How to Work With Common Law

Christopher Enright

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First Edition	11 November 2015
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Citation
Enright, Christopher (2015) 'How to Work With Common Law', Sinch: Canterbury

National Library of Australia 'Cataloguing in Publication' Entry	
Author	Enright, Christopher 1947 – author
Title	How to Work With Common Law / Christopher Enright
ISBN	9780994495303 (paperback)
Series	Legal Skills Series
Notes	Includes bibliographical references and index
Subjects	Common law--Australia
Dewey Number	340.570994

Cover Design	
Designer	Howard Randell
Firm	Eye for Image
Website	www.eyeforimage.com.au

Overlap
There is unavoidable overlap in the principles and structures used for legal reasoning and legal method. Consequently parts of this book are taken from, or appear in, other publications.

Preface

Common law is a messy beast. This book seeks to analyse and explain it. By this means it seeks to enable readers to work with common law more effectively.

The starting point is the content of a common law rule. Every common law rule consists of elements and consequences. Each element of a common law rule is a generalisation of one of the material facts of the case that gave birth to the rule. There are potentially a number of versions of a rule for two reasons First, there is no logical or official means for determining which facts are material. Second, there is no precise or official means for determining the extent to which a court should generalise a material fact in order to create an element of a rule.

There is, however, a general guide. A rational aim of a court should be to make the version of the rule that yields the highest net benefit to society.

This book covers these matters and more. It explains the structure and authority of common law rules and the means of evaluating rules by reference to net benefit. Naturally it considers the two key principles that underlie common law, namely ratio decidendi and stare decisis (which is the driver of precedent). It also explains the remaking of a common law rule and the characteristics of common law.

Christopher Enright
11 November 2015

List of ‘How to’ Books

This table sets out a list of books in Sinch’s ‘How to’ series:

How to Answer a Problem Question
How to Detect Ambiguity in Statute Law and Common Law
How to Interpret a Statute
How to Organise Law and Litigation
How to Prove Facts
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Abbreviations	Meanings
Deans of Windsor	Dean and Canons of Windsor
DPP	Director of Public Prosecutions
FCT	Federal Commissioner of Taxation

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1. See Kirby (1992A).

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Labels

Introduction

Discussion in this publication refers to items such as a statute or a meaning of an ambiguous provision. Often these are part of a collection, list, range or set of items. Frequently the text puts them in a diagram where they represent a model or a step on the way to explaining a model. The purpose here is to explain the labelling system used to refer to these items.

Describing Items

Labelling Items

There are several aspects to labelling the items in a set, range, list or collection. These are name, number, letter and designating a set of items.

Name

The name of an item commences with a capital letter. Some examples are Element, Statute and Meaning.

Number

Items in a set, range, list or collection are generally numbered. For example, the elements of a legal rule are labelled Element 1, Element 2, Element 3 and so on. These numbers are ways of identifying elements and distinguishing one from another. They are generally not intended to create any list according to preferences or values.

Letter

Items in a set, range, list or collection can be lettered. For example a list of statutes can be Statute A, Statute B and so on.

Designating a Set of Items

It is useful to designate a set of items with a single and simple tag. Here is an outline. The basic proposition is that a simple and obvious tag has two aspects:
1. Description. Use a written label on the items as a tag or description. Put it in plural form. Thus a tag for a set of statutes would be ‘Elements’.

2. Numbers. After the tag add a space then a compound numerical tag consisting of three items:
   2.1 The number of the first item in the set.
   2.2 A hyphen.
   2.3 The number of the last item in the set.

Here are two illustrations:
1. A set of six elements would be Elements 1-6.
2. A set of elements where the number can vary from situation to situation is written as Elements 1-n.

1. Naming the Items

The item has a name, which is usually obvious. For example each statute in a set of statutes would bear the name 'Statute', and each elements in a set of elements would be 'Element'.

2. Numbering the Items

There are two possibilities for the numbering of a set, list or range of items:
1. There can be a fixed number in the set.
2. There can be a variable number in the set.

2.1 Fixed Number in the Set

In a particular instance there may be a specific number of items in a set. For example a particular legal rule might be composed of five elements. In this case the first and last numbers designate the number of items in the set or range. In this example of a set of five elements, one would designate the set as 'Elements 1-5'.

2.2 Variable Number in the Set

Sometimes the text refers to a set or a list in general terms in cases where the number of items in the set can vary from situation to situation. In this event, the way to go is to number the last item with the symbol 'n'. To refresh readers, 'n' stands for however many there are on a particular occasion. An example would be a general discussion about elements of a legal rule. In this case the possibilities vary from legal rule to legal rule. Thus the designation of this set of items is Elements 1-n.

Null Option

There is a special case with options where one of the options is to do nothing and leave things as they are. This occurs, for example, with the proposed making of a statute where one option is just not to enact a statute. In a case such

as this the option is labelled with the symbol for nought, namely '0'. Thus the option not to enact a statute is designated as Statute 0. Statute 0 represents the null option – it is the option for a legislature not to enact a statute on a topic whereas Statutes 1, 2 3 and so on are options for different versions of a statute on a topic (on the basis that there is no form of a statute that can better present conditions). Given this the full set or range of possible statutes for a legislature to enact consists of Statutes 0-n.

Corresponding Items

Sometimes there are sets with corresponding items. This can occur for a number of reasons. Here are two examples:

1. For making and interpreting law, items correspond because of causation. Each version of a statute on a subject and each meaning of an ambiguous provision will cause an effect if a legislature enacts the statute or if a court declares the meaning to be legally correct.
2. In the model for litigation, elements and facts correspond because each element delineates a category of facts so that in a particular case the element is satisfied by a fact that falls within that category. Similarly, facts and evidence correspond because each fact is proved or potentially provable by some evidence.

Single Relationships

Corresponding items are labelled with the same number or letter. Here are some illustrations:

1. Statutes, Meanings and their Predicted Effects. Statute 0 is predicted to cause Effect 0, Statute 1 is predicted to cause Effect 1, Statute 2 is predicted to cause Effect 2 and so on. Meaning 1 is predicted to causes Effect 1, Meaning 2 is predicted to cause Effect 2 and so on. Similarly, Statute X (or Meaning X) is predicted to cause Effect X while Statute Y (or Meaning Y) is predicted to cause Effect Y.
2. Facts Satisfying Elements. Fact 1 is the label given to a fact that fits within or satisfies Element 1, Fact 2 is the label given to a fact that fits within or satisfies Element 2 and so on.
3. Evidence Proving Facts. Evidence 1 is the label given to evidence that might prove or has proved Fact 1, Evidence 2 is the label given to evidence that might prove or has proved Fact 2, and so on.

Collective Relationships

It is possible to use labels of correspondence to make collective statements. Here are some examples: Statutes 0-n are predicted to cause Effects 0-n, while

Evidence 1-n is capable of proving Facts 1-n. To construe these collective statements properly it is necessary to apply the maxim *reddendo singula singulis*. Literally this says that each is rendered on their own. In plainer language, the items are to be taken singularly so the each item in the first list is paired with the corresponding item in the second list. The adverb 'respectively' captures this notion.

Two or More Version of an Item

There may be two or more versions of an item. Additional letters or numbers can distinguish the different versions. For example:

1. If Element 2 is ambiguous because it has two meanings, the versions of Element 2 can be designated Element 2A and Element 2B.
2. There can be two versions of a fact. There are two major possibilities:

2.1 In a case there may be two versions of Fact 2 because the plaintiff propounds one and the defendant propounds the other. These can be designated 'P' and 'D' to signify the plaintiff and defendant's version. Thus the two versions are Fact 2P and Fact 2D.

2.2 After investigating the facts of a case the defendant may find that there is evidence to support two versions of one of the facts in their case. These are facts that the defendant could use to rebut the plaintiff's satisfying Element 3. The defendant or the court could designate these as Fact 3D.1 and Fact 3D.2.

Subdivisions of Items

It is possible to designate subdivisions of an item with a numbering system that invokes the form but not the meaning of decimal points. Thus if Element 2 has three sub-elements, one can designate them as Element 2.1, Element 2.2, and Element 2.3. If Element 2.2 has three sub-elements we can designate these as Element 2.2.1, Element 2.2.2 and Element 2.2.3. Obviously this form of numbering adapts to any number of levels of subdivision.

Possibilities: 'X', 'Y', Etc

Sometimes the text needs to refer to any option, that is, to an option in general terms. Conveniently this is labelled with a capital letter. Commonly, this is the letter X, so that a general option for a legislature wishing to pass a statute is Statute X. Naturally, if there is a need to refer to more than one option additional letters may be used. For example, there could be reference to Statute X and Statute Y; in this case Statute X is one possible statute and Statute Y is another possible statute.

Signifying Relationships

Sometimes it is necessary to signify a relationship between two items. This can be done using standard symbols. This table sets out the major possibilities:

Symbol	Relationship	Illustration
<	Less than	X<Y. X is less than Y.
>	Greater than	X>Y. X is greater than Y.
=	Equals	X=Y. X equals Y,
≠	Not Equals	X≠Y. X does not equal Y.
≈	Approximately Equals	X≈Y. X is approximately equal to Y.
≡	Congruence Relationship	X≡Y. X is congruent with Y.
≅	Isomorphic	X≅Y. X is structurally identical to Y
Labels Diagram 1. Symbols for Relationships		

Listing Items

Where there is a list, for example a list of the meanings of an ambiguous provision, we can set these out in the text as a series – Meaning 1, Meaning 2 ... Meaning n. In the text, as we have noted, the range can be efficiently represented as Meanings 1-n. In a table they are set out as a list in the following way:

Meanings
Meaning 1
Meaning 2
Meaning n
Labels Diagram 2. List of Meanings

In this presentation it is not strictly necessary to include Meaning 2. Indeed, it is actually redundant, when n=2. However, it usefully emphasises the sense of a list that sets out the range of options or possibilities.

Diagrams

Lists in a table can be connected to become a diagram or figure. This can involve corresponding items. A useful illustration consists of a diagram that has two major columns that match corresponding items. One column sets out the meanings of an ambiguous provision in a statute in Statute X and the other sets out the effect for the whole statute that each meaning is predicted to cause. Here is the illustration:

1	2	3	
Meanings	→	**Effects**	**1**
Meaning 1		Effect 1	**2**
Meaning 2		Effect 2	**3**
Meaning n		Effect n	**4**
Labels Diagram 3. Meanings and Effects			

This diagram functions in the following way:
* Column 1 shows the meanings of the ambiguous provision, being Meanings 1-n.
* Column 3 shows the effect of the statue that each meaning is predicted to cause if a court chooses them as the legally correct meaning of the ambiguous provision. Let us flesh this out. Every statute that is enacted causes a number of outcomes. The author refers to the full collection of outcomes that a statute is predicted to cause as an effect. When a court interprets a statute it is faced with the basic options in terms of the range of meanings of the ambiguous provision that gives rise to the need to interpret the statute. The diagram labels these meanings as Meanings 1-n. If a court decides that Meaning 1 is the legally correct meaning of the ambiguous provision that decision is likely to have an impact on the effect that the whole statute will cause. Column 3, as stated, sets out this effect, the effect of the whole statute, for Meaning 1. In a similar way it sets out the effect for each other meaning of the ambiguous provision. This method of identifying the effects of each meaning caters for the constitutional rule in each Australian jurisdiction that requires a court to interpret a statute in the way that will 'best achieve' the purpose and object for which the legislature enacted the statute. Now the purpose or object of a statute is to cause some effect or outcome. Hence the term 'Effect' aligns directly with purpose and object (which of course is why the table includes it).
* Column 2 contains an arrow pointing from the Column 1 to Column 3, thereby indicating that each meaning in Column 1 is predicted to cause the statute to have the corresponding effect in Column 3.
* Columns 1-3 indicate meanings and their predicted effects. Assume for the purposes of the explanation that a court is interpreting an ambiguous provision in Statute X that has Meanings 1-3:

1. If a court chooses Meaning 1 as the legally correct meaning the prediction is that Statute X will cause Effect 1.
2. If a court chooses Meaning 2 as the legally correct meaning the prediction is that Statute X will cause Effect 2.
3. If a court chooses Meaning 3 as the legally correct meaning the prediction is that Statute X will cause Effect 3.

Probability

A number of symbols are used for probability. This diagram shows the common symbols and their meanings:

Symbol	Meaning
P(A)	probability that event A occurs
P(B)	probability that event B occurs
P(A ∪ B)	probability that event A or event B occurs (A union B)
P(A ∩ B)	probability that event A and event B both occur (A intersection B)
P(A')	probability that event A does not occur
P(A | B)	probability that event A occurs given that event B has occurred already (conditional probability)
P(B | A)	probability that event B occurs given that event A has occurred already (conditional probability)
P(B | A')	probability that event B occurs given that event A has not occurred already (conditional probability)
ϕ	the empty set = an impossible event
S	the sample space = an event that is certain to occur

Labels Diagram 4. Symbols Used for Probability

Chapter 1
Common Law

Introduction

A case can decide any of three types of questions or issues – issues of law, issues of fact and issues of discretion. When a case decides an issue of fact or an issue of discretion the decision in the case that is specifically on these issues is not a precedent. The situation, though, is different with a case that decides a question of law – if a superior court or an appellate court decides a question of law the decision does become a precedent.

There are two main types of decisions that involve a question of law:
1. One is a decision about making, amending, interpreting or abolishing a rule based in common law – these decisions are part of common law in the purest sense of the term. So cases are the maternity ward where common law rules are born.
2. The other is a decision interpreting legislation, be it a statute or a piece of delegated legislation. This is part of common law in a broad sense of the term. This text, however, does not focus on this aspect.[1]

Each of these decisions is part of judge made law and part of common law in a broad sense of the term. These decisions constitute precedents to bind or guide courts that subsequently face a similar question to that which was the subject of the original case.

1. For a discussion of how to interpret a statute see Enright (2015) *How to Interpret a Statute* and Enright (2015) *A Method for Interpreting Statutes*.

Nature of Common Law

Introduction

The expression common law has three meanings, which need to be explained at the outset to avoid confusion:

1. Common law refers to cases as a source of law because courts make common law rules. This is the primary meaning of the term. It is also the focus of attention in this text.
2. Common law refers to a particular type of case law, namely that developed by the common law courts. Common law in this sense is contrasted with case law developed by the Court of Chancery and referred to as equity.
3. Common law describes a legal system that has common law as part of its law. Such legal systems belong to Britain and to her former colonies.

Common law as a source of law consists of legal rules that are made by courts in the course of a deciding a case.[2] Common law is also called by two other names – case law because it is made in and found in cases, and judge made law because judges make it. The cases that contain common law are referred to as precedents or authorities. Common law originated in England, although there is also a Scottish common law. There are three types of law that are properly described as common law. These reside on a continuum that contains three identifiable locations:

1. One End of the Continuum: Common Law Rules. At one end there is pure common law, which is law produced entirely by judges. Judges make it, amend it and interpret it.
2. Middle of the Continuum: Statutory Common Law. In the middle of the continuum are places where the law is statutory so that courts must interpret it. But as they do so, courts also make law in a substantial way because the provision they interpret is so open and broad.
3. Other End of the Continuum: Interpretation of a Statute. After a legislature has enacted a statutes courts may interpret the statute to determine its legally correct meaning.

This book outlines these three types of common law here for the sake of completeness. However the remainder of the book is directed solely to discussing common law rules in the pure sense of the term.

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2. For an account of the general nature of common law see Beaten (1997), Atiyah (1985), Burrows (1980), Burrows (1976B), Calabresi (1982), Holmes (1881), Lucke (1982), Lee (1988), Lehman (1984), Jaconelli (1992).

Common Law Rules

Common law rules are the purest form of common law. There are three tasks that courts perform – making rules, amending rules and interpreting rules. Clearly the outcomes of these processes are part of the common law. Indeed the processes of making, modifying, amending and interpreting common law blur into each other.

Making Common Law Rules

There is an extensive account of the making of common law in later chapters. Consequently the discussion here is brief.

Where there was no applicable statutes judges could decide to create a rule of common law to fill what they perceived was a gap in the law. This is why common law comprises rules made by judges for the purposes of deciding the dispute in cases. There are four aspects to making common law rules – formulating the rule, publication of judgments, doctrine of precedent and names of common law rules.

Formulating the Rule

Put simply, in their judgment the judges will state the nature of the dispute, reason as to the best way of resolving it, then indicate the rule they are making to resolve the dispute if they believe that such a rule is worth making. Rules of common law are, therefore, contained in, and sometimes enmeshed in, the text of judgments. This is why common law is also called judge made law. As Lord Buckmaster put it, common law is found in 'the judgments of judges entrusted with its administration.'[3] The rule of law that the court creates to resolve a case is labelled the *ratio decidendi* of the case. Literally this means the reason that the court decided the case in a particular way.[4]

Publication of Judgments

Cases that decide questions of law are published with the consequences that lawyers have access to them. Originally publishers did this solely in the printed law reports but cases are now also published electronically. In fact, electronic publishing is now the main source of published case law.

3. *Donoghue v Stevenson* [1932] AC 562, 567 per Lord Buckmaster

4. A classic piece the on nature of the reasoning process by which common law is made is found in Cardozo (1921). See also McHugh (1999), Simpson (1986), Twining (1986). According to Jaconelli (1992) common law furnishes Solomonic justice. That is, justice is based on winner take all in contrast to a compromise.

Doctrine of Precedent
Courts are required by the doctrine of precedent, which is sometimes described by its Latin tag as *stare decisis*. It requires a court to heed prior decisions of courts on question of law. In some cases the court is bound by the decision and must follow it. In other cases the court is not bound to follow it but is bound to heed and consider it.

These practices mean that after a court makes a new rule later courts are likely to apply it as a precedent in future cases on the same point. During the course of this use, later courts may alter the original common law rule. They may develop it, qualify it, refine it and interpret it, and may sometimes subject it to radical redefinition or even abolition.

Names of Common Law Rules
Lawyers develop names for common law rules. Some examples are the various torts such as trespass, defamation, nuisance and negligence.

Changing a Common Law Rule
A court can change an existing rule. A typical reason for this is that the case involves types of facts that are similar in some ways to the facts of the case that is the precedent and are also different in some way. One possible response of the court is to amend or reformulate the common law rule to include the different types of facts within its scope. A court can also abolish a common law rule.

Interpreting a Common Law Rule
Courts interpret a common law rule when it is ambiguous. They determine which meaning is legally correct.

Scope of the Rules
In early times common law was the major source of law, as indicated by the fact that basic areas of law – constitutional law, contract, tort, crime and property – are common law creations. However, in varying degrees in the many jurisdictions where common law operates, the common law rules have now been displaced or modified by statutory provisions. The age of statutes has now come.

Statutory Common Law
Common law includes a hybrid form called statutory common law. This consists of common law made under statutory authority. In the middle of a continuum between statute law and pure common law are places where the law is statutory so that courts must interpret it, but as they do so, courts also make law in a substantial way. This happens where a statute uses a wide and open term such as

'just,' equitable,' or 'appropriate,' and a court interprets the provision. To do so the court must flesh out these malleable terms with description, components, guidelines and criteria. This process can be conceived in a number of ways – as thick (intentional) interpretation; as statutory common law in that interpreting a statute with wide and open terms constitutes a simulated form of making common law; or as common law developed from a statutory base or arisen from a statutory launching pad. [5]

Interpretation of a Statute

Judges interpret statutes and delegated legislation. This judicial interpretation involves a court's deciding between two or more fairly specific competing meanings. Cases that interpret legislation can be conceived in either of two ways – as statute law since they attach meaning to statutes, or as common law since the courts formulate their interpretation. These cases interpreting statutes also constitute precedents for future interpretation.

Origin of Common Law

Common law in England dates back to the centralisation of judicial administration that took place in England under King Henry II (1154-1189). Before common law came into being, English law included a few statutes on special topics, but the major law was local customary law (also called custom). Being local, customary law varied from place to place. The local feudal lord held court when necessary and administered the customary law that operated in their fiefdom. One of King Henry II's changes to the administration of justice was to send his Royal judges on circuit. They started to hear cases that might otherwise have been heard by the feudal lord. In the process, these judges started to compare the various customary laws that they encountered and talk about these rules among themselves. This became a catalyst for change. When a judges heard a case in a particular place, there would be times when they would not apply the customary rule from that place but the rule from some other place. They did this because in their view this other rule provided a better legal solution to the problem than did the local rule. Bit by bit over time this process supplanted the various local laws with one uniform set of rules. In some ways it amounted to a judicial codification of customary law. This law came to be called common law because the law was uniform or common throughout the realm (although pockets of customary law survived).[6]

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5. See Kirby (1992).
6. There is an interesting illustration of the operation of custom as a way of developing rules in the sport of surfboard riding. There has now developed a customary rule that the surfer closest to the breaking part of the wave (the inside or the peak) or the first surfer to their feet has the right of way or priority. A person who violates this rule is considered to be stealing the wave by 'dropping in.' What is

It was not surprising that a common law developed. The judges were professionals, touring regularly, who had ample opportunity to discuss problems and solutions with their fellow judges. In addition, the later invention of printing helped uniformity because it enabled law reports to be published.

In early times common law was the major source of law, as indicated by the fact that basic areas of law – constitutional law, contract, tort, crime and property – are common law creations. However, in varying degrees in the many jurisdictions where common law operates, statutory provisions have now displaced or modified many common law rules, and have also created new rules on a large scale.[7]

Making of Common Law

One of the important things to understand is how courts make common law rules. The next chapter provides an outline. The three chapters following that chapter examine the three major aspect of making a common law rule in detail.[8] These aspects are:

1. Determining the content of a proposed common law rule. This is based on the concept of ratio decidendi.
2. Determining the value of a proposed common law rule. This is based on the concept of net benefit.
3. Identifying the source of authority of a common law rule. This is based on the concept of stare decisis.

There is a fuller discussion of making common law in later chapters.[9] What follows now is a basic description or outline.

Ratio Decidendi and Stare Decisis

Case law is underpinned by two concepts, *ratio decidendi* and *stare decisis*:

1. Legal Rule. Ratio Decidendi. The ratio *decidendi* is the legal rule that decides the case and for which the cause is authority. The ratio decidendi is the content of a rule and thus a definition of a rule.[10]
2. Precedent: Stare Decisis. *Stare decisis* (to stand by what has been laid down or decided) requires a later court to follow, or at least to consider following, earlier decisions. This is how the rule becomes permanent while at the same

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of special interest about this is also that it involves some notion of property in a wave.

7. Holmes (1881), Beaten (1997), Milsom (1980-82)
8. Chapters 2-6
9. Chapters 2-6
10. Chapter 3 Content of a Rule: Ratio Decidendi

time acquiring authority because of judicial approval. Stare decisis confers authority on common law rules. It is the reason that governments and citizens must obey them. In other words stare decisis is the source of authority of a common law rule.[11]

Once a court has decided a case three things can happen that affect the standing of the case:

1. A losing party may bring an appeal to a higher court, which will review the decision. In consequence it may overrule the decision and substitute another decision.
2. A later court may consider and appraise the case either positively or negatively. In consequence the later court may alter the legal rule that the case expounds.[12]
3. The case may be subject of comment in a secondary source such as a textbook or a journal article. The nature of these comments may affect the willingness of courts to confirm, reform or abolish the common law rule.

Value of a Rule: Net Benefit

There is no official dictum as to the quality of a common law rule. Nevertheless as a matter of simple reasoning it is likely that the judges created the rule that they thought would create the best outcome. In formal terms this involves formulating the version of the desired rule that yields the highest net benefit. Logically, this is the best way to proceed.[13]

Content of a Rule: Ratio Decidendi

A court makes a new rule using the following structure.[14] First it identifies the facts of the case that are material. Material facts are facts that in the opinion of the court require regulation by a common law rule. Then the court generalises each material fact to some degree to create the elements of the common law rule. These elements determine the scope of the rule by defining the types of facts to which it applies.

The following diagram portrays this process, where Material Facts 1-n are the material facts:

Material Facts	→	**Generalisation**	→	**Elements**
Fact 1				Element 1

11. Chapter 5 Authority of a Rules: Stare Decisis
12. Chapter 6 Remaking Common Law
13. Chapter 4 Value of a Rule: Net Benefit
14. Chapter 3 Content of a Rule: Ratio Decidendi

Fact 2				Element 2
Fact n				Element n
Diagram 1.1 Determining the Scope of a Rule				

Next the court has to determine the consequences when someone breaks the rule. In civil law the standard consequence is damages although equity provides some other remedies. In criminal law the standard consequence is some form of punishment. It is possible to expand the diagram to show the consequences:

Material Facts	→	**Generalisation**	→	**Elements**
Fact 1				Element 1
Fact 2				Element 2
Fact n				Element n
				↓
				Consequences
Diagram 1.2 Determining the Consequence of a Rule				

In summary at the conclusion of a case the court has done two things:
1. It has formulated a new common law rule that consists of elements and consequences.
2. It has used this rule to decide the case and so resolve the dispute between the parties.[15]

There are two concluding points:
1. Modification of Rules. Once a rule has been made it is possible that later courts will alter it in some way. They may modify it over time by extension, qualification, reformulation or interpretation as it faces and adapts to new situations. It is also possible that a later court will abolish the rule if it is seen not to work well or is out of step with community values. There is also the possibility that a statute abolishes a common law rule or contains a provision that puts the rule on a statutory footing, possibly with some alteration.
2. Fluidity of Rules. There is no formal storehouse that contains the absolutely correct version of each common law rule. In addition there are some factors or circumstances relating to common law rules that make them fluid. The consequence of this is that there may be uncertainty or ambiguity about the correct version of a common law rule. There is discussion of the reasons for and nature of this fluidity in a later chapter.[16]

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15. In other words a case has two functions. It has arbitral functions because it resolves a dispute. It has law making functions because the court makes law to decide the dispute.
16. Chapter 3 Content of a Rule: Ratio Decidendi

Authority of a Rule: Stare Decisis

As explained, the doctrine of s*tare decisis* (to stand by what has been laid down or decided) requires a later court to follow, or at least to consider following, earlier decisions. This is how stare decisis confers authority on common law rules. Stare decisis is to common law what sovereignty is to Parliament.

Reception of Common Law

Common law came to Australia through the operation of a constitutional rule. This constitutional rule was itself part of English common law and provided that, when Britain established a colony by settlement, the colony received on settlement as much of the common law and statute law of England as was capable of applying to it at the date of its settlement. Basically, on settlement Australia initially received common law by operation of this common law rule of reception. However, in some Australian jurisdictions statutory provisions enacted after settlement now determine the date of the reception of common law.

Queensland, New South Wales, Victoria and Tasmania

Reception Based on Common Law

The common law rule for the reception of common law operated for the eastern part of Australia, which now comprises Queensland, New South Wales, Victoria and Tasmania. This meant that common law was initially received there on settlement, which was on 26 January 1788.

Reception Based on Statute

In 1828, the British government enacted the *Australian Courts Act 1828* (Imp) (9 Geo IV c83). The main purpose of this statute was to adjust the date for the reception of British statutes in order to bring to Australia a number of reforms that the British parliament had made to its statute law since its reception in 1788. However, the Act also included provisions for reception of common law. Section 24 made two provisions. It declared that the common law and statute law of Britain applied to eastern Australia. It set the date for the reception of English law, so far as applicable, on 25 July 1828; this meant that common law and statute law of Britain applied in the eastern part of Australia in the form it was on 25 July 1828.

South Australia and Western Australia

In South Australia and Western Australia reception rests on the common law rule. Hence the date of reception was the date of settlement. In South Australia, for the purpose of the application of English law the date of settlement

('establishment') is determined by s4A of the *Acts Interpretation Act 1915* as 28 December 1838. Western Australia was settled on 1 June 1829.

Commonwealth

Although there was no special grant of common law to the Commonwealth in the *Constitution*, nevertheless, by implication, rules of common law adhere to the operation of the Commonwealth government, and affect its institutions, officers and procedures. For example in *R v Kidman* it was held that there could be a common law offence of conspiracy to defraud the Commonwealth.[17] Also the general rules of common law apply in Commonwealth territories.

Applicability Test

For received British statutes there were two basic rules for determining which part of common law (and statute law) was received on settlement:

1. Applicability Test. A statute was received into a colony only if it was capable of applying there, that is, it needed to be applicable to the colony in the state it was then in.
2. Subsequent Amendments. If a statute satisfied the applicability test and was received, it was not affected by subsequent amendments or repeals to the statute in Britain.

Logically these two rules should apply to common law. But because of the fluid nature of common law, the applicability test has not been stringently applied. Moreover, changes to common law in England or in other jurisdictions have frequently been adopted in Australia.[18] As a result common law has developed in Australia along lines similar to those in England, although there are points of divergence. Similarly it has developed on much the same lines in all the Australian jurisdictions.

Power of Australian Parliaments

Parliaments can, by statute, abrogate or modify common law rules, whether they were received on settlement or developed by Australian courts. (They can also abrogate or modify English statutes received on settlement.)

Australian Common Law

Britannia Rules

For a time Australia was beholden to Britain with regard to common law. There were several forces pushing in this direction. The final court of appeal was the

17. *R v Kidman* (1915) 20 CLR 425, and see *Groves v Commonwealth* (1982) 40 ALR 193
18. *Skelton v Collins* (1966) 115 CLR 94

Privy Council so its decisions were binding on Australian courts. English courts had declared the House of Lords otherwise to be the supreme authority on matters of common law for colonies.[19] The High Court acquiesced to this by deciding that it was bound by decisions of the House of Lords.[20]

Australian Judicial Sovereignty

Over time Australia was increasingly became, and was seen to become, a nation in its own right. Part of this nationhood is that Australian courts are no longer beholden to British courts in making decisions on what should and should not be rules of common law and the composition of those rules. This came about in stages:

1. Initially the final court of appeal in the Australian judicial system was the Privy Council.
2. Initially Australian courts regarded decisions of the House of Lords as binding on Australian courts, including the High Court. Consequently there was uniformity between Australian and English common law.
3. Legislation abolished appeals to the Privy Council so that as from 1986 it was not possible to appeal from an Australian court to the Privy Council.[21]
4. In 1963 the High Court decided and declared that it was no longer bound by decisions of the House of Lords.[22] This led to the High Court asserting that State courts should follow the High Court in preference to the House of Lords.[23]
5. In 1978 the High Court declared that it was no longer bound by decisions of the Judicial Committee of the Privy Council.[24]
6. The High Court said, that '[t]here is but one common law in Australia which is declared by [the High Court] as the final court of appeal.'[25] Later cases have

19. As Lord Dunedin put it in *Robins v National Trust Co* [1927] AC 515, 519: '[The House of Lords] is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board.' (When the Privy Council is hearing a case the panel of judges (typically five in number) hearing the particular case is known as 'the Board'.
20. *Piro v W Foster* (1943) 68 CLR 313, 320, 326, 335-336
21. The legislation that abolished appeals comprised the following – *Privy Council (Limitation of Appeals) Act 1968* (Cth), *Privy Council (Appeals from the High Court) Act 1975* (Cth), and *Australia Act 1986* (UK).
22. *Parker v The Queen* (1963) 111 CLR 610, 632
23. *Skelton v Collins* (1966) 115 CLR 94
24. *Viro v The Queen* (1978) 141 CLR 88
25. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563. See also *Re Wakim* (1999) 163 ALR 270, 303. The court referred with approval to two articles by Sir Owen Dixon – see Dixon (1943) and Dixon (1957).

consistently followed that view. [26] Courts now sometimes refer to it as the common law of Australia or the national common law.[27]

While Australian courts are masters of their own house they still pay attention to decisions from courts of other common law jurisdictions. These include of course the United Kingdom as well as the courts of Canada,[28] New Zealand[29] and the United States.[30]

Uniformity of Common Law throughout Australia

Since federation the High Court of Australia has exercised a general appellate jurisdiction over the State Supreme Courts and over federal courts. This has produced a single uniform Australian common law, as distinct from common law that varied from state to state.[31]

Sources of Common Law

There are two sources of common law. In the first phase common law rules derive their authority from the fact that a judge pronounces the rule in a case. In the second phase, text writers get hold of the case. They can polish the prose that encompasses a rule and order it into better shape. In this way they make the description of the rule more cohesive and fluent.

Cases

Because courts create common law the rules of common law are found in the judgments of the courts. Courts create common law in the process of deciding cases by the operation of two processes.[32] First, courts articulate the new common rule when they decide the case.[33] Second, the decision that the court makes is treated as precedent so it will generally be followed in subsequent similar cases[34] – consequently, the original decision that created the rule affects

26. *Lipohar v The Queen* (1999) 200 CLR 485; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503
27. *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15; *Commonwealth v Mewett* (1997) 191 CLR 471, 521-522; *Kable v DPP (NSW)* (1997) 189 CLR 51, 112–113, 137–139; *Lipohar v The Queen* (1999) 200 CLR 485
28. *Pilmer v Duke Group Ltd* (2001) 207 CLR 165
29. *Vigolo v Bostin* (2005) 221 CLR 191
30. *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516, [18]
31. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563
32. Schauer (1995)
33. From the view point of precedent the rule that the court laid down as it decided the case is called the ratio decidendi, meaning the reason for deciding the case.
34. This was required by the principle referred to as *stare decisis*, which means literally to stand by what has been decided.

not only the parties to the case but all other citizens as well.[35] However, once a rule has been made it is highly likely, perhaps even inevitable, that it will be modified over time by extension, qualification or reformulation as courts face and adapt it to new situations or just tidy it up.

This form of law making, however, raises a problem, in that the law as it affects the parties to the case is made retrospectively. Thus there is always the risk for parties who litigate in the common law realm that the law deciding the dispute will not be clarified or formulated until the case has been decided. Hence common law justice depends in this instance on predictability – only if a party can accurately foresee how a court will respond (an unlikely event) can the law that affects them and their dealings be ascertainable, as the rule of law requires.[36]

Textbooks

Case law can be messy because the rule may not be clearly stated by the court or becomes enmeshed in the case with the reasoning that justified and made the rule. Consequently, in practice the best source of case law is sometimes a textbook, which is why it is said that common law is also found in the 'writing of lawyers.'[37] A textbook can gather rules that are scattered throughout a multitude of cases and put them together to form an ordered account of the law. This is a great advantage because it tidies and shapes the law, thus making it accessible and easier to understand.

Consideration in Secondary Sources

Frequently a secondary sources will discuss a case. For example, a textbook on a subject will cite and state the rules decided by the significant cases. In addition they will often discuss major cases in some detail. After a court has decided a major case, especially an appellate court, it is common for one or more lawyers each to write an article in a periodical analysing, explaining and appraising the case.

Equity

Introduction

Common law is divided into two categories, common law (in a narrow sense of the term) and equity. Both are judge made law. In the narrow usage here,

35. In other words a case has both arbitral and law making functions – see Lucke (1982-83).
36. Atiyah (1992)
37. *Hollis' Hospital and Hague's Contract* [1899] 2 Ch 540, 552, and see *Cochrane v Moore* (1890) 25 QBD 57 at 74, per Lord Esher.

common law refers to rules developed by the common law courts, which originally were the Courts of King's Bench and Common Pleas. Equity originated in the practice of the Chancellor, the keeper of the king's conscience, granting remedies when common law remedies were inadequate. Eventually this function was taken over by the Chancellor's court, the Court of Chancery, and equity developed into a body of judge made rules in the same manner as the common law. These rules operate, however, as a refinement or extension of the common law, not as a contradiction of it. Thus equity is judge made law which supplements common law or is a gloss on the common law. Equity is parasitic (in the biological not the pejorative sense). Equity is strictly part of common law because it is judge made law. But because it is regarded as so special it is also considered a separate entity.

Court of Chancery

The principle that underlies equity is that many laws that are otherwise good are capable of rendering an injustice in some circumstances. The variations and contingencies of human behaviour are so vast it is hard to make a simple rule that does justice in every situation. English law chose equity as a way around this problem. A person could apply to the Chancellor and at a later stage in the development of equity to the Chancellor's court, the Court of Chancery. The Chancellor was considered to be the keeper of the King's conscience.

Theoretically, though, the common law courts could have done the same job that equity did by modifying legal rules. Hence a way to conceive the position is that there is one body of judge made law that combines the principles of law and equity. All that is then special about equity is that a different court makes it.

Functions of Equity

Equity performs a number of functions. The major ones are as now follows:

1. Widening Grounds for Remedies. Equity widens substantive common law and thus allows an established action where common law did not. For example, equitable fraud is wider than common law fraud.
2. Cause of Action. Equity provides a new cause of action, that is, one which common law did not provide. An example is an action for rectification of a contract.
3. New Remedies. Equity provides a remedy that common law did not. For example, at common law the remedy for breach of contract was damages. Equity added a remedy in the form of specific performance for breach of a contract of sale. If a court issues specific performance it will require a party to perform their part of the contract. For example it will require a seller of land to transfer property that is the subject of the contract to the purchaser.

4. New Property Interests. Equity recognises interests in property that common law did not recognise. Equitable interests in property have three forms:

4.1 It is a right to enjoy the property. This involves receiving the rents or profit or using the property.

4.2 It is a right to 'get in' the legal title. One way in which this can arise is a legally incomplete or ineffectual transfer of property.

4.3 It is a mere equity imposing some obligation on the legal owner.

5. Recognising Assignments. Equity recognises assignment of property which common law did not recognise. For example, a chose in action was originally not assignable at common law but was assignable in equity.

6. Maxims. Equity developed a series of maxims to guide the judges in applying it rules.

Readers can see that equity is not a distinct branch of the law like tort and criminal law, but a collection of rules operating in property and contract law. It blends into these in the ways set out above. This means that the way to apply equity is to start with the basic structure of the area of law to which it applies and add the principles of equity into appropriate categories. These may be new categories or parts of existing categories.

Custom

As has been explained, before common law became a source of law most of the law consisted of custom that varied from place to place and which was administered in a court over which the local feudal lord presided. Common law developed when, over time, the royal judges started hearing cases that had previously been heard by the feudal lord. Over time these judges selected what they believed was the best version of customary law, perhaps with some modification, and started to apply that version in all cases. Consequently these versions became 'common' throughout the realm, as is reflected in the term common law. In other words common law developed because of a judicial codification of customary law, although pockets of customary law survived.

In the light of these developments it is interesting to note some areas of life today – surfing and queues – that are regulated by some form of custom. These illustrate custom as a way of developing rules.

Surfing

In the sport of surfboard riding there has developed a type of customary rule that either the surfer closest to the breaking part of the wave (also called the inside or the peak of the wave), or the first surfer to their feet, has the right of way or priority for catching the wave. A person who violates this rule is considered to

be stealing the wave by 'dropping in'. What is also interesting about this practice is that it involves some notion of property in a wave.

Queues

British people have a penchant for queuing in an orderly manner. So much so, that 'it is just not done' for someone to jump the queue. (Note here that the phrase 'it is just not done' illustrates one way in which a customary law can arise. Julius Stone referred to this as the normative force of the actual.) This customary law of queuing seems to have been received into Australia. For example, in current political debate, some people refer to refugees who have arrived in Australia by boat without a visa as 'queue jumpers'.

Duration and Change

There is no absolute rule that an ancient or obsolete common rule ceases to apply.[38] Therefore a rule of common law laid down in a case can last indefinitely and will last until it is modified or terminated. This can happen in any of three ways – by statute, by delegated legislation and by judicial action. Moreover, as discussed above, the rules of common law tend to be fluid in their content. Whereas with a statute it is always clear what are the words of the statute, the words of a common law rule are fluid in that there can be various versions of them.

Statute

A statute can modify or abolish a common law rule. Statutes are superior to common law and, when inconsistent, will override it. It is possible, however, that an implied qualification may be put on the scope of the statute so that it is construed to leave the common law intact. This interpretation of a statute may be promoted by a presumption that statutes are presumed not to override entrenched common law rights except with the clearest possible words.

An example of a statute abolishing a common law rule comes from s2(1) of the *Torts (Interference with Goods) Act 1977* (UK). This provision abolished the tort of detinue because it was largely redundant. Detinue provided a remedy for wrongful detention of goods. However, subject to a possible exception, the scope of detinue was already substantially covered by two other torts. One consisted of the action for trespass to goods (trespass *de bonis asportatis*), while the other was the tort of conversion.

The possible exception was loss or destruction of goods in breach of duty by a bailee. To ensure that this part of detinue was still actionable, s2(2) of the Act

38. *Dugan v Mirror Newspapers* (1979) 22 ALR 439

made a statutory extension to the common law tort of conversion by providing that this action by a bailee now fell within the scope of conversion. Section 2(1) abolished detinue with minimum fuss and a total absence of flourish. It provided: 'Detinue is abolished'.

Delegated Legislation

Delegated legislation can modify or abolish a common law rule. Since delegated legislation is part of statute law, the rules applicable to statutes, discussed above, apply to it, subject to a qualification – because of its inferior status the presumption is even stronger that delegated legislation does not override common law, especially established common law rights, in the absence of words that are abundantly or even over abundantly clear.

Judicial Action

In a later case a court can alter the effect of an earlier case – the court can do this by interpreting, modifying, distinguishing, overruling or not following the earlier case.