

## Topic 1: An Introduction to the Law and its sources

- 1) **Law v Common sense:** Common sense v technical knowledge. **Pepper Finance Corporation v Williams [2008]** is a good example of common-sense v technical legal knowledge of the law. The case is about a foreclosure of a Mortgage over Mrs. Williams house, as she does not have a legal knowledge to defend her case, she tries to argue based on the common-sense.
- 2) **Legal sense:** As a lawyer you start developing the legal sense through language, way of thinking and improving your knowledge.
- 3) **Specialised legal language:** There are pure legal terms.
- 4) **General terms:** There are general terms that could have a special legal meaning.
- 5) **Legal terms:** Legal terms that exists in everyday speech, but the legal meaning is different from usual English.
- 6) **Law and Politics:** Judges are bound with prior precedents, politics are not. Issues should be resolved based on the law, not because of political issues. Judges should not seek for popularity and should never give their opinion on cases. In **Latham CJ, First Uniform Tax case** states that politicians should not interfere on legal decisions.
- 7) **Principles:** (a) Separation of Powers, (b) Doctrine of Precedents, (c) Rule of Law, (d) Federal system, (e) Representative and responsible government, etc.
- 8) **ATUAL: Sources of law:** (a) Statute law (made by the Parliament) is the interpretation of the general words to particular circumstances x (b) Case Law (made by the Judges) is the interpretation of the particular circumstance in a case and apply the principles and reasoning in the judgments to general situations. This is what we mean by **generalising the ratio**. The **common law** is the law developed by judges from superior courts, which were the major source of legal rules but due to the increasing of the government regulation such law was replaced as the main important source of Australian law. When judge make decisions they are concerned primarily with the case before them. Together, a series of decisions dealing with similar topics has the effect of creating a firm legal framework. I.e.: **Donoghue v Stevenson [1932]**: where the plaintiff claimed that she found the decomposed remains of a snail in a bottle of ginger that she was drinking. As the bottle was bought by a friend, she did not have a contract with the seller and therefore could not sue for a breach of contract. Thus, she decided to bring an action against the manufacturer, which should have a legal duty of care with the consumer. The principle of 'neighbour principle' was established: You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Today, the **legislation** has now become the most common source of new rules of law. There are two forms of legislation: statutes (made by the Parliament) and delegated or subordinate legislation, which is made by someone other than Parliament, usually, a Governor or a statutory body. **Legislative v Court** Legislative bodies have an advantage over courts, they can be proactive. Courts have to wait for a dispute before making laws. On the other hand, Parliament can prevent problems from occurring.
- 9) **Reported cases:** judgments published in law reports. Only those cases which deal with significant points of law are considered to be valuable precedents and are included in law reports. **Unreported cases:** judgments either too recent to be reported, or considered not sufficiently important to report.
- 10) **Law:** A section is made up of elements. We have to interpret it in order to assist our clients.
- 11) **Questions of Law X Fact:** (a) Law: is a legal issue that only a judge can decide about it, there is a legal issue involved. (b) Fact: a witness can give evidence about it, the judge does not have to interfere. So it is a matter for a jury to decide it. ONLY questions of law create binding precedent. I.e.: Judgment of Solomon.
- 12) **Classification of Law:** Law (remedies that concern things)/Equity (remedies that concern to people). Private (tort, contract, real property etc.), Public (criminal law, constitutional law, administrative law, evidence, practice and procedure etc.), Commercial (commercial transactions, law of associations etc.) and National law and international law. Civil and Criminal Law.
- 13) **Structure of Case Law:** (a) Facts, Legal Issues, (c) The Law, (d) Ratio and (e) Decision.
- 14) **Merritt V Merritt [1970]** \*Facts - Husband and Wife are separated (seeing another woman) but not divorced yet made an arrangement for him to pay allowance and wife pays off mortgage and once mortgage is paid, ownership of title transferred to her name only. (joint at the time) Arrangement was written up and signed by both parties. \*Issues - whether there were legal obligations and intention \*Courts - separated meant not domestic agreement, thus it was a contract (both had legal intention). Intention to enter legal relations.
- 15) **Thornton v Shoe Lane Parking [1971]** - example of setting aside previous ratio and development of new ratio. The plaintiff was injured in a car park partly due to the defendant's negligence. The plaintiff was given a ticket on entering the car park after putting money into a machine. The ticket stated the contract of parking was subject to terms and conditions which were displayed on the inside of the car park. One

of the terms excluded liability for personal injuries arising through negligence. The question for the court was whether the term was incorporated into the contract ie had the defendant brought it to the attention of the claimant before or at the time the contract was made. This question depended upon where the offer and acceptance took place in relation to the machine. **Held:** The machine itself constituted the offer. The acceptance was by putting the money into the machine. The ticket was dispensed after the acceptance took place and therefore the clause was not incorporated into the contract.

- 16) **Legal Institutions** are drawn from a number of sources: the text books; cases; legislation; articles; and other books.
- 17) **Positive law** refers to a body of man-made laws that may regulate conduct in a certain area. It has to be written down, before that the law does not exist. This type of law may be traced back to ancient times and is typically passed by government at the local, regional, or national level. Positive law is sometimes contrasted with natural law, which is typically based on moral principles. Positive laws might set the standards for acts that are required as well as those that are prohibited. Penalties are usually given to those who violate positive law. Some examples of positive laws might include statutes, judicial verdicts, and ordinances. Positive laws may be written and enacted by government lawmakers, courts, and administrative agencies. Those who are physically present where the positive laws have governing power are typically required to obey such laws. Legal positivism is sometimes compared with natural law. **Natural law** commonly refers to the natural order, or a moral and ethical code that people share as human beings. For example, a fundamental human right, we can assume that even though it is not written. Positive law is artificial order and consists of rules of conduct that people place upon each other. Natural law is inherent and may not require government enforcement, while positive laws are the legal ones that people are typically expected to follow. It can be a bit vague, can lead to difficult interpretation.

### Topic 3 - Introduction to Legal Problem solving

- 18) **IRAC:** Issue (what is the legal issue?), Reasoning (describe the law), Application (apply the facts to the law) and Conclusion (Provide an answer).
- 19) **Ratio Decidendi:** is the only binding part of the judgment. That is the reasoning of a judgement. The way the judge came to that conclusion. It only binds the courts that are lower in the same judicial hierarchy.
- 20) **Obiter Dicta:** is a comment or observation by the judge on an issue that is not in dispute between the parties. It is not binding, but it may be persuasive.
- 21) **Contract:** mainly case law: **Carlill v Carbolic Smoke Ball Co [1893]**. Is an agreement that is enforceable at law.

- **Offeror** who makes a proposal; **Offeree** who receives the offer.

**Elements of a Contract: (a) Offer:** the indication by one person to another of his or her willingness to enter into a contract with that person on certain terms.

- **Must be communicated to the offeree:** **Henthorn v Fraser [1892]**, where the defendant withdrew the offer to the complainant by post. \*Issue - Postal acceptance rule will be considered as communication of accepting an offer as soon as the letter is posted.
- **NOT an Offer if the Offeree hears the intention of the offeror from a third party:** **Cole v Cottingham (1837)**.
- **NOT Offer if it is supply of information:** **Harvey v Facey [1893]** \*Facts - One asks another to sell Bumper Hall Pen shares at lowest price and the other suggested lowest price is 900 pounds. The other agreed and ask for exchange but no response. \*Issues - whether there were legal obligations and intention. \*Courts - Merely a request for the supply of information, no contract or intention.
- **NOT Offer if it is an invitation to treat:** **Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953]**. \*Facts - Boots have chemist which displayed goods on shelves. P sent 2 men to buy products and claim Boots 'self-service' system was an offer to sell products. \*Issue - when did the contract form (when was the offer made). \*Courts - the 'self-service' system is an 'invitation to treat', thus was not an offer. Offer begins when the customer takes the goods and brings it to cashier and exchange money to buy the product.
- **However, some Aids are not invitation to treat:** **Carlill v Carbolic Smoke Ball**. \*Facts - Ad made by CSB for all to try their product for a period of time and if they suffer any symptoms of cold, flu, etc....they will be rewarded 100p. On the Ad, it specifies an amount (1000p) already deposited at local bank to show that they are genuine. Carlill tried and suffered the symptoms but CSB claims no contract, therefore no reward. \*Issue - whether the ad had the intention to form a contract. \*Courts - Although ads are generally 'invitation to treat', this had extra info (deposit) to show intent, thus a contract was formed. (doesn't have to be to individuals, can be made to the world), also consideration was involved.

- **CONCLUSION about Offer:** Offer has to intend to be bound (Harvey v Facey [1893], detailed (Carlill v Carbolic Smoke Ball Co [1893], communicated Henthorn v Fraser [1892]).

**(b) Acceptance:** Is the “yes” to end negotiation.

- **Must respond to the Offer:** Only to: whom the offer was made, who received the offer, who have the offer in mind.
- **Must accept offer with offer ‘in mind’:** **R v Clarke (1927)**. \*Facts - Clarke was questioned for murder as a suspect and doctored on his friends to the police and wanted the reward. \*Issue - whether offer was accepted. \*Courts - Clarke did not have ‘offer in mind’ at point of acceptance.
- **Must be communicated to the offeror:** **Felthouse v Bindley (1862)** \*Issue - Silence is not sufficient as acceptance must be communicated.
- **Must correspond with the offer:** The offer and acceptance must precisely correspond. Otherwise, is a counter-offer.

**(c) Consideration:** Is the price or value paid for the promise.

**(d) Intention to enter into legal Relations:** There must be a common intention to enter into obligations.

**Rose & Frank Co v JR Crompton & Bros Ltd [1923]**. \*Facts - Arrangement between UK and US company whereby they continue to deal subject to 6 months notice, but UK pulled out after 1 month. Written and signed arrangement specifically states it’s an honorable agreement and not legally binding. \*Issues - whether there was intention by both parties to create legal relations. \*Courts - Agreement although signed and written is not legally binding as both agree to the ‘honorable clause’.

- **NOTE:** In **social and domestic agreements** there is a presumption **against** an intention to enter into legal obligations: Balfour v Balfour [1919], Cohen v Cohen (1929), Jones v Padavatton [1969].

**Balfour V Balfour [1919]** \*Facts – Wife and Husband had verbal agreement while happily married for payments to her so she can support herself. They were separated (live in different countries – wife felt sick) but still married and he did not pay. Wife sued and won but Husband appealed. \*Issues – whether there were legal obligations.

\*Courts – domestic and social agreements not legally binding, no contract

**Cohen V Cohen (1929)**. \*Facts – Wife and Husband (still happily married but at the time lived in different states) made arrangement to give her dress allowance. \*Issues – whether there were legal obligations and intention. \*Courts - domestic and social agreements not legally binding, no contract.

**Jones V Padavatton [1969]**. \*Facts – Mother (J) and daughter (P) made arrangement for P to move from US to UK to work and P would provide allowance. This amount changed as it included J a house to stay. Fight between them and P sought possession of house. P sought appeal. \*Issues - whether there were legal obligations and intention. \*Courts – domestic agreements (even though not husband and wife, but close relations) should not be legally binding.

- **The presumption is rebuttable:** Merritt v Merritt [1970] and Wakeling v Ripley (1951).

- **NOTE:** In **business or commercial agreements**, there is a rebuttable presumption that the parties **did intend** to create legal obligations: Carlill v Carbolic Smoke Ball [1893], Rose & Frank Co v Crompton & Bros Ltd [1925].

## 22) Consumer Law:

- **Sale by Description: § 56 Consumer Law:** Ashington Piggeries v Christopher Hill [1971], Grant v Australian Knitting Mills (1936). **Explain what you want.** **Ashington Piggeries v Christopher Hill [1971]**. Facts - AP look to develop Mink food (developed secret formula), and asked CH to make it (oral contract). - Food made following AP’s ingredients but it killed Minks because of a type of preservative CH used (DMNA) was poisonous to Minks. Courts - there were no express terms (ie, do it safely, negligently) - therefore no breach of contract but - there were implied terms under SOGA. under SOGA - goods were a sale by description (ie, list of special ingredients). - goods correspond with the description (Yes). **Grant v Australian Knitting Mills (1936)**. Facts - G went to buy undies at a store made by AKM and contracted some severe dermatitis as undies had sulphite in them. (contaminated by manufacturer) Courts - look at implied terms that were not in contract (SOGA). - him wanting to buy underwear is a sale by description, and did goods correspond with description (Yes).
- **Sale with a Disclosed Purpose: § 55 Consumer Law:** Purpose made known? Obvious purpose? Underpants - Grant v Australian Knitting Mills OR Reliance on seller’s judgement? **Ashington Piggeries v Christopher Hill**. **Explain what you want, but with a specific disclosed purpose.**
- **Acceptable Quality: § 54 Consumer Law:** Rasell v. Garden City Vinyl and Carpet Centre Pty Ltd (1991), Carpet Call Pty Ltd v Chan (1987). **You expect good quality of a good product.** **Carpet Call Pty Ltd v Chan (1987)**. the consumers bought a heavy duty carpet for a nightclub, which should be durable. But, in a short period of time the wear and tear on the carpet were very

visible. The failure to provide a good that it is not durable, represents a failure to provide a good with acceptable quality.

- **Rasell v Garden City Vinyl and Carpet Centre Pty Ltd (1991)**. Facts - R decorated house and chose carpet of apricot colour to match, but carpet was watercoloured (various colours, she only saw parts of it) and requested for carpet to be removed. -Courts – carpets do fit as per ordinary purpose, but her purpose was for the carpet to look good and match the rest of the house, which it didn't, therefore it was not of merchantable quality.
- **Remedies:** Demand repair, replacement, or refund.

- 23) **State Government Insurance Commission v Trigwell (1979)** \*Facts - Car accident between Trigwell and Rooke (R), R died but accident caused by sheep owned by Kerins that was astray on highway. T won in Supreme Court and it ruled R was liable, K was not. Third Party Insurer appealed to HC. \*Issues - whether Kerins have legal obligation to have duty of care - whether ruling of Searle V Wallbank laws (common law of England) apply to South Australian Law \*Courts - no duty of care from Kerins; law in Searle V Wallbank formed part of South Australian Law (appeal dismissed).

*There are five elements of sections 54(1) and 55(1) of the ACL, which are, person, supply, trade or commerce, goods, and consumer. Each element is dealt with below.*

- *Person – s2C Acts Interpretation Act – person includes a corporation*
- *Supply – s2 Australian Consumer Law – supply in relation to goods means supply by way of sale, exchange, lease, hire or hire-purchase*
- *Trade or Commerce – s2 Australian Consumer Law – means trade or commerce within Australia and includes any business.*
- *Goods – s2 Australian Consumer Law – is an inclusive definition that would include a fridge, oven, flooring*
- *Consumer – s3(1) Australian Consumer Law – a person is taken to have acquired goods as a consumer if the amount does not exceed \$40,000 or the goods were of a kind ordinarily acquired for personal, domestic or household use.*

#### **Topic 4: Australian Legal Institutions**

In the 1850s, the various colonies formed their own parliaments. However, the parliaments were still subject to Britain, so their powers were limited. In 1899, the colonies agreed to form a single nation under a federal system of government. In 1900, the British Parliament approved it, when it passed the Constitution Act. Each colony handed over limited powers to a central Parliament called Commonwealth Parliament.

- 1) **Federalism:** Australia is a federation with both a federal parliament and state/territory parliaments. In this context, no parliament has unrestrained power to legislate over all issues. The States shared a part of their power to the Commonwealth and decided to retain the residual power (“Plenary Power”). Thus, the power of Australian parliaments to make legislation is limited by the division of powers between the state and the Commonwealth.
- 2) **Rule of Law:** All men are equal before the law and no one should be above the law. It imposes limits on the government’s power as the government is subject to the law and should not be arbitrary. Basically, the law should apply equally to everyone. **Essential Elements:** (i) Government by law as opposed to government by arbitrary fiat. (ii) Governments only operate if they have specific legal authority to do so (**Principle of Legality a key element of the Rule of Law**), which can either be found in the common law or legislation. (iii) Citizens can only be punished for breach of a law. **Other Elements:** (i) Governments cannot tax their citizens or punish without lawful authority. (ii) The courts have special duty to protect citizens by ensuring these principles and freedoms are adhered to.
- 3) **Justice Lady (rule of law):** **Blind:** The law applied to everyone. **Scale:** Everyone is to be treated equally. **Sword of Justice:** People should not wait for a long period for justice. Everything should happen as quickly and fairly as possible.
- 4) **Rule of Law x Western Liberalism:** Everyone should be treated equally. Freedom of speech, press, religion. Individual liberality is supreme, which can only be interfered with by lawful means.
- 5) **SEPARATION OF POWERS:** The development of this separation of powers was the work of several political philosophers, such as, Aristotle, John Locke and Baron de Montesquieu. In 1660, on Cromwell’s death it was noticed that it was dangerous and unstable to vest power in the Parliament as it was in the King. Then, they realized that the power should be separated in order to have check and balance. The power is spread into different bodies in order to be able to provide the necessary check and balance. The Constitutions provides that legislative powers are divided between the Commonwealth and the States.