider or reopen *Gould v Brown* obscures important considerations. The order that was made in *Gould v Brown* was made pursuant to s 23(2)(a) of the *Judiciary Act*. It was made in circumstances where the Court was, as s 23(2)(a) says, ‘equally divided in opinion’. That is, there was no opinion on the issues raised that was an opinion commanding the assent of a majority of the Court. It follows that, although the decision in *Gould v Brown* disposed finally of the appeal and bound other courts in Australia to arrive at a like result on the issues it dealt with, it established no principle or precedent having authority in this Court. There is, then, no question in the present matters of the Court reopening or reconsidering one of its earlier decisions. It is unnecessary to examine the circumstances in which the Court will do that.

It was submitted that the Court should adopt a different rule from the rule stated by Dixon J in *Tasmania v Victoria*⁸⁷ and subsequently applied on several occasions (that a decision of a full court of this Court in which opinions are equally divided creates no precedent binding this Court). But any different rule must grapple with the difficulty of identifying what principle is established by a decision of an equally divided Court. In general, this Court considers itself bound by its earlier decisions. (The exceptions to, or qualifications on, that general rule are of no immediate relevance.) But what is binding is not the order that is made disposing of the particular proceeding. The Court is bound by the principles of law that are established by its decisions. The expedient prescribed by s 23 of the *Judiciary Act* enables a decision to be given in the particular case but the application of that provision does not give to the opinion of those members of the Court who favoured that disposition of the matter any special status.⁸⁸

7.43

The position of lower courts faced with an evenly split High Court precedent may be more difficult. The High Court, as in *Wakim*, can consider afresh the issue left uncertain by its previous decision. However, lower courts are more constrained by High Court authority. In *Langley v Langley*, Mahoney J, considering a decision of an equally divided High Court, indicated that

this Court should, even if there be no *ratio decidendi* to be extracted from the decision, seek to ensure that its decision is consistent with the views or the approach adopted by members of that Court, as far as that is possible, having regard to the differences in view which may have been expressed by them.⁸⁹

Dissenting judgments

7.44

While on the topic of multiple inconsistent judgments in appellate decisions, something should briefly be said about dissenting judgments. Obviously, a dissenting judgment cannot be strictly binding. However, it may still be persuasive. It may influence courts which are not bound by the majority judgment, including the dissenting judge's own

⁸⁶ (1998) 193 CLR 346.

⁸⁷ (1935) 52 CLR 157.

⁸⁸ *Wakim* (n 85) 570–1.

⁸⁹ [1974] 1 NSWLR 46, 54.

court on a later occasion. Consider, for example, Evatt J's dissent in the High Court decision of *Chester v Council of the Municipality of Waverley*⁹⁰ in an early 'nervous shock' case. Having searched for her lost child for several hours, Mrs Chester saw his body dragged out of a flooded trench. She saw local lifesavers attempt resuscitation unsuccessfully. She sued the local council, which had dug the trench and failed to provide adequate steps to safeguard it, for her consequent psychiatric injury. The majority did not recognise this 'hitherto unknown cause of action'.⁹¹ Evatt J dissented in a judgment celebrated for its 'strong, empathic and persuasive language',⁹² a 'great Australian dissent' because of 'the immediate impact it had on statute law and its eventual but forceful significance for the modern common law of both Australia and England'.⁹³

Interestingly, courts have different practices with regard to dissents and separate concurring judgments. It is a strong tradition of the Privy Council, and the Criminal Division of the Court of Appeal of England and Wales, to issue a single judgment.⁹⁴ Other courts at times appear to have sought to maximise the rate at which they deliver composite judgments.⁹⁵ With a single judgment it is obviously easier for lower courts, and the lawyers who practise in them, to know what the law is,⁹⁶ furthering the goals of efficiency and certainty: see **Chapter 6**. However, some suggest that preventing or discouraging dissenting (or separate concurring) judgments infringes judicial independence and integrity.⁹⁷

Ratio decidendi and obiter dicta

A judge will often find it necessary or convenient to consider how an issue which is not in direct contention may be decided. The judge may, for example, suggest a resolution of a hypothetical dispute based upon a version of events differing in some respect from the facts of the case. Such statements may illustrate or clarify the principle which is actually applied in the case (the ratio). But since these statements do not concern the actual facts of the case, they are not strictly necessary, and so will not be a source of rationes. These incidental or passing remarks regarding legal principle are called obiter dicta (singular: obiter dictum). Obiter dicta of eminent judges in superior courts are often very persuasive for judges deciding later cases but, according to the traditional understanding of the doctrine of precedent, they are not strictly binding.

7.45

In *Tabet v Gett*,⁹⁸ Heydon J highlighted the dangers with courts indulging in obiter musings. He suggested that the awareness of both judge and counsel that a particular legal

7.46

⁹⁰ (1939) 62 CLR 1.

⁹¹ *Ibid* 11 (Rich J).

⁹² Barbara McDonald, 'Justice Evatt and the Lost Child in *Chester v Waverley Corporation* (1939)' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 58, 59.

⁹³ *Ibid* 60.

⁹⁴ Cross and Harris (n 9) 94; Roderick Munday, '"All for One and One for All": The Rise to Prominence of the Composite Judgment within the Civil Division of the Court of Appeal' (2002) 61 *Cambridge Law Journal* 321, 340.

⁹⁵ See, eg, Munday (n 94).

⁹⁶ Sir Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37 *Australian Bar Review* 102, 110.

⁹⁷ J D Heydon 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205; responses include Mason (n 96). See also Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189; Gabrielle Appleby and Heather Roberts, 'He Who Would Not Be Muzzled: Justice Heydon's Last Dissent in *Monis v The Queen* (2013)' in Lynch (ed) (n 92) 335.

⁹⁸ *Tabet v Gett* (n 31).

question is crucial to the outcome of the case helps sharpen the quality of the argument, and its absence may reduce the quality of the debate. He explained his concerns with obiter in these terms:

The only significance of an answer would lie in what future courts would make of it. They are likely to treat it not as a decision, but only as a dictum; not as the resolution of a controversy, but only as advice; not as an event, but only as a piece of news.

The consciousness ... that the outcome of a debate about the correctness of contested propositions of law is decisively important to the interests of those parties often greatly assists the sharpness and quality of that debate. ... Here a stage has been reached in a journey along the path to decision which has caused that consciousness to cease to exist because an issue has ceased to be decisively important. No assistance can be gained from a consciousness that has ceased to exist. In this field, for me, at least, to embark on difficult and doubtful inquiries in an attempt to answer the question without the assistance to be gained from that consciousness is a potentially very dangerous course. This is a case in which, since it is not necessary to do so, it is desirable not to.⁹⁹

7.47

Statements made by judges are often clearly identifiable as obiter dicta. The statement may be preceded by words signalling their obiter status, such as 'although a consideration of this question is not necessary for the decision in this case'. On other occasions, distinguishing between ratio and obiter requires close consideration of the actual facts and matters in dispute. In *Eslea Holdings Ltd v Butts Samuels JA*, with whom Kirby P agreed, said of a recent decision of the High Court of Australia:

It seems to me that since their Honours found that the necessary evidentiary footing was absent ... the statement concerning the nature of an estoppel by convention is not an alternative basis for the court's conclusion but an *obiter dictum*. Nonetheless, it appears in a reserved joint judgment of the High Court, to which I am bound to pay the very greatest respect and attention.¹⁰⁰

Sometimes regard must be had to the precise line of reasoning taken by the court. A court may have a choice as to the ground on which it decides the case. For example, a plaintiff who has been injured by a product bought from the defendant manufacturer may claim compensation on the alternative grounds of breach of contract and negligence. The court may find for the plaintiff in contract, and then comment in passing that it would also have upheld the negligence claim. Statements of law on contract may then be rationes while those on negligence would be only obiter dicta. Had the court chosen to decide on the basis of negligence rather than contract, the reverse would be the case.

In some cases a court may pursue two or more different routes to a conclusion without indicating which is the true basis for the decision. In such a case each basis for the decision should be considered to provide a separate ratio.¹⁰¹ If one of the grounds is more carefully reasoned than the others, this may provide a reason to consider that ground to provide the true ratio, while the others are merely obiter; however, caution should be exercised in making this determination.¹⁰²

⁹⁹ *Ibid* [97]–[98] (Heydon J).

¹⁰⁰ (1986) 6 NSWLR 175, 186.

¹⁰¹ *McBride v Monzie Pty Ltd* (2007) 164 FCR 559, 562 [6].

¹⁰² *Brunner v Greenslade* [1971] Ch 993, 1002–3.

In *Re Lower and Comcare*,¹⁰³ Forgie DP, in the Administrative Appeals Tribunal, was required to determine whether certain observations in an earlier decision of Tamberlin J in the Federal Court were ratio and binding, or obiter and not binding. The applicant argued that they were obiter dicta on the basis that the observations were preceded by the words 'in my view'. Forgie DP rejected this argument:

Certainly, I understand that his Honour adopted the expression 'in my view' in [19] but it seems to me that his doing so is not indicative of its being *obiter dicta* rather than part of the *ratio decidendi* of the case. Apart from [19], Tamberlin J used a similar form of words on no fewer than five other occasions in the course of his judgment ([12], [18], [20] and [34]) and the expression 'in my opinion' on one ([18]). In [18], he uses both expressions in concluding what is clearly part of the *ratio decidendi* of the case ... The use of expressions such as 'in my view' in his judgment reflects his Honour's style just as my adopting the expression 'it seems to me' earlier in this paragraph reflects mine. Both are used in presenting concluded views.¹⁰⁴

Obiter dicta are increasingly common in dismissed criminal appeals. The appeal court will often find that (a) the trial judge may well have made the mistake claimed by the defendant; but (b) this made no difference to the verdict — even had the mistake not been made the jury would have convicted the defendant. To decide on ground (b) is to apply 'the proviso' (see 7.41): 'the Full Court may, notwithstanding that it is of the opinion that the point raised in an appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred'.¹⁰⁵ In the High Court decision *CTM v The Queen*, Kirby J, the lone dissentient, warned of having recourse to the proviso in such cases:

An appellant has no special interest, as such, in resolving contested questions of criminal law, such as were at issue in this appeal. If it is thought that an appellant may succeed in substance but will generally fail on the 'proviso' an important practical incentive for the bringing of criminal appeals is diminished, if not lost entirely. Yet, when legally justified, the prosecution of such appeals is essential to the proper administration of criminal justice in Australia.¹⁰⁶

Not every statement of a rule of law by a judge is necessarily ratio or obiter. Frequently during the course of a judgment, a judge will restate and discuss propositions of law from previous cases. Such recitations may provide a useful foundation for the judge's reasoning but they will be neither ratio nor obiter unless they receive the endorsement of the judge.

7.48

EXERCISE 8: IDENTIFYING RATIO AND OBITER

Analyse the judgment of McCardie J in *Cohen v Sellar*,¹⁰⁷ set out below, giving the following information:

7.49



7.50

1. Citation.

¹⁰³ (2003) 74 ALD 547.

¹⁰⁴ *Ibid* 552 [15].

¹⁰⁵ See, eg, *Criminal Procedure Act 1921* (SA) s 158(2); see also s 6(1) of the *Criminal Appeal Act 1912* (NSW).

¹⁰⁶ (2008) 236 CLR 440, 479 [131].

¹⁰⁷ [1926] 1 KB 536. For a recent Australian decision with similar facts, see *Papathanasopoulos v Vakopoulos* [2007] NSWSC 502.

2. Brief statement of the material facts.
3. Procedural history, distinguishing the two actions and explaining why this decision concerned *the defendant's* claim for a remedy.
4. The issues to be decided.
5. The passages in the judgment which could be argued to be:
 - a) *rationes decidendi*; or
 - b) *obiter dicta*.

Cohen v Sellar [1926] 1 KB 536

High Court, King's Bench Division

McCardie J at 546–9:

The plaintiff, Miss Cissie Cohen, aged 24, had been engaged in business, and was a young woman of obvious ability. The defendant, Nathan Sellar, aged 27, occupied a clerical post at a moderate weekly salary. Each belonged to the Jewish faith. In August 1923, they agreed to marry, and in December 1923, the defendant handed to the plaintiff a single-stone diamond ring worth £30. No express condition accompanied the delivery of the ring. It was, however, admittedly given and received as an engagement ring in contemplation of marriage.

Unhappy differences soon arose between the two. Each had a quick temper, and quarrels were frequent. So acute became the state of affairs that in June 1924, the parties went before a Jewish tribunal in order to secure, if possible, an adjustment of the strife, but no reconciliation was achieved. Matters reached a climax in December, 1924. The mutual asperities were then most pronounced, and the two did not meet after that date. The plaintiff asserted that in that month the defendant refused to marry her. The defendant, on the contrary, asserted that it was the plaintiff herself who, with emphatic words, broke off the engagement. Apart from damages the substantial question for the jury was which of the two had refused to marry. The jury found that it was the defendant and not the plaintiff who had refused to carry out the promise. They awarded the plaintiff £34 10s as special damages in respect of certain items claimed by her, and £40 as general damages for the loss of the marriage. Few will doubt that the act of the defendant in ending the engagement saved both parties from an unhappy married life. There was no suggestion of any breach of morality between the two. The defence contained no plea of legal justification for breaking off the engagement.

In the course of the trial the question arose which of the two litigants was entitled to the engagement ring. An action had been brought in the County Court by the defendant to recover back the engagement ring from the plaintiff. The County Court judge adjourned the hearing to await the decision of the High Court action. The County Court action was removed to the High Court and was made a counter-claim in the proceedings before the jury and myself.

...

The questions for my decision emerge from a breach of promise action tried before me with a common jury. I am indebted to each of the counsel for their learned and able arguments. A few facts can be stated. [His Lordship stated the

facts set out above and continued.] Both counsel requested that I should, after the jury had given their verdict on the other questions in the case, determine the points of law with respect to the ring. Hence their arguments on a later day before me.

... I now turn to the two recent cases which bear on betrothal gifts. In neither of them was any reference made to *Young v Burrell* Cary's Causes in Ch 77; 21 Eng Rep 29, or *Oldenburgh's Case* Freeman's KB 213; 2 Mod 140, or *Lockyer v Simpson* Moseley 298.

First I take *Jacobs v Davis* [1917] 2 KB 532. The headnote is as follows: 'When an engagement ring is given by a man to a woman, there is an implied condition that the ring shall be returned if the engagement is broken off.' This broad statement seems to favour [counsel for the defendant's] argument before me. But the headnote must of course be read with the actual judgment of Shearman J. He was dealing with a case where the lady broke off the engagement, and the man thereupon sued for the return of the engagement ring. In the course of his decision Shearman J said [1917] 2 KB 533: 'Though the origin of the engagement ring has been forgotten, it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it. Whether the ring is a pledge or a conditional gift, the result is the same. The engagement ring given by the plaintiff to the defendant was given upon the implied condition that it should be returned if the defendant (ie, the lady) "broke off the engagement". She did break the contract, and therefore must return the ring.' It seems reasonably clear that Shearman J impliedly held that if the plaintiff himself had broken off the promise he could not get back the ring. This too, I infer, would have been the opinion of Bray J: see the words of his decision with respect to wedding gifts in *Jeffreys v Lack* 153 LT Newspaper 139.

Such are the decisions. The principles involved are illustrated by the arguments in the already cited case of *Lockyer v Simpson* Moseley 298. It was conceded by the Attorney-General in that case that if the lady had refused to marry the man she must return the gifts delivered to her in contemplation of marriage.

This I hold to be the correct legal view. If a woman who has received a ring refuses to fulfil the conditions of the gift she must return it. So, on the other hand, I think that if the man has, without a recognized legal justification, refused to carry out his promise of marriage, he cannot demand the return of the engagement ring. It matters not in law that the repudiation of the promise may turn out to the ultimate advantage of both parties. A judge must apply the existing law as to the limits of justification for breach.

The conclusions I have stated are I think borne out by the general body of opinion. The apparent dictum to the contrary in *Oldenburgh's Case* Freeman's KB 213; 2 Mod 140, cannot be relied on at the present day.

By the slow growth of decisions the promise of marriage is today fixed with many of the legal characteristics of a commercial bargain. It is governed largely by the principles of law applicable to ordinary contracts. The conditions which attach to a gift made in contemplation of marriage must be viewed in relation to the incidents which flow from the engagement itself. It is therefore appropriate to quote the words of Lord Sumner in *Bank Line v Capel* [1919] AC 435 at 452, where, speaking of a commercial adventure, he said: 'Reliance cannot be placed on a self-induced frustration.' The like rule will, I think, apply to a matrimonial adventure also. So too Lord Finlay LC said in *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1 at 6:

'It is a principle of law that no one can in such a case take advantage of the existence of a state of things which he himself produced': see also *Mackay v Dick* (1881) 6 App Cas 251 at 264.

A like result to that I have already stated will follow if an engagement ring be regarded as a pledge or deposit for the fulfilment of a contract. A person who wrongly refuses to carry out a bargain will lose his deposit: see *Ex parte Barrell* (1875) LR 10 Ch 512 and *Howe v Smith* (1884) 27 Ch D 89.

I have thought it best to deal with the matter somewhat fully, as it was so adequately argued before me. I may therefore venture to add a few words on other aspects of the matter which may arise and which were referred to by counsel. If the engagement to marry be dissolved by mutual consent, then in the absence of agreement to the contrary, the engagement ring and like gifts must, I think, be returned by each party to the other. This seems clear on principle. If the marriage does not take place either through the death of, or through a disability recognized by law on the part of, the person giving the ring or other conditional gift, then I take the view that in such case the condition is to be implied that the gift shall be returned. For although, as I have said, such a gift cannot be dissociated from the engagement to marry, yet I think that in the circumstances of betrothal gifts there should be no application of the operation of such decisions as *Krell v Henry* [1903] 2 KB 740 and *Chandler v Webster* [1904] 1 KB 493. If the marriage actually takes place then the engagement ring or like gift will, in the absence of express agreement to the contrary, become, I infer, the absolute property of the recipient, and that property will not, I presume, be divested by subsequent divorce.

The judgment I have given does not, of course, touch gifts which, as in *Lockyer v Simpson* Moseley 298, are absolute and free from condition. It touches conditional gifts only.

I must add just a word on another point. The jury, after giving their verdict, expressed a view that the plaintiff, Miss Cohen, should return the ring to the defendant. But the matter was not left to them for decision and their view was only a suggestion. They were not cognizant of the points involved in the dispute as to the ring. In any event it would have been right that the plaintiff should keep possession of the ring so that she might be able to take it in execution for the damages and costs awarded in her favour against the defendant.

For the reasons given there must be judgment for the plaintiff with costs on claim and counterclaim.

Authoritative obiter dicta

7.51

Obiter dicta are judicial statements of law that are not strictly necessary for the present decision. The legal principle being propounded is not properly raised by the issues in the case. As noted in the previous section, judges at times are hesitant make obiter statements on the basis that the principles being addressed are too hypothetical and will not have received full argument. Nevertheless, judges often do make obiter observations. And sometimes superior courts go to considerable lengths to expound important legal principles even though they are only provoked by, rather than directly

relevant to, the proved facts of the case before them. Two classic cases in which this has occurred are *Central London Property Trust Ltd v High Trees House Ltd*¹⁰⁸ and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* ('*Hedley Byrne*')¹⁰⁹. In the former, in the King's Bench Division of the English High Court, Denning J expounded the doctrine of equitable or promissory estoppel even though the actual decision in the case did not involve an application of the doctrine. His judgment was nevertheless followed widely and proved extremely influential in the evolution of the doctrine of equitable estoppel.

The issue in *Hedley Byrne* was liability for negligent misstatement. The plaintiff had obtained information from the defendant bank about the creditworthiness of a third party, a customer of the bank, with whom the plaintiff was considering doing business. The defendant negligently and incorrectly provided a favourable report, and consequently the plaintiff performed work for the third party for which the latter was unable to pay. The decision of the House of Lords was that the defendant was not liable for the plaintiff's loss because it had disclaimed responsibility for inaccuracy. That was the decision in the case. Fifty pages of the House of Lords' reasoning, however, discuss what the result would have been had there been no disclaimer. Although obiter, this analysis by the Law Lords constituted a major development in the law governing negligent misstatement and recovery for pure economic loss.

In *Nowicka v Superannuation Complaints Tribunal*¹¹⁰ Sundberg J quoted two pertinent observations:

7.52

A mere passing remark or a statement or assumption on a matter that has not been argued is one thing, a considered judgment on a point fully argued is another, especially where, had the facts been otherwise, it would have formed part of the *ratio*. Such judicial *dicta*, standing in authority somewhere between a *ratio decidendi* and an *obiter dictum*, seem to me to have a weight nearer to the former than the latter.¹¹¹

It is a truism upon which there is no need to enlarge that *dicta* are of various degrees of persuasiveness. At one end of the scale we have the considered opinion of all members of the House of Lords who sat to hear a case. At the other end of the scale we have broad observations made on the spur of the moment such as the remark which prompted Lord Abinger to say 'It was not only an *obiter dictum*, but a wide divaricating *dictum*'. *Dicta* of the highest degree of persuasiveness may often, for all practical purposes, be indistinguishable from pronouncements which must be treated as *ratio decidendi*.¹¹²

In the Australian context, Justice Heydon, while warning of the risks of judges introducing obiter into their judgments, nevertheless indicated extrajudicially that 'lower courts ought to respect the decision rather than disloyally engaging in an over-ruthless characterisation of what is said as *dicta*'.¹¹³ In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah Constructions*')¹¹⁴ the High Court expressed the view that, as the highest court in the Australian judicial hierarchy, its *dicta* — especially *dicta* subscribed

¹⁰⁸ [1947] KB 130.

¹⁰⁹ [1964] AC 465.

¹¹⁰ [2008] FCA 939 [21].

¹¹¹ *Brunner v Greenslade* (n 102) 1002–1003 (Megarry J).

¹¹² Cross and Harris (n 9) 77.

¹¹³ Heydon, 'How Far?' (n 12) 39.

¹¹⁴ (2007) 230 CLR 89 ('*Farah Constructions*').

to by a majority of Justices — should be accorded great respect. In its unanimous judgment, the Court was extremely critical of the New South Wales Court of Appeal for departing from ‘long-established authority and seriously considered dicta of a majority of this Court’,¹¹⁵ and stated:

The result of the statements by the Court of Appeal … has been confusion among trial judges of a type likely to continue unless now corrected. … [A] trial judge of the Supreme Court of New South Wales now ‘faces the difficult situation of obiter dicta in the High Court some 30 years ago conflicting with recent dicta in the Court of Appeal, which have met with substantial criticism’. The confusion is not likely to be limited to New South Wales judges.¹¹⁶

As with the High Court’s similarly critical remarks in *Phillips*, discussed above at 7.23, the ‘haughty’¹¹⁷ attitude expressed by the High Court is open to question. Keith Mason, who was President of the New South Wales Court of Appeal in *Farah Constructions*, described the High Court decision as a ‘profound shift in the rules of judicial engagement’.¹¹⁸ He suggested that the decision has been viewed as an ‘assertion of a High Court monopoly in the essential developmental aspect of the common law’ which will ‘have the effect of shutting off much of the oxygen of fresh ideas that would otherwise compete for acceptance in the free market of Australian jurisprudence’.¹¹⁹ The High Court’s attitude in *Farah Constructions* appears inconsistent with its earlier suggestion that, given the restrictions imposed on High Court appeals, intermediate appeal courts serve as ‘courts of last resort for all practical purposes’.¹²⁰

Judicial law-making

7.53

As discussed in **Chapters 2** and **3**, law-making is not a core part of the judicial function. That is the legislature’s job. The judiciary’s function is to interpret and apply existing law to resolve the disputes that come before it. Where an issue is addressed unambiguously by legislation, the court has no choice but to apply the legislation. If there is any ambiguity in the legislation, the court should consider, and in many cases apply, the interpretation adopted in previous cases. Where the issue is free of legislation, the court should consider, and in many cases follow, relevant precedents.

¹¹⁵ Ibid 150–1 [134].

¹¹⁶ Ibid [151]; the internal citation is *Kalls Enterprises Pty Ltd (In liq) v Baloglow* (2006) 58 ACSR 63, 78 [47] (Hamilton J), quoted in *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council* [2006] NSWSC 1217 [30] (Barrett J).

¹¹⁷ Keith Mason, ‘President Mason’s Farewell Speech’ (2008) 82 *Australian Law Journal* 768, 769.

¹¹⁸ Ibid.

¹¹⁹ Ibid. See also Keith Mason, ‘The Distinctiveness and Independence of Intermediate Courts of Appeal’ (2012) 86 *Australian Law Journal* 308.

¹²⁰ *Nguyen v Nguyen* (1990) 169 CLR 245, 268 (Dawson, Toohey and McHugh JJ) (‘Nguyen’).



FILLING GAPS IN THE LAW

Where there is no Australian precedent, a trial judge may obtain assistance from authorities from foreign jurisdictions.¹²¹ The question of what a trial judge should do when faced with no pertinent Australian authority, only conflicting foreign decisions, was considered by Heydon JA in the New South Wales Court of Appeal in *Union Shipping New Zealand Ltd v Morgan*.¹²² On appeal, the defendant argued that the trial judge was wrong to have followed *MacKinnon v The Iberia Shipping Co Ltd*¹²² — a decision of the Court of Session,

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¹²¹ (2002) 54 NSWLR 690 ('Union Shipping').

¹²² 1955 SC 20.

Scotland's Supreme Civil Court — in view of conflicting authorities of the United States Supreme Court and academic criticism. Heydon JA said:

The criticisms were misplaced. In view of the quality of the court which decided *MacKinnon's* case, the absence of contrary authority in the British Commonwealth, the fact that the United States cases are based on a process of statutory construction and a 'proper law of the tort' theory which was not part of the intra-Australian conflict of laws, the general acceptance of *MacKinnon's* case, though subject to criticism, as stating the law, and his own position as a primary judge, the primary judge did not err ... In fact his behaviour was entirely correct and legitimate: it was a model of what a primary judge should have done in the circumstances.¹²³

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Judges are occasionally presented with novel issues that are free of legislation and authority. Despite all the shelves of case law and legislation in law libraries and legal databases, new issues may be thrown up by developments in society, economics, technology and medicine. Law, with its inherently conservative approach, can struggle to keep up. In *Mount Isa Mines Ltd v Pusey*, Windeyer J referred to '[l]aw, marching with medicine but in the rear and limping a little'.¹²⁴

Consider, for example, *Cattanach v Melchior* ('Cattanach').¹²⁵ In *Cattanach* the first defendant, Dr Cattanach, had performed a sterilisation procedure on the first plaintiff, Ms Melchior, at Redland Hospital, the second defendant. He carried out the operation competently but was negligent in failing to warn her that further steps might be necessary to avoid pregnancy. As a result, she became pregnant and had a healthy baby boy. Ms Melchior and her husband brought an action against the defendants, arguing that the failure to warn was negligent and claiming compensation for their consequent losses. This 'wrongful birth' action was novel; it would have been inconceivable at an earlier stage in the development of medical science. At trial and in the Queensland Court of Appeal the plaintiffs were successful. She obtained damages for pain and suffering, and costs associated with the pregnancy and birth. Her husband obtained damages for loss of consortium, and both plaintiffs obtained damages for the cost of raising the child to the age of 18. The defendants appealed to the High Court in connection with the final head of damages, but the Court dismissed the appeal by a majority of 4:3.¹²⁶ A number of legislatures responded to the recognition of the wrongful birth action in *Cattanach* by passing legislation blocking it.¹²⁷

A few years later the High Court faced a closely related type of claim in *Harriton v Stephens* ('Harriton').¹²⁸ The difference was that this was an action for 'wrongful life' rather than wrongful birth. The medical negligence action was brought by the child who had been born severely disabled, rather than by the parents. The High Court rejected the claim by a majority of 6:1. The action proceeded on the basis that, had the plaintiff's mother received proper treatment and advice, she would have had an

¹²³ *Union Shipping* (n 121) 701 [14], 734 [115] (Heydon JA, Hodgson JA agreeing at [120], Santow JA agreeing at [121]).

¹²⁴ (1970) 125 CLR 383, 395.

¹²⁵ (2003) 215 CLR 1 ('Cattanach').

¹²⁶ McHugh, Gummow, Kirby and Callinan JJ; Gleeson CJ, Hayne and Heydon JJ dissenting.

¹²⁷ *Civil Liability Act 2002* (NSW) ss 70, 71; *Civil Liability Act 2003* (Qld) ss 49A(2), 49B(2); *Civil Liability Act 1936* (SA) s 67.

¹²⁸ (2006) 226 CLR 52 ('Harriton'); and *Waller v James* (2006) 226 CLR 136, decided at the same time.

abortion. In assessing compensation, the Court would have to draw a comparison not between a life with disabilities and a life without disabilities, but between a life with disabilities and no life at all. According to the majority, this comparison ‘cannot be made’;¹²⁹ it is ‘impossible’.¹³⁰

New issues may also be thrown up by new legislation. Of course, the judge has to apply the legislation, but it may be ambiguous or leave the judge with wide discretion. As Justice Heydon has pointed out extrajudicially,¹³¹ the ever-growing body of legislation continues to present trial courts with cases of first impression. A contributing factor is that ‘modern statutes are long, complex, not always well-drafted, frequently amended, and sometimes repealed and re-enacted in a slightly different form’; novel legal issues may also arise ‘where legislation is piecemeal in the sense that it does not cover the field and there is a need for the general law to be synthesised with it’.¹³² The principles governing statutory interpretation are discussed in **Chapters 10–15**.

If there is a gap in the law, the judge must fill the gap. This is as true of magistrates as it is of Justices of the High Court. The essence of the judicial role is that a decision must be made. The judge ‘must respond to the parties’ arguments ... cannot walk away ... cannot postpone indefinitely ... cannot say it is too hard’.¹³³ It follows that ‘there is never an absence of law’.¹³⁴ As former Justice Michael Kirby commented extrajudicially, ‘[i]f there is no apparent law on the subject the judge is duty-bound to create it’.¹³⁵

For many years, the judicial law-making role was not acknowledged. Jurists subscribed to what was called the ‘declaratory theory of law’. Under that theory judges did not make law, even if the issue before them had never been dealt with before. Rather, by looking at existing common law and statute law principles, they were said to have extracted a rule that was held always to have existed, but which had remained unused, waiting to be declared at the appropriate moment. By the end of the 18th century, legal philosophers such as Jeremy Bentham and John Austin had exposed that theory as a fiction, and had asserted that, in some cases, judges did make law when making their decisions. As legal theorist Julius Stone pointed out:

How could the law of a small community, based on agriculture and cottage industry, of the 16th and 17th centuries have developed the enormous complex of rules which could regulate a great commercial and industrial empire if the judges had only been drawing on pre-existing sources?¹³⁶

Lord Reid provided a sardonic account of the declaratory theory:

¹²⁹ *Harriton* (n 128) 105 (Hayne J).

¹³⁰ *Ibid* 126 (Crennan J).

¹³¹ Heydon, ‘How Far?’ (n 12).

¹³² *Ibid* 18.

¹³³ Michael Kirby, ‘Judicial Activism? A Riposte to the Counter-Reformation’ (2005) 11 *Otago Law Review* 1, 14 (‘A Riposte’).

¹³⁴ *Ibid*.

¹³⁵ *Ibid*.

¹³⁶ Lyndel Prott, ‘Stone and Legal Reasoning’ (1986) 10 *Bulletin of the Australian Society of Legal Philosophers* 144.

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Those with a taste for fairytales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame.¹³⁷

Now it seems that most, if not all, judges and legal commentators reject the fairytale and accept that judges do make law.

DEVELOPING THE LAW

7.58

Even where there is no gap in the law, judges still have the power, in some cases, to change the law. A court may be allowed to reject an established principle of common law. Clearly, judges should respect the supremacy of Parliament; they cannot ignore legislation no matter how dimly they view it: see, for example, 4.45. However, legislation often leaves room for interpretation. Despite the doctrine of precedent, a court may be able to depart from an established interpretation of legislation. (The doctrine of precedent applies, potentially with some slight variation, to decisions involving statutory interpretation, as discussed at 8.7ff.)

The doctrine of precedent is inherently conservative. Judges resolving disputes today should apply the principles that were applied to similar disputes in the past. This serves the goals of predictability, equality and efficiency. However, as discussed in this chapter and the next, the doctrine is not wholly rigid. If a superior court in the same hierarchy has previously made a clear decision on identical facts, the lower court will be required to follow that decision and apply the law as there stated with the same result. But in other situations, precedents may be only persuasive and otherwise binding precedents may be distinguishable or open to interpretation.

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Judges may be tempted to depart from precedent for a variety of reasons. A judge may consider the principle to be erroneous as a matter of principle, or contrary to a clear policy goal. Alternatively, the judge may consider that, while the established principle generally operates well, the present case has special features that the principle fails to account for. In these situations, the judge may feel some pressure to depart from precedent and develop the law.

It should be noted that precedents do not lose their authority merely through the passage of time. Indeed, the contrary is often true: 'a precedent gains in authority with age'.¹³⁸ Though, as John Salmond noted in an article published in 1900, in a passage quoted by the High Court,

this statement ... must be read subject to an important qualification. Up to a certain point a human being grows in strength as he grows in age; but this is true only within narrow limits. So with the authority of judicial decisions. A moderate lapse of time will give added vigour to a precedent, but after a still longer time the opposite effect may be produced, not indeed directly, but indirectly through the accidental conflict of the ancient and perhaps partially forgotten principle with later decisions. Without having been expressly overruled or intentionally departed from, it may become in course of time no longer really consistent with the course of judicial decision. In this way the tooth of time will eat away an ancient precedent, and gradually deprive it of all authority and validity. The law becomes animated

¹³⁷ James Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law (New Series)* 22.

¹³⁸ Salmond (n 35) 383, cited in PGA (n 35) [24].

by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative.¹³⁹

Nevertheless, some precedents retain their legal authority despite being out of step with modern societal values. To a greater or lesser extent, this will present the court with a ‘judicial dilemma’.¹⁴⁰ To comply with the existing rule opens the court to criticism that it is out of step with community values or social developments, while to change the law invites the charge that the court is undermining certainty and breaching the separation of powers by ‘usurping the role of the legislature’.¹⁴¹

Given the way the doctrine of precedent operates, judges higher in the court hierarchy will have greater scope to depart from precedents than lower courts. ‘The ultimate function of developing the law must lie for the most part in the hands of an ultimate appellate court’.¹⁴² And, as *Phillips* and *Farah Constructions* illustrate, the High Court has guarded its privileged position jealously (notwithstanding that, on another occasion, it suggested that intermediate appellate courts are serve as ‘courts of last resort for all practical purposes’).¹⁴³ Lower courts, particularly trial courts, are more likely to feel constrained by what appear to be inappropriate precedents.

A number of the common law reforms made by the High Court in the 1980s and 1990s included the overruling of tort law authorities that were viewed as out of step with the broader principles of negligence law as outlined in *Donoghue v Stevenson* and its progeny. Ad hoc torts and immunities were abolished, and the reach of negligence law was extended. In *Australian Safeway Stores v Zaluzna*,¹⁴⁴ the body of principle governing occupiers’ liability, which previously had an uncertain relationship with negligence law, was unambiguously subsumed by it. In *Burnie Port Authority v General Jones Pty Ltd*,¹⁴⁵ the High Court abolished the rule in *Rylands v Fletcher*,¹⁴⁶ a strict liability tort for the escape of dangerous substances from the defendant’s property. The Court held that such circumstances should be dealt with by the principles of negligence law. In the decision in *Northern Territory v Mengel* (‘Mengel’),¹⁴⁷ the High Court unanimously overruled *Beaudesert Shire Council v Smith* (‘Beaudesert’).¹⁴⁸ *Beaudesert* had held that a person should be entitled to compensation if they have suffered harm as the inevitable consequence of the unlawful, intentional and positive acts of another, even if that harm was neither intended nor foreseeable. The High Court in *Mengel* considered the *Beaudesert* rule to be inconsistent with the broader principles of modern tort law, which confine liability to injuries that are intentional or negligent. In *Northern Sandblasting*¹⁴⁹ the High Court disapproved the immunity of landlords from liability arising from defects in rented premises, ruling that landlords should be held liable for injuries flowing from their negligence.

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¹³⁹ Salmond (n 35) 383, cited in *PGA* (n 35) [24].

¹⁴⁰ Michael McHugh, ‘The Judicial Method’ (1999) 73 *Australian Law Journal* 37, 42.

¹⁴¹ Ibid.

¹⁴² Heydon, ‘How Far?’ (n 12) 44.

¹⁴³ *Nguyen* (n 120) 268.

¹⁴⁴ (1987) 162 CLR 479.

¹⁴⁵ (1994) 179 CLR 520.

¹⁴⁶ (1868) LR 3 HL 330.

¹⁴⁷ (1995) 185 CLR 307.

¹⁴⁸ (1966) 120 CLR 145.

¹⁴⁹ See discussion at 7.34 and n 52.

Judicial negligence law reform continued into this century. In *Brodie v Singleton Shire Council*,¹⁵⁰ by a majority of 4:3 the High Court overturned the immunity of highway authorities from liability for injuries arising from nonfeasance in their care and management of highways. In so doing it overruled the High Court's earlier decisions, *Buckle v Bayswater Road Board*¹⁵¹ and *Gorringe v Transport Commission (Tas)*.¹⁵² The majority held it was necessary to abolish the immunity and deal with the liability of highway authorities under the general law of negligence, in order to '[place] the common law of Australia on a principled basis'.¹⁵³ Gleeson CJ, dissenting, acknowledged the many criticisms that had been made of the immunity. He added, however, that '[t]he question for decision is what is the appropriate judicial response to such criticisms'.¹⁵⁴ In his view, the change was too great in its implications for the judiciary to make: it should be left to Parliament.

If the rule is to be changed, the change should be made by those who have the capacity to modify it in a manner appropriate to the circumstances calling for change, who may be in a position to investigate and fully understand the consequences of change, and who are politically accountable for those consequences.¹⁵⁵

In *Imbree v McNeilly*¹⁵⁶ the High Court overturned its earlier decision, *Cook v Cook*,¹⁵⁷ which had established a different standard of care for learner drivers; the change was necessary 'to maintain a better connection with more fundamental doctrines and principles'.¹⁵⁸ *Cattanach*, the wrongful birth case discussed at 7.55, while involving a new principle rather than a change to existing principle, can be viewed as part of this pattern. The majority considered that liability flowed from the general principles of negligence law.¹⁵⁹ 'Duty, breach and damage are all conceded'.¹⁶⁰ The majority were not prepared to recognise, as an exception to general principle, an immunity against wrongful birth liability.¹⁶¹ *Harriton*, in which the wrongful life action was not recognised, is distinguishable from the point of view of principle — it was difficult to conceptualise existence and life as compensable damage.¹⁶²

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The extent to which it is legitimate for the High Court to change the law has been a hotly contested issue on which a range of views have been expressed. Towards the liberal end of the spectrum, Justice McHugh has acknowledged that the common law must develop in response to societal values:

¹⁵⁰ (2001) 206 CLR 512 ('Brodie').

¹⁵¹ (1936) 57 CLR 259.

¹⁵² (1950) 80 CLR 357.

¹⁵³ *Brodie* (n 150) 542.

¹⁵⁴ *Ibid* 529.

¹⁵⁵ *Ibid* 536. Note that legislatures promptly reintroduced a '[s]pecial non-feasance protection for roads authorities': see, eg, *Civil Liability Act 2002* (NSW) s 45. See also *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 30 [11] (Gleeson CJ).

¹⁵⁶ (2008) 236 CLR 510 ('Imbree').

¹⁵⁷ (1986) 162 CLR 376.

¹⁵⁸ *Imbree* (n 156) 526 [45] (Gummow, Hayne and Kiefel JJ).

¹⁵⁹ *Cattanach* (n 125) 27, 28 (Gummow and McHugh JJ), 68 (Kirby J), 106 (Callinan J).

¹⁶⁰ *Ibid* 32 (McHugh and Gummow JJ).

¹⁶¹ See, eg, *ibid* 29 (McHugh and Gummow JJ), 106 (Callinan J).

¹⁶² See discussion at 7.55 and nn 129–138.

When legal rules and principles are no longer efficient or do not meet social needs, they must be reviewed and sometimes revised or extended. The law is a social instrument — a means, not an end. It changes as society changes.¹⁶³

Similarly, Gummow J has endorsed Lord Radcliffe's view that 'the common law is a body of law which develops in process of time in response to the developments of the society in which it rules'.¹⁶⁴ And Justice Kirby has referred to 'the great tradition of the common law — adapting and updating the law for a time of rapid social change'.¹⁶⁵

Towards the conservative end of the spectrum, Chief Justice Gleeson has stated: 'The expertise which the members of the court are required to bring to bear on that function is their expertise as lawyers ... The quality which sustains judicial legitimacy is not bravery, or creativity, but fidelity'.¹⁶⁶ Justice Hayne expressed a similarly modest view of the judicial role, describing 'judicial reticence ... as a fundamental informing principle for every judge at every level in the judicial system'.¹⁶⁷ Justice Callinan has also been critical of the view that a court should 'look to and adopt its own view of contemporary community perceptions and values'.¹⁶⁸ More stridently, Justice Heydon equated 'judicial activism' with the 'death of the rule of law', castigating its 'illegitimate' use of judicial power to further 'some political moral or social programme'.¹⁶⁹

A particularly controversial example of law-making by the High Court is provided by *Mabo v Queensland [No 2]* ('Mabo [No 2]'),¹⁷⁰ in which the High Court rejected the application of the *terra nullius* principle to Australia, and upheld native title, dramatically overturning established doctrine (see 4.3ff). Brennan J said:

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.¹⁷¹

Similarly, Deane and Gaudron JJ, in their joint judgment, said:

If this were any ordinary case, the Court would not be justified in reopening the validity of fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years ... Far from being ordinary, however, the circumstances of the present case make it unique ... [T]he two propositions in question provided the legal basis for the dispossession of the Aboriginal people of most of their traditional lands.¹⁷²

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¹⁶³ McHugh (n 140) 42.

¹⁶⁴ *Wik Peoples v Queensland* (1996) 187 CLR 1, 179 (Gummow J), quoting from *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, 591–2 (Lord Radcliffe).

¹⁶⁵ Kirby, 'A Riposte' (n 133) 10.

¹⁶⁶ Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4, 11.

¹⁶⁷ Kenneth Hayne, 'Letting Justice Be Done Without the Heavens Falling' (2001) 27 *Monash University Law Review* 12, 15.

¹⁶⁸ Ian Callinan, 'An Over-Mighty Court?' (1994) 4 *Proceedings of The Samuel Griffith Society* 81, 96.

¹⁶⁹ Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110, 113 ('Judicial Activism').

¹⁷⁰ (1992) 175 CLR 1 ('Mabo [No 2]').

¹⁷¹ *Ibid* 42 (Brennan J).

¹⁷² *Ibid* 109 (Deane and Gaudron JJ).

Dissenting, Dawson J said:

The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts.¹⁷³

Some commentators took a similar view. Historian Geoffrey Blainey said that

the majority judgment ... denied the legitimacy of this country. ... The High Court has become too powerful. It seems to have the ambition to become a sort of supreme legislature, a third Parliament, and that runs counter to the path Australian democracy has taken over the years.¹⁷⁴

In delivering his judgment in *Mabo v Queensland [No 2]* Brennan J acknowledged the constraints on judicial law-making:

[T]his Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.¹⁷⁵

He considered that the principles the majority advanced, discussed in 4.4, while departing from established precedent, were consistent with the essential structure of Australian property law.

7.64 Competing pressures, for and against High Court law-making, were prominent in a pair of criminal appeals dealing with similar issues, one decided in 1991 and the other in 2012. In the earlier case, *R v L*,¹⁷⁶ the defendant had been charged with the rape of his wife. There was common law authority going back more than 250 years that marriage carried with it the wife's irrevocable consent to sexual intercourse with her husband.¹⁷⁷ This provided a defence for a husband charged with the rape of his wife. But, by the 1990s, social conditions and values had changed and the principle was no longer acceptable to the vast majority of the Australian population. That being the case, the High Court considered itself 'justified in refusing to accept a notion that is so out of keeping with the view currently taken by society of the relationship between the parties to a marriage'.¹⁷⁸ The majority expressed doubts as to whether marital immunity was ever part of common law,¹⁷⁹ but if it was, the High Court unanimously held it should be abolished.

The High Court was presented with a more difficult sequel to *R v L* in *PGA v The Queen ('PGA')*.¹⁸⁰ In 2010 in South Australia the defendant was charged with the rape of his wife in 1963, several decades before the High Court's common law rejection of the immunity in *R v L* in 1991 and South Australia's legislative narrowing and abolition of the immunity in 1976 and 1992.¹⁸¹ In separate dissenting judgments, Heydon J and

¹⁷³ Ibid 145.

¹⁷⁴ Richard Evans, 'The Blainey View: Geoffrey Blainey Ponders *Mabo*, the High Court and Democracy' (1995) 69 *Law Institute Journal* 203, quoted in Kathy Laster, *Law as Culture* (Federation Press, 2nd ed, 2001) 132.

¹⁷⁵ *Mabo [No 2]* (n 170) 29.

¹⁷⁶ (1991) 174 CLR 379 ('*R v L*').

¹⁷⁷ Matthew Hale, *Historia Placitorum Coronae (History of the Pleas of the Crown)* (Sollom Emlyn, 1736) vol 1, 629.

¹⁷⁸ *R v L* (n 176) 390.

¹⁷⁹ Ibid 388–90.

¹⁸⁰ *PGA* (n 35).

¹⁸¹ *Criminal Law Consolidation Act Amendment Act 1976 (SA)* s 12 inserted new sub-ss (3) and (5) to s 73 of the principal Act. The *Criminal Law Consolidation (Rape) Amendment Act 1992 (SA)* replaced the existing s 73(5).

Bell J held that marital immunity was part of the common law in 1963, and expressed concern about its retrospective abolition half a century later in 2012. Judicial change of the law is always retrospective (in that the judicial decision is always after the events under consideration); however, retrospectivity raises particular concerns where criminal liability is concerned.¹⁸² And in this case the concerns were further heightened by the many years that had passed between the conduct and the judicial change of law.¹⁸³ A majority of the High Court, however, indicated that marital immunity was not part of the common law in 1963, nor even in 1935 when South Australia's *Criminal Law Consolidation Act* was passed.¹⁸⁴ The majority expressly held that it was not extending criminal liability retrospectively.¹⁸⁵

The majority's judgment in *PGA* is difficult and controversial. Kos Lesses suggests that the majority 'expressly denied the role of social change in Australia as a legitimate method of legal reasoning'.¹⁸⁶ Lesses applauds the majority for still managing to arrive at a decision which recognises marital rape as a crime:

There may have been a time and place when such treatment was considered acceptable and hence the possibility of a positive public policy for the marital immunity. But that time had well and truly passed in Australia as at 1963. The decision of the majority in *PGA v The Queen* is a praiseworthy declaration to this effect.¹⁸⁷

However, other commentators are critical of the majority's approach and consider that the dissenting judgments, in acknowledging that the defence was in existence in 1963, are more accurate. For example, Jill Hunter suggests that the majority judgment 'effectively masks social and legal reality'.¹⁸⁸ Wendy Larcombe and Mary Heath concur, indicating that in 1963 'the legal treatment of rape in marriage across Australia, as in other common law jurisdictions, proceeded on the basis that the marital immunity was part of the law'.¹⁸⁹ It was not until the 'sustained feminist activism' of the 1970s that attitudes changed, bringing about statutory reforms.¹⁹⁰ Larcombe and Heath agree with Heydon J's assessment that the majority's conclusion rests on a belief 'that history can be rewritten in complete defiance of all contemporary evidence'.¹⁹¹ 'The decision ... fails to acknowledge the lived experiences of wives and husbands and their relationship to the law as it was understood in 1963.'¹⁹² Ngaire Naffine and Joshua Neoh suggest that the majority 'absolved the common law from responsibility'¹⁹³ and that the majority

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¹⁸² *PGA* (n 35) 402–15 (Heydon J), 444–5 (Bell J).

¹⁸³ *Ibid* 402 (Heydon J), 423 (Bell J).

¹⁸⁴ *Ibid* 384 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

¹⁸⁵ *Ibid* 369.

¹⁸⁶ Kos Lesses, 'PGA v The Queen: The Role of Repetition, Reputation and Fiction in the Common Law' (2014) 37 *Melbourne University Law Review* 786, 832, citing *PGA* (n 35) 384.

¹⁸⁷ Lesses (n 186) 833.

¹⁸⁸ Jill Hunter, 'Rape Law, Past Wrongs and Legal Fictions: Telling Law's Story with Integrity', in Paul Roberts, Simon N M Young, and David Dixon (eds), *The Integrity of Criminal Process* (Bloomsbury, 2016) 327, 347.

¹⁸⁹ Wendy Larcombe and Mary Heath, 'Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*' (2012) 34 *Sydney Law Review* 785, 803.

¹⁹⁰ *Ibid* 803.

¹⁹¹ *Ibid* 803, quoting *PGA* (n 35) 414 (Heydon J).

¹⁹² Larcombe and Heath (n 189) 788.

¹⁹³ Ngaire Naffine and Joshua Neoh, 'Fictions and myths in *PGA v The Queen*' (2013) 38 *Australian Journal of Legal Philosophy* 32, 51.

decision constituted ‘a failure to recognise the fact of wife rape and the role of law in giving it full licence’.¹⁹⁴

An acknowledgment of the legal and social reality of marital immunity in 1963 would not necessarily preclude a prosecution 50 years later. Hunter highlights a possible solution, albeit one requiring some judicial courage, as she draws a comparison with war crimes:

Rape might ... be viewed as a crime that is a ‘moral transgression [justifying] ... the public interest in seeing the transgressors called to account [and outweighing] ... the need of society to protect an individual from prosecution on the basis that a law did not exist at the time of the conduct’.¹⁹⁵

Law reporting

7.66

The development of the doctrine of precedent required a comprehensive system of law reports in which authoritative decisions may be found by the judges and lawyers involved in later cases: see 7.5. Since the 1860s in England and Wales, and progressively in Australian jurisdictions, judgments given in the more important cases have been systematically published in series of law reports. Generally, only the more important cases decided by superior courts get reported. These constitute only a small proportion of the cases decided in the judicial system each year; they are those which raise significant points of law and are thought to be valuable as precedents. (Virtually all decisions of apex courts like the High Court of Australia and the United Kingdom Supreme Court get reported, often in several different sets of law reports.) The editor of each series of law reports is responsible for deciding which cases should be reported. Headnotes are generally drafted by a reporter, usually a barrister, solicitor or academic lawyer, employed by the publisher of the law report series.

7.67

Each set of law reports has its own abbreviation series reference — for example, the *Commonwealth Law Reports* series is abbreviated to CLR. A reported case is referred to (or ‘cited’) by giving the case name (usually the names of the parties), the year in which the decision was made or reported (each law report will use a system of dates), the volume number (if there is one), the abbreviated series reference, and the page at which the report begins. A guide to the most important Australian law report series, together with those of a few foreign jurisdictions, appears in **Essential Legal Toolkit C** at the end of this book. The rules for the citation of cases are explained in **Chapter 21** at 21.14ff. A list of abbreviations of commonly used reports appears in **Essential Legal Toolkit B** at the end of the book. For a fuller list, see *LexisNexis Concise Australian Legal Dictionary* and the *Australian Guide to Legal Citation* in **Further reading** below.

In the past, law reporting played a crucial role in making past decisions available for use in subsequent disputes. Now, however, many unreported decisions are readily also available over the internet. For guidelines on the citation of unreported decisions, see 21.27 and **Essential Legal Toolkit D**. See **Chapter 18** for a discussion of case law databases.

¹⁹⁴ Ibid.

¹⁹⁵ Hunter (n 188) 333, quoting from the war crimes case *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 689 (Toohey J).

AUTHORISED AND UNAUTHORISED REPORT SERIES

From the beginning of the 16th century until the middle of the 19th, law reports in England were produced by private reporters under their own names. For that reason, they are called the Nominate Reports and are of variable quality depending on the skills of the individual reporter. They were not checked by the courts from which the cases came. Most of these series, some of which were short-lived, are reproduced in the English Reports: see also 1.26. In England in 1865, the body now known as The Incorporated Council of Law Reporting for England and Wales was set up to begin systematic reporting of all cases decided by the superior courts: see 7.5. These reports are seen by the courts which decided them before being published and are regarded, therefore, as authorised. They include the *Law Reports*, which are made up of a number of distinct series such as the decisions of the Queen's Bench Division (QB) and the Appeal Cases (AC).

7.68

Law reporting in the Australian colonies followed a similar pattern to that of England. Before the mid-1860s law reporting was haphazard. During the 1860s, however, Councils of Law Reporting were set up in the colonies and the systematic production of authorised report series began. Each jurisdiction has at least one authorised series; for example, the *Commonwealth Law Reports* (CLR) contains decisions of the High Court of Australia and previously also of the Privy Council.

7.69

In both England and Australia, unauthorised series, which are not produced by Councils of Law Reporting, have continued to be published alongside the authorised reports. These may be specialist reports, such as *Australian Criminal Reports* (A Crim R), or general reports for a jurisdiction, such as the *State Reports of Western Australia* (SR(WA)).

7.70

Where a decision appears in both authorised and unauthorised reports, the court will generally require the authorised citation to be provided.¹⁹⁶ The advantage of unauthorised reports was that, since they are not checked by the court, they can be published more quickly. This advantage has diminished, given the wide and prompt availability of decisions published by the relevant court over the internet: see 7.71. However, the unauthorised report has the possible advantage of including a headnote and the navigability of headers and footers.

CASES ON THE INTERNET

7.71

Access to court decisions has been transformed by their increasing availability on the internet. Most law report series are now available on commercial legal platforms such as *Lexis Advance* or *Westlaw AU*, and virtually all appeal court decisions are available soon after they are handed down on sites such as *AustLII* and the court websites: see Chapter 18. Moreover, decisions downloaded from the internet have the benefit of being fully text-searchable. The unreported versions generally do not have headnotes and are not authorised (see 7.68), but they are extremely valuable to legal researchers and may be cited in court. Furthermore, the proliferation of case law databases in other jurisdictions has meant that international precedents are increasingly also used in argument.

¹⁹⁶ See, eg, Supreme Court of Victoria, *Practice Note 9 of 2011 — Citation and Provision of Copy Judgments to the Court and Opposing Counsel*, 7 November 2011.

7.72

These developments may not be an unqualified boon. Dyson Heydon, a former Justice of the High Court, has complained extrajudicially that the ease of access to such a wealth of decisions constitutes a ‘challenge to [judicial] probity’.¹⁹⁷ ‘The duty of a judge’, Heydon suggests, ‘is to decide the case’, and entailed in this is ‘a duty to say no more than what is necessary’.¹⁹⁸ However, aided by the internet, ‘many modern judges’¹⁹⁹ go far beyond that:

Often no cases are followed, though all are referred to ... They do not limit themselves to reported cases, but use computers to obtain access to unreported ones. They use huge footnotes ... The citations often in fact do not demonstrate judicial erudition, being associate-generated, or worse, computer-generated. But however they are generated, they seem more designed to highlight supposed judicial learning than to advance the reasoning in any particular direction relevant to the issues between the parties.²⁰⁰



Further reading

- James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004).
- Rupert Cross and JW Harris, *Precedent in English Law* (Oxford University Press, 4th ed, reprint, 2004).
- Robert French, ‘Judicial Activism: The Boundaries of the Judicial Role’ (2010) 10 *Judicial Review* 1.
- Matthew Harding and Ian Malkin, ‘The High Court of Australia’s Obiter Dicta and Decision-Making in Lower Courts’ (2012) 34 *Sydney Law Review* 239.
- Dyson Heydon, ‘How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?’ (2009) 9 *Oxford University Commonwealth Law Journal* 1.
- Dyson Heydon ‘Threats to Judicial Independence: The Enemy Within’ (2013) 129 *Law Quarterly Review* 205.
- Michael Kirby, ‘Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty’ (2006) 30 *Melbourne University Law Review* 576.
- Alastair MacAdam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (LexisNexis Butterworths, 1998).
- Anthony Mason, ‘Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?’ (2003) 24 *Adelaide Law Review* 16.

¹⁹⁷ Heydon, ‘Judicial Activism’ (n 169) 118.

¹⁹⁸ Ibid 121.

¹⁹⁹ Ibid 118.

²⁰⁰ Ibid 118–19.

- Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37 *Australian Bar Review* 102.
- Michael McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37.
- William Twining and David Miers, *How to Do Things with Rules* (Cambridge University Press, 5th ed, 2010).



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