CHAPTER 6

The role of the courts in law-making

This chapter traces the development of judge-made law, the operation of the doctrine of precedent and the interpretation of statutes by judges. It concludes by examining the strengths and weaknesses of law-making by the courts and the law-making relationship between courts and parliament.
Key terms

**binding precedent** A precedent that must be followed—for instance, a decision of the Supreme or High Court

**common law** Case law developed in the courts—this term is sometimes used to describe all case law or judge-made law

**doctrine of precedent** The system used by courts to make law. Judgments of superior courts are recorded and reported in volumes called law reports, and applied to future cases with similar facts. Note that the expression ‘doctrine of precedent’ refers to the overall system used to create law in courts, not specific judgments

**ejusdem generis** A legal maxim used in the interpretation of statutes—the term means ‘of the same kind’—when a general term will be interpreted to include the category indicated by the specific terms that precede it

**inter partes** A decision between the parties, in which one wins, and one loses

**legal maxim** A traditional rule, convention or practice

**obiter dictum** A judge’s statement of opinion or observation made during a judgment but not part of the reason for a decision

**persuasive precedent** A precedent that a court does not have to follow but which is nevertheless very influential—applies to decisions of a lower court or a court at the same level

**precedent** Law made by courts. It may refer to a single judgment (‘a precedent’) or several judgments (‘precedent’)

**ratio decidendi** The legal reasoning, or rule, upon which a decision is based

**stare decisis** The basis of the doctrine of precedent, where inferior courts stand by the decisions of superior courts

**statutory interpretation** The process of judges giving meaning to words within an Act where there is a dispute as to the application of the Act
What is the doctrine of precedent?

One of the most important ways that the legal system achieves fairness is by making sure that like cases are treated alike. The idea here is simple, and we see examples of it in everyday life. For example, imagine a teacher states that there will be no talking during class time, and enforces that rule with all students—except one. Allowing one student to talk while everyone else in the class may not is inconsistent, and unfair, and should not happen. Once a rule is set up, it should be applied to all students.

In the same way, it would be grossly unjust if the law about murder was applied to most people, but not all. Those people who avoided a murder conviction might feel happy; those who did not would be outraged—and society would be confused about whether murder was legal or not. Instead of social cohesion, there would be disintegration.

So, the doctrine of precedent is simply a system used by courts to make sure that similar cases are dealt with by similar law, in the interests of consistency and fairness.

When a legal dispute arises, the courts are the place where it must be resolved. In order to make sure that each case is dealt with fairly (and consistently), courts will look to see if any previous case (that is, a precedent) has dealt with the same fact situation, and will apply that precedent to ensure consistency. (To enable courts to find precedents, judgments of courts are recorded in written reports called law reports.)

So, the doctrine (that is, system) of precedent grew out of the courts’ role to adjudicate disputes, and their desire to be fair in so doing.

Law created by courts using the doctrine of precedent is referred to as ‘common law’, precedent, or judge-made law.

How did common law develop?

The evolution of the common law can be traced back to the days of Anglo-Saxon England. Before 1066, when the Normans under William the Conqueror invaded England, the Saxons had established a system of local courts throughout the country. These courts applied laws that consisted of a combination of local customs and the laws made by the kings.

A system of courts

After the Norman Conquest, the Norman kings introduced a more centralised structure for government and the administration of justice. This evolved over many centuries. At first the Norman kings relied on the existing courts to administer justice, but they sent out their own officials to preside over cases.

The role of these justices was mainly to collect taxes. They also had the responsibility for settling minor disputes. They travelled around England collecting taxes and hearing disputes. These travelling justices became known as ‘circuit’ judges. Today, judges travelling to regional centres to hear cases are still referred to as being ‘on circuit’.

By the twelfth century a network of king’s courts had developed and the local courts became less important. A major advantage of taking a case to the king’s court was that the decisions were more effectively enforced. The decisions of the king’s court had the backing of the king’s power.
Referring to past decision

The rulings and principles established by judges developed into a uniform system of law. The circuit judges would meet and compare the cases that they had heard throughout the country. They would discuss the advantages and disadvantages of the various local customs that they had experienced. Gradually, the judges began to replace the local customs they considered to be unfair with the customs applied in similar cases from other areas. As a result, a body of ‘common customs’ evolved. This provided for greater consistency and certainty throughout England.

The law common throughout England became the law declared by judges. The judges would look back on previous cases to decide what the law should be. This process is known as precedent. The operation of the doctrine of precedent is a feature of the common law system.

Common law evolved from judges looking back at previous cases to determine what the law should be. Each time a judge decides that an established rule applies to a new situation, the judge is using precedent. Other judges would apply the same legal principles in similar cases. This is different from the law made by parliament, which is found in Acts or statutes.

Common law and statute law

Today, many of the common law principles have been rewritten in statutes. Where there is a conflict between common law and statute law, statute law prevails. In other words, if common law says one thing and the statute law states something different, you must obey the statute law.

Precedents

A precedent is a reported judgment of a court that establishes a point of law. A judgment is a court decision. The judgment will include the reasons for the decision. The reasons for the decision are known as the ratio decidendi. The judgments of courts are published in law reports.

The ratio decidendi, or the reason given by a court when deciding a case, forms the legal principle. These legal principles are used to determine subsequent and later cases. The doctrine of precedent refers to rules used by the court to decide when they should use the legal principle established in a past case.

Not all court judgments are reported. Only the decisions of the higher courts (known as ‘courts of superior record’) that involve new or significant issues of law are published in law reports. To determine what the law should be, lawyers and judges refer to the reports of past similar (or like) cases. In Australia and Victoria in particular, all courts in the court hierarchy from the Supreme Court and above are courts of superior record.

Reported judgments

To understand how lawyers and judges use precedent, it is important to understand how to read a reported case. When a case is reported, a full statement of the case is printed. This statement will include:

- the names of the parties involved in the dispute
- the name of the court and the year the case was heard
Making and Breaking the Law

The ratio decidendi, or reason for deciding, forms the legal principle.

Obiter dicta, the plural of obiter dictum, are statements made that do not form a ratio decidendi but may be persuasive.

Stare decisis means to stand by what has been decided.

Courts are bound to stand by the decisions of higher courts in the same hierarchy in like cases.

Look at the Library section of the High Court of Australia’s website <www.hcourt.gov.au> for examples of recent judgments.

A summary of the facts

the arguments presented by both sides

the judgments of the judge/s—the reasons given by a judge explaining and justifying the decision made

a decision inter partes—a decision in favour of one of the parties, specifying which party won the case.

Ratio decidendi

Not everything said by a judge (or judges) in the course of reaching a decision is a precedent. Only the ratio decidendi forms the legal principle to be used in future cases.

The term ratio decidendi means literally ‘the reason for deciding’. The ratio decidendi is the rule of law stated by the judge as the reason for deciding. According to the doctrine of precedent, in cases that have similar circumstances, the ratio decidendi of higher courts will be binding on all lower courts (in the same court hierarchy).

Obiter dictum

A comment made by a judge on a question of law, but not directly relevant to deciding the case, is an obiter dictum: a statement made by the way. A judge’s statement or opinion in a judgment that is not part of the ratio decidendi (precedent) may be used as a persuasive argument in later cases.

Stare decisis

Stare decisis means ‘to stand by what has been decided’. Lower courts stand by, or follow, the decisions of the higher courts in ‘like cases’.

The rules relating to stare decisis can be summarised as follows:

• Precedents can be set only by a higher court (usually when exercising an appellate jurisdiction).

• All lower courts are bound by the decisions of higher courts in the same hierarchy.

For instance, the Victorian County Court is bound by the decisions of the Victorian Supreme Court. Both courts are part of the Victorian court hierarchy. The Victorian County Court does not, however, have to follow a decision of the South Australian Supreme Court—the South Australian Supreme Court is not part of the Victorian court hierarchy. (A decision of a court from outside the hierarchy is ‘persuasive’—it can be used as a convincing argument about what the law should be—however, it is not binding.)

• Decisions of courts at the same level, or equal standing, are not binding. For example, a judge of the Supreme Court may disagree with previous decisions of other judges in the Supreme Court. The previous decisions are seen as highly persuasive. By convention, a judge will follow a decision by an earlier judge in the same court. This convention is seen as providing for certainty and consistency. One exception to this convention is the High Court. The High Court is not bound by its own past decisions.

Binding precedent

A binding precedent is a legal principle that must be followed. The doctrine of precedent depends on lower courts following the decisions of higher courts. The general rule is that a decision of a higher court in the same hierarchy is binding or must be followed by lower courts in the same hierarchy when deciding similar or ‘like’ cases. For instance, in Victoria a judge of the County Court must follow the decisions of judges in the Supreme Court. The decision of the High Court (the highest court in Australia) is binding on all other Australian courts.
6.1 An example of a reported judgment

Harriton v. Stephens
[2006] 226 ALR 391

HIGH COURT OF AUSTRALIA
GLEESON CJ, GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

Date of decision
9 May 2006
Canberra
[2006] HCA 15

Torts—Negligence—‘Wrongful life’ cases—Whether disabled person may bring action against doctor for failing to diagnose medical condition affecting unborn child so that mother could terminate pregnancy—Scope for existence of duty of care—to which possible to assess compensatory damages—Notions of corrective justice—Overseas jurisprudence.

The appellant was born with severe disabilities. It was common ground that her disabilities were the result of her mother suffering from rubella during pregnancy. It was also common ground that the respondent had failed to diagnose the condition, in which event the mother would have sought termination of the pregnancy. The appellant sued the respondent in the New South Wales Supreme Court, alleging negligence in this respect. The court dismissed the proceeding and the New South Wales Court of Appeal dismissed the appellant’s appeal. The appellant further appealed to the High Court.

Held, dismissing the appeal:

Per Crennan J (Gleeson CJ, Gummow and Heydon JJ agreeing; Hayne and Callinan JJ to similar effect; Kirby J dissenting):

(i) The appellant did not have a cause of action against the respondent. There was no relevant duty of care, taking into account the need to preserve coherence of legal principles, the fact that the appellant could not properly show actual loss or damage and the value that the law placed upon human life: at [2], [4], [172], [181], [182], [206], [208], [225], [249], [250], [252]–[254], [257], [261]–[263].

5. KIRBY J In Cattanach v Melchior this court decided that the parents of an unplanned child, born following the negligence of a medical practitioner, could claim damages for the cost of raising that child. This type of action has become known as an action for ‘wrongful birth’. The decision in Cattanach followed earlier like decisions in other Australian courts supporting such recovery. The holding in that case was not challenged in this appeal.

6. The Court is now required to decide whether a child, born with profound disabilities, whose mother would have elected to terminate her pregnancy had she been aware that there was a real risk of the child being born with such disabilities, is entitled to damages where a medical practitioner negligently failed to warn the mother of that risk. Such actions have been called ‘wrongful life’ actions. This is a value-loaded label. An alternative, namely, ‘wrongful suffering’, has been suggested. However designated, such proceedings have received a generally hostile reception from courts in Australia and elsewhere ...

Persuasive precedents

A persuasive precedent is a precedent that contains a ‘convincing’ argument, but one that does not have to be followed because it is not binding. It is not a decision made by a higher court in the same court hierarchy in a case with similar facts.

Decisions that are considered to be persuasive authority include:
- obiter dicta statements of a court at the same level in the same court hierarchy; for example, a Supreme Court judge is not bound by the obiter dicta statements made by other Supreme Court judges in past cases
- ratio decidendi of courts of the same level or lower in the same hierarchy; for example, a County Court judge would not be bound by a decision of another County Court judge or a decision of a magistrate in a previous case
- the decision of a court in another hierarchy.

Although not binding, such cases may be seen as a point of reference. They give an indication of how other judges think the law should be.

Precedent in action—a case study

The operation of the doctrine of precedent is easier to understand by looking at specific examples. The case of *Donoghue v. Stevenson* [1932] AC 562 is a significant case. In this case the fundamental legal principle of negligence was established.
Donoghue v. Stevenson

A friend of Mrs Donoghue bought her a bottle of ginger beer. The beer was served in a dark, opaque bottle. Mrs Donoghue had drunk about half the bottle of ginger beer before emptying what remained onto her ice-cream. As she did this, a partly decomposed snail floated out of the bottle. Mrs Donoghue became ill. She suffered gastroenteritis and shock. She claimed that her illness was a direct result of consuming the ginger beer and seeing the decomposed snail.

Mrs Donoghue sued the manufacturer of the ginger beer. She claimed that they had been negligent. Mrs Donoghue could not bring an action under the law of contract because she was not a party to the contract. The contract for the sale of the ginger beer had been formed between the manufacturer and Mrs Donoghue’s friend. The defence counsel argued on behalf of the manufacturer that there was no duty of care because there was no contract between the manufacturer and Mrs Donoghue. A duty of care only applied to ‘dangerous things’. The ginger beer could not be considered a ‘dangerous thing’.

However, the House of Lords decided that Mrs Donoghue was entitled to be compensated by the manufacturer. This case was the first case in which the House of Lords decided that the manufacturer owed a duty of care to the ultimate consumer.

The basic legal principle of negligence is based on Lord Atkin’s ratio:

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 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 into question.

M’Alister (or Donoghue) [Pauper] v. Stevenson

House of Lords [1932] AC 562

THE APPEAL was heard by five judges of the House of Lords. Lord Atkin summed up the majority view.

The liability for negligence, whether you style it such or treat it as in other systems as a species of ‘culpa’, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay … 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 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 into question …

… [A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take reasonable care … It is a proposition that I dare to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

The result was that by a majority of 3–2, the Lords held that there was a valid cause of action.
Grant v. Australian Knitting Mills

A later Australian case heard in the Privy Council, *Grant v. Australian Knitting Mills* [1936] AC 85, involved similar circumstances. In this case the plaintiff, Dr Grant, bought some woollen underwear from a store. The underwear had been manufactured by the Australian Knitting Mills Ltd. Dr Grant suffered dermatitis as a result of wearing the woollen underwear. It was later discovered that the condition was caused by the excessive use of chemicals in the process used to make the underwear. Although not identical, this case can be seen as having similar circumstances to the earlier case of *Donoghue v. Stevenson*.

According to the doctrine of precedent, the court would have applied the rule of law stated in *Donoghue v. Stevenson* to the case of *Grant v. Australian Knitting Mills*. Like Mrs Donoghue, Dr Grant was deemed to be a ‘neighbour’. He was a person who was closely and directly affected by the act of the manufacturer and the manufacturer ought to have had him in mind as being affected when preparing the underwear. The manufacturer had a duty to take reasonable care to avoid acts that they could reasonably foresee would be likely to injure consumers such as Dr Grant. Dr Grant was successful in his claim for damages. This was the first Australian case to adopt the legal principle of negligence.

### 6.3 Are the fact situations the same?

<table>
<thead>
<tr>
<th>Donoghue v. Stevenson</th>
<th>Grant v. Australian Knitting Mills</th>
</tr>
</thead>
<tbody>
<tr>
<td>• A consumer purchased goods.</td>
<td>• A consumer purchased goods.</td>
</tr>
<tr>
<td>• Mrs Donoghue did not have a contract with the manufacturer.</td>
<td>• Dr Grant did not have a contract with the manufacturer.</td>
</tr>
<tr>
<td>• There was a snail in the bottle.</td>
<td>• Underwear contained chemical residues.</td>
</tr>
<tr>
<td>• The bottle of ginger beer had been carelessly prepared.</td>
<td>• The underwear had been carelessly prepared.</td>
</tr>
<tr>
<td>• The ginger beer manufacturer could have reasonably foreseen that damage would result from the carelessness.</td>
<td>• The underwear manufacturer could have reasonably foreseen that damage would result from the carelessness.</td>
</tr>
<tr>
<td>• Mrs Donoghue was closely and directly affected by the actions of the manufacturer.</td>
<td>• Dr Grant was closely and directly affected by the actions of the manufacturer.</td>
</tr>
<tr>
<td>• Mrs Donoghue suffered gastroenteritis and shock.</td>
<td>• Dr Grant suffered dermatitis.</td>
</tr>
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### Hedley Byrne v. Heller

The principles of *Donoghue v. Stevenson* have been applied and extended to many other cases. For example, in the case of *Hedley Byrne v. Heller* [1964] AC 465, the principles of *Donoghue v. Stevenson* were extended to include liability for providing information and advice.

In this case a banker was asked by a creditor to provide information about the creditworthiness of another person. The banker provided the information, stating that the individual in question had a good credit rating. On the basis of this information, credit was given. However, the loan was not repaid and the information supplied by the bank was found to be incorrect. The creditor sued the banker but was unsuccessful. Although the court agreed that a duty of care was owed, the banker had clearly stated that the advice was given ‘without responsibility on the part of the bank or its officials’.

The court found in favour of the banker. The court also stated that if the banker had not made the disclaimer, the banker would have been found liable. (A disclaimer is a statement that you will not be responsible. In this case, the disclaimer stated that the bank would not be responsible for the information.) The court based this decision on the fact that a ‘special relationship’ existed between the person giving the statement and the
person relying on the statement. The banker owed a duty of care to the creditor. This case provided the basis for many cases about the giving of special expert advice in a particular area. It applies to advice given by doctors, lawyers, financiers and other professionals.

Flexibility and precedents

As we have already discussed, the doctrine of precedent is based on the idea that lower courts rely on the decisions of higher courts to decide what the law should be. This may give the impression that the law, once stated by a court, can never be changed or modified. This is not true. There are a number of approaches that judges can use to ensure the law avoids injustices and keeps pace with the changing needs and values of society.

Following

When a subsequent court applies a precedent set in a previous case, it is said to be ‘following’ the previous decision. Lawyers also refer to this as seeing a precedent being ‘applied’ to a later case.

Reversing

Where a higher court hears a case on appeal and decides that the lower court which had heard the case had wrongly decided the case, it will reverse the decision. The ratio decidendi of the lower court is no longer valid. It is replaced by the ratio decidendi of the higher court. Examples of reversing appear below, and in the Hadba Case on pages 164–66.

Low-loader decision reversed

An example of a court reversing an earlier decision occurred when the High Court ruled in May 2004 in the case of the Insurance Commission of WA v. Container Handlers Pty Ltd (2004) 218 CLR 89. In this case, a man owned a low-loader insured for personal injury ‘directly caused by, or by the driving of, a motor vehicle’. A driver working for the man was injured when he pulled off the road to repair a wheel—the jack collapsed. The Full Court of the Supreme Court of Western Australia concluded that the injuries were injuries ‘directly caused by, or by the driving of, a motor vehicle’. The High Court reversed the decision, declaring that the expression ‘injury directly caused by, or by the driving of, a motor vehicle’ was limited to motor vehicles that were being driven at the time. As the low-loader was not being driven but was being repaired at the time the injury occurred, it was not covered by the insurance policy.

Overruling

A case may come before a higher court that relies on a legal principle that has been formed in an earlier case decided in a lower court. The judge presiding in the higher court may believe that the earlier case has been wrongly decided and the higher court would not follow the precedent set by the lower court. When a higher court decides not to follow the decision of a lower court in a previous case, the higher court is said to overrule the earlier decision.

Reversing and overruling are different processes in that overruling a case requires two separate cases. (A decision being reverse involves one case that is subject to an appeal to a higher court.)
Disapproving
Courts at the same level are not bound by each other’s decisions. Where a judge in a court refuses to follow an earlier decision of another judge at the same level, they are said to have disapproved the decision. In other words, they have demonstrated that their opinion of the law differs from that of the previous judge. This may result in an appeal to a higher court to determine what the law should be.

Distinguishing
Courts are bound only by the decisions of higher courts in similar cases. Where the facts of a case are sufficiently different from a previous case, the decision in the previous case will not be considered binding. Of course no two cases are exactly the same. Provided a judge is satisfied that the facts of a case are sufficiently different that an injustice would result from the application of the earlier precedent, then distinguishing is considered an appropriate means of avoiding the use of that precedent. The judge may decide the case by formulating a new precedent. This process allows for the continued development of the common law to meet new situations.

Activity
Explaining the doctrine of precedent
1. What is a precedent? Explain the difference between a precedent and the doctrine of precedent.
2. Why is the principle of stare decisis essential to the effective operation of the doctrine of precedent?
3. Distinguish between ratio decidendi and obiter dicta.
4. What is the difference between a binding and a persuasive precedent?
5. Under what circumstances will a precedent be considered binding?
6. Will judges always follow past decisions? Explain the processes of reversing, overruling, disapproving and distinguishing a decision. What impact does each of these processes have on the operation of the doctrine of precedent?

Case file
When playtime causes injury
One ordinary primary school day during recess, an eight-year-old Grade 3 student was injured while playing on her school’s flying fox, a handle suspended from a rail mounted between two platforms. The girl had waited in line to take her turn swinging from one platform to the other while holding the handle. When her turn arrived she took the handle and was about to swing away, but two other children grabbed each of her legs. She called to them to leave her alone and tried to shrug them off. One did, but the other held on, and the extra weight caused the girl to lose her grip on the handle. She fell, suffering personal injury when she struck the platform.

The school did have a teacher on duty in the area that included the playground, but the teacher was elsewhere when the girl was hurt, dealing with some children who were inside school buildings without permission.

Suit in negligence
Because the plaintiff was only eight years old, the law required an adult to sue on her behalf. Through her father, acting as litigation guardian, the plaintiff sought damages for negligence for personal injury in the Supreme Court of the Australian Capital Territory. The plaintiff alleged that the school committed the tort of negligence by breaching the duty of
care owed to her by failing to roster sufficient teachers for playground duty, and specifically failing to ensure that a teacher was supervising the play equipment area at all times.

This case raised an important question. It is very clear that teachers and schools owe a duty of care to prevent students being injured at school. But the question raised by the case was about the standard of care required. How much care did a teacher or school have to give in supervising play equipment? Was it constant care that was required, or something less?

The facts
The play equipment in question had been at the school for the previous six years, and no serious injury had occurred in that time. In order to ensure safety, the school had set up a ‘hands off rule’ that applied when students were in the playground. Students were not allowed to touch each other when on play equipment. The school also had a roster that determined which grades could use the play equipment, and on that day it was Grade 3’s turn.

The school also had two teachers on yard duty each recess. One teacher supervised the area used by junior grades, the second teacher supervised the area is used by the senior grades, including Grade 3. The senior area included the play equipment.

When the girl was injured, the teacher on yard duty was not observing the flying fox. The teacher had been watching the children on the play equipment for several minutes, and the children had all been behaving appropriately. However, about 30 seconds before the plaintiff was injured, the teacher noticed some students misbehaving in one of the school buildings that was out-of-bounds, and so the teacher moved away to deal with those children. While she was dealing with those children the plaintiff was injured.

Was the duty of care breached?
Although the plaintiff did not succeed at trial, the Court of Appeal of the Australian Capital Territory held that the school had been negligent. The defendant appealed to the High Court against this ruling, and the High Court had to determine whether the defendant had breached its duty of care to the plaintiff.

The major issue that the High Court had to consider was about the standard of care required. Was there a need to supervise the play equipment at all times?

The court held that there was not.

The court pointed out that the tort of negligence requires people to take ‘reasonable’ care of one another, and not ‘perfect’ care.

First the court considered the plaintiff’s argument that there should have been more staff on duty in the yard, allowing one staff member to constantly supervise the flying fox. The court held that this would be unreasonable. While having more staff on duty might allow for the flying fox to be supervised constantly, it would do damage to the learning of students. In order to allow for one staff member to constantly supervise the flying fox, the court pointed out that the staff at the school would have had to give up their breaks, and the court said that this was unreasonable:

[T]eachers, as much as … pupils, [are] entitled to the benefits of a break from work. Reasonable persons in the position of the first defendant were entitled to regard it as desirable to secure for staff those benefits with a view to teaching being properly conducted.

In other words, the court recognised that teachers, like other workers, needed a break to refresh their minds and ensure peak performance.
Then the court considered the argument that the standard of care required of the school was to constantly supervise the flying fox, regardless of how many staff were on duty. The court held that this was not the correct standard of care. The court noted that the school’s rules that were designed to ensure safe play (the roster system and ‘hands off’ rules.) The court also said that it was not reasonable to supervise children during particular activities every single moment of time.

That would be ‘damaging to teacher pupil relationships by removing even the slightest element of trust; it is likely to retard the development of responsibility in children, and it is likely to call for a great increase in the number of supervising teachers in the costs of providing them.’

In short, the court made it clear that the standard of care required is to take reasonable, but not perfect, care.

The result
The High Court reversed the decision of the Court of Appeal, and held that the defendant had not been negligent.

Activity
When playtime causes injury—a case study of precedent in action

Read the case file ‘When playtime causes injury’ on pages 164–66 and answer the questions below.

1 Refer back to the case of Donoghue v. Stevenson (1932) AC 562 on page 161.
   a What is the tort of negligence?
   b To what extent is the fact situation in the case described above similar to the fact situation in Donoghue v. Stevenson?
   c Outline any differences that you have noted between the fact situation in the two cases. To what extent do you consider these differences to be significant?
   d What is a binding precedent?
   e Do you think that the principles of negligence should be applied in this case? Explain.

2 This case was heard on appeal by the High Court. It reversed the decision of the Court of Appeal of the ACT. Explain what the term ‘reversed’ means. What impact would the decision made in this case have on future cases concerned with the liability of schools for injuries to students? Would the case be binding on Victorian courts?

3 Consider each of the following situations. Using the judgment in the case above, do you think that the principles of negligence could apply? Explain.
   a Assume that the school had not set up a ‘hands off’ rule or roster for using the play equipment. Would the school be liable?
   b Assume that this incident occurred 15 minutes after school was dismissed for the day. The only staff on duty at the time were those who were supervising school bus pick-ups. They could neither see nor supervise the children on play equipment. Several staff walked past the playing children on their way back to their offices, but did nothing to stop the children playing. Is the school liable? How would your decision differ if the incident occurred one hour after finishing school and all staff were still at school in a meeting?
Problems in interpreting past decisions include the following.

- **Locating relevant cases** Over time, there may have been numerous cases relating to a particular area of law. A lawyer may have failed to trace all the relevant cases or a particularly significant case where the facts in question are crucial.

- **Identifying relevant ratios** Even when the relevant cases have all been located, identifying the *ratio decidendi* can also prove to be problematic. Reported cases often involve complex arguments. The judgment may contain many comments about the facts of the case, references to other cases, and statements about general propositions of law as well as the reasons for deciding. It may be difficult to determine what is *obiter dictum* and what is the *ratio decidendi*.

- **Cases with more than one ratio** Precedents are often established by courts hearing appeals. In these cases, the court will be presided over by three, five or even seven judges. While the judges may agree on the final outcome of the case, each judge may have a different reason for deciding. In such cases each judge prepares a statement of their own reasons for deciding and there may be multiple *rationes decidendi*. This makes it very difficult to decide which fundamental principle of law established in the reported case will apply to future cases.
Dissenting judgments  In some instances, one or more judges may dissent or disagree with the final decision. The dissenting judges will have prepared a statement of their reasons for dissenting. Where there is more than one judgment it is even more difficult to determine the rule of law.

Determining what is a like case  Of course no two cases are exactly alike. There may be a number of factual and legal similarities between a case currently being considered and past cases. However, each case also has its own peculiarities that distinguish it from earlier cases. It may be difficult to determine the extent to which the specific facts of a case can be generalised to fit a category that would give rise to a particular legal right. For instance, to what extent do the facts of *Grant v. Australian Knitting Mills* match the facts of *Donoghue v. Stevenson*? Certainly there are many similarities. However, the case of *Donoghue v. Stevenson* was concerned with goods sold for consumption. *Grant v. Australian Knitting Mills* was concerned with clothing. Do the cases fit into the same general category, which gives rise to a legal right? Is the difference in the purpose for which the goods were sold significant enough to distinguish the case? In the case of *Grant v. Australian Knitting Mills* the judges decided that the facts, although slightly different, did fit into the same general category.

Conflicting authorities  In some cases, more than one precedent may be presented to the court. Where a judge is faced with conflicting authorities, a decision will have to be made about which precedent to follow. Factors that may influence this decision will include the level of the court hearing the previous case, the number of judges and whether they all agreed, as well as the degree to which the decision has been followed by other courts.
Chapter 6  The role of the courts in law-making  169

Activity

Judge-made law

1 Describe the role of the Supreme Court in the law-making process. Would the decisions of the following courts be binding on the Victorian Supreme Court? Explain.
   ● Supreme Court of New South Wales
   ● High Court
   ● Supreme Court of Canada

2 Explain the difference between the following terms:
   ● ratio decidendi and obiter dictum
   ● binding precedent and persuasive precedent
   ● overruling and reversing
   ● disapproving and distinguishing.

3 What would you expect to be the outcome if a judge did not follow a precedent that is clearly binding on the court?

4 How does the doctrine of precedent operate to reduce conflict in the community?

5 Outline the major problems that may be experienced in interpreting past decisions.

6 ‘The doctrine of precedent provides for the consistent application of legal principles as well as providing a means to develop the common law to meet the needs of the community.’ Do you agree? Justify your opinion.

The ability of judges and courts to make law

Sometimes a case comes before the courts concerning a matter on which there has been no clear statement of law, or within which the existing principles of law are out of date and require change. In these circumstances, the needs of individuals to have the matter resolved by the courts may result in a change in the law. Recent examples of such issues include disputes about the rights of the unborn child, surrogacy, access to reproductive technologies and the recognition of native title.

The courts are not free to make law in the same sense as parliament. Unlike parliament, judges cannot make law as an immediate response to a community demand or when a general need is perceived. The courts can act only to declare those legal principles that apply to the facts of the case before them. In the majority of cases, judges have no discretion to make law.

When will a new precedent be set?

A number of factors need to be taken into consideration before a court can set a new precedent. These include:
   ● it must be a novel case
   ● the case needs to be heard by a higher court (court of superior record)
   ● the judge must be prepared to adopt a law-making role
   ● the parties must be prepared to take the case to court where the outcome is uncertain.

Novel cases

Before a court can declare a new legal principle, it must wait for a novel case concerned with a particular issue or legal question that has not been decided before in a court of superior record in the same hierarchy. A novel case is one in which the fact situation can be distinguished from the facts in previously decided cases, and in which, therefore, no
precedent applies. An example of a novel case is the case of Donoghue v. Stevenson, as discussed on page 161. A novel case is also called a ‘test’ case.

**Test cases**

Test cases are not common. First, the parties must have sufficient financial backing to bear the costs involved in taking a court action. As the case is *res integra* (a case of first impression) there are no guarantees that their claim will be successful. Should the party bringing the case to court be unsuccessful, they risk having to meet not only their own legal costs, but also the costs of the other party.

**Higher courts**

The operation of the doctrine of precedent may mean that the court is not in a position to develop a new legal principle. The operation of *stare decisis* means that, in effect, only higher courts can make or change a binding precedent. In order for a change to occur, the case presented before the higher court must concern a new fact situation to which no existing binding precedent applies. Even so, the court can only reach a decision in relation to the information presented in individual cases. It cannot change entire areas of law in the same manner as parliament.

**Role of the judge**

Furthermore, the case must come before a court in which the judges are prepared to adopt a law-making role. A conservative judge may declare that the plaintiff has no established cause of action under common law and dismiss the case. On the other hand, a judge may decide that there is no precedent to prevent the court from deciding the case.

Over the years, the role of judges as law-makers has been debated at length. The degree to which judges are prepared to distinguish one case from previous cases will depend in part on the judges’ view of their role in the law-making process. Some judges are reluctant to be seen as law-makers. In order for the courts to be properly
involved in the law-making process, they must assert their power to bring about a change in the law.

**Role of the parties**

Court action, especially before our higher courts, is expensive. Individuals may therefore be reluctant to take novel cases to court due to the uncertainty of the outcome. In order for a case in which a new precedent may be set to come before the courts, the parties must be determined to proceed with the action. The parties will usually proceed to an appellate court and will need to be prepared to risk the costs associated with such an action. Furthermore, the case may need to come before a judge who is willing to adopt a new direction in precedent rather than a conservative approach.

Are farmers responsible for animals that stray?

Australian law about the liability of farmers for animals straying onto highways was based on a long-standing British precedent. This precedent dated back to the times when farms did not have fences, before the invention of motorcars or the development of major roads and highways. The legal principle was that owners of land adjoining a road were under no legal obligation to fence in animals to avoid their straying onto the road. Farmers did not ‘owe a duty of care’ to road users. This rule was upheld in the English case of *Searle v. Wallbank* [1947] 1 All ER 12.

This law applied to all Australian states that had not passed legislation on the rights of farmers and road users. The application of the legal principles of *Searle v. Wallbank* was challenged in the case of *State Government Insurance Commission v. Trigwell* (1979) 142 CLR 617.

**Trigwell’s Case**

In this case, a woman was travelling at night along a road in rural South Australia. When she saw a car approaching from the opposite direction she dipped her car headlights. However, as her headlights were on low, she did not see two sheep that had strayed onto the road from a nearby farm. In the collision with the sheep, the car swerved across the road and collided with the oncoming car in which the Trigwell family was travelling. The woman driving the car was killed and members of the Trigwell family were seriously injured.

The Trigwells sued for the damages caused by the accident. They claimed that the accident was caused by the negligence of:

- the farmer in failing to ensure that his sheep did not escape through broken fences
- the driver of the other car.

The State Government Insurance Commission was the deceased driver’s insurance company. They would be responsible for paying for any damages caused by the negligent actions of the driver. The Supreme Court of
South Australia decided that the State Government Insurance Commission had to pay the Trigwells for the damages resulting from the negligent actions of the driver.

Evidence was presented to the court that indicated that the driver had not tried to slow down after hitting the sheep. This evidence was sufficient to convince the judges that there had been a failure on the part of the driver to exercise reasonable care. However, the court decided that the farmer, who had not repaired his fences and had thereby failed to stop the sheep from straying onto the road, was not liable under the legal principles established in Searle v. Wallbank.

The State Government Insurance Commission appealed to the High Court against the decision of the Supreme Court of South Australia.

The High Court decision
The High Court decided that the legal principles developed in the case of Searle v. Wallbank applied in Australia, and their decision in Trigwell’s Case was a binding precedent on all state courts. Unless the state had legislated to override the common law relating to stray animals, the courts were bound to apply this precedent. (To overcome this problem, the Victorian Parliament later passed the Wrongs (Animals Straying on Highways) Act 1984 (Vic.). Similarly, the South Australian Parliament legislated in 1983 to limit the application of the precedent in that state.)

Are courts law-makers?
The statements made by the judges in Trigwell’s Case reveal the attitudes that some judges have to the role of the courts in changing the law.

The court is not a legislator
Justice Mason (who represented the majority view) stated:

I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular circumstances or conditions, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency.

Its responsibility is to decide cases by applying the law to the facts found. The court’s facilities, techniques and procedures are adapted to that responsibility; they are not adapted to the legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for and examine submissions from groups or individuals who may be vitally interested in the making of changes to the law.

Common law adapts to change
Justice Murphy, in his dissenting judgment, stated that:

a judge in a common law system may rightly refuse to follow precedent which is absurd, contrary to reason, or plainly inconvenient … The virtue of the common
Statutory interpretation

The role of a court is to apply the law to resolve disputes. As well as applying common law to resolve a case, courts may also need to apply statutes, or Acts of Parliament. Judges must interpret the words of an Act when a case comes before the court in which the intention or the meaning of words used is disputed. This is referred to as **statutory interpretation**. By doing this, judges are often involved in clarifying what is the law.

The English language is very complex. This is particularly true of its legal terminology. Acts of Parliament can be difficult to understand. Attempts are being made to simplify the language used so that the average person more easily understands it. However, judges may still need to interpret Acts of Parliament. Even lawyers and judges find that the language used in Acts confusing. In many instances there is argument about what the words and phrases mean. The easiest way to understand how judges interpret statutes is to look at an example. Consider the following case.

**The Chroming Case**

At about 3 pm on 21 July 2002, a police officer in a divisional van went to a car park in response to information about a group of young people in the area. He found four youths in the car park, one he knew. The group was standing approximately five metres from a railway pedestrian bridge. This area was within view of the train platform, the pedestrian bridge and other areas of the railway station car park. There was no evidence of any other person being present at the time. The police officer noticed cans of spray paint on the ground. There were traces of paint around the mouths and clothes of each of the youths. The police officer approached the youth and the following conversation took place:

**Police Officer:** I’ve warned you about this before.

**Youth:** Yeah. (The youth then removed two cans of spray paint from his front pockets and a plastic bag containing paint from another pocket in his jacket.)

**Police Officer:** Do you have a parent or guardian around or close by?

**Youth:** Nah, nobody near here.

**Police Officer:** Why are you chroming out here?

**Youth:** Nothing else to do.
Police Officer: I’ve told you people find this offensive and we get complaints.
Youth: Ah, well.
Police Officer: What is your reason for offensive behaviour in a public place?
Youth: Yeah, just nothing else to do.

The police officer charged the youth. The youth was convicted by a magistrate for offensive behaviour. Although the defendant was dismissed and no penalty imposed, a conviction was recorded. The case went on appeal from the Children's Court to the Supreme Court. In the appeal it was argued that on the given facts, it could not have been reasonably found that the conduct constituted offensive behaviour. The facts of the case were not contested.

The issue was if ‘chroming’ in a public place could be described as ‘offensive behaviour’.

What is offensive behaviour?
Offensive behaviour in a public place is an offence under the Summary Offences Act 1966 (Vic.). The Act does not define the term ‘offensive’. To determine whether an offence had been committed, the judge had to define the term ‘offensive’. In other words, the judge had to interpret the Act to apply it to a case before the court.

Referring to precedent
To decide what offensive behaviour meant, the judge referred to a number of past cases. These cases dealt with a similar problem in interpreting the meaning of the term ‘offensive’. The judge said:

The law relating to offensive behaviour is tolerably clear. It will never be pellucid [transparent] because offensiveness depends upon time, place, social context and to some extent, although not exclusively, upon the intent of the offender. Its categories are never closed and that which may be offensive to one generation may be regarded as a matter of hilarity by the next. I come to the authorities. Wooster v. Smith, a case which concerned a protester holding a banner reciting rather quaintly—and one would now expect rather shamefacedly by the protester—which read: ‘Stop Yank intervention in Korea’.

That behaviour attracted a charge of offensive behaviour. O'Bryan J in defining that conduct said: ‘It must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.’ This definition has been repeatedly referred to with approval … [by] Chief Justice Bray in Proust v. Bartlett. The Chief Justice considered that motive was irrelevant provided the conduct was conscious and voluntary and would be regarded as offensive to the average contemporary citizen or reasonable person …

More recently and pertinently, Harper J in Pell v. Council of the Trustees of the National Gallery considered a blasphemy case depicting the Christ associated with human urine … he said that that task should be undertaken having regard to society as ‘multicultural, partly secular and largely tolerant if not permissive’. Similarly, in this case concerning offensiveness, prevailing community standards should be assessed.
Referring to parliament
The judge also referred to recent parliamentary reports in his consideration of community standards and chroming:

I come now to the statutory provision. Chroming as a social phenomenon received the attention of the Parliamentary Drugs and Crime Prevention Committee 2002. Its report inquiring into ‘The Inhalation of Volatile Substances’ (Victorian Government Printer) gave a definition of inhalation … The history of the legislation reflects current community standards relating to chroming. The Principal Act, the Drugs Poisons and Controlled Substances Act 1981 (No. 9719) created offences … concerning chroming and made it an offence to inhale paint.

In 1983, an amending Act (No. 10002) deleted this offence but maintained the criminality of selling paint ‘if a person knows or reasonably ought to have known, or has reasonable cause to believe that another intends to use (the paint for inhalation)’. In 2003, Parliament passed further amendments, not yet proclaimed, empowering the police to impound paint thought to be for inhalation and detain youths so as to prevent them from breathing it in. Civilised society has always attempted to prevent self-harm.

By referring to the parliamentary report, the judge concluded that community standards no longer held it appropriate to treat ‘chroming’ as a criminal offence. The offence had been repealed since 1983. Furthermore, parliament had acted to provide laws for the care and protection of young people found ‘chroming’—that is, that they could be taken into custody for their own wellbeing but not treated as criminals. Unfortunately, these laws were not in force at the time the youth was detained and charged.

Referring to legal maxims
Sometimes judges use common law principles—known as legal maxims—to help them interpret an Act. *Ejusdem generis* is an example of a legal maxim. According to this rule, a general word is interpreted to include only things of the same type as the words listed before it. In this case the judge forms the general category of ‘immediate and strong reactions’ to assist in determining whether the behaviour was offensive.

The judge concluded:

I return to the relevant case law. It is no longer necessary for the Crown to prove that the offender intended to be offensive, but it is still a requirement that the conduct has the effect of wounding the feelings, arousing anger, resentment, disgust or outrage in the mind of the reasonable person who may have or could have viewed, or been the object of that conduct. In my view, the words should be interpreted ejusdem generis. Wounded feelings, anger, resentment, disgust, outrage, all denote immediate and strong emotions or reactions. A reaction to conduct which is merely indifferent or at its highest anguished, is not the same as being offended. Merely being put out, or affronted by conduct, does not warrant the imposition of a criminal penalty upon the actor. A person may be appalled by conduct and yet his or her own personal feelings not be wounded by it.
Reasons for interpreting statutes

There are a number of reasons why it is necessary for the courts to interpret a statute. One of the problems in drafting legislation is the need to cover all possible cases. Legislation attempts to cover every situation that has happened (or that might arise). Acts of Parliament often set out only in broad terms the law dealing with a specific area. The courts will need to interpret whether the broad terms set out in the Act include the specific circumstances in the case before them.

Other reasons why legislation may need to be interpreted are outlined in the table on the following page.
6.4 Reasons why legislation may need to be interpreted

<table>
<thead>
<tr>
<th>The intention of the Act is not clear</th>
<th>• Parliament’s intention may not be clear enough. Accurate instructions and direction may not have been given to the parliamentary counsel.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Act is about a complex and technical topic</td>
<td>• Parliamentary counsel are extremely skilled in drafting legislation. However, they may not be familiar with specialist areas, such as areas of technology.</td>
</tr>
<tr>
<td>Difficulty in foreseeing possible future applications of the Act</td>
<td>• It is difficult to consider all future applications of an Act. In our rapidly evolving society, it is almost impossible to predict changes in technology and science, or social and environmental conditions.</td>
</tr>
<tr>
<td>Inconsistencies within an Act or between Acts</td>
<td>• Lengthy Acts, or Acts that have been amended a number of times, may cause problems in that there may be inconsistencies. Various provisions within an Act may vary slightly, as the same word may be used in more than one context within the Act, resulting in confusion.</td>
</tr>
</tbody>
</table>
| Time pressures in drafting legislation | • There may have been pressure to draft the Act in a hurry, resulting in clumsy, vague or ambiguous wording within the Act. 
• Due to time pressures in drafting legislation, there may not have been sufficient communication between the instructing minister and the parliamentary counsel. 
• There may have been little opportunity to check the legislation after drafting. This may result in loopholes. |
| Problems relating to defining words | • The words used in an Act may attempt to cover a broad range of situations, but the courts have to interpret whether a specific situation comes under this broad definition. 
• Words may not be defined within the Act. 
• Often Acts need to be interpreted to limit conflict between Acts within a state or between a state and the Commonwealth. 
• Language is by its nature imprecise—words may change in meaning over time. |
| Words used may not cover recent changes | • Legislation may have become out of date and need to be revised. The wording of an Act may not cover recent changes. For instance, a statute may refer to records and tape recordings but not specifically refer to other forms of recording technology, such as DVDs or the downloading of music from the internet. |

An Act may need to be interpreted because there are problems relating to defining terms or the meaning of terms may change over time. When interpreting an Act judges must interpret the intention of parliament.

How judges interpret legislation

There is a number of sources or aids used by judges to assist them in arriving at the true intention of the legislation. These sources may be either intrinsic or extrinsic. Intrinsic sources are those sources that are contained within the Act. Extrinsic sources are sources that are not contained in the Act.

Intrinsic sources

Judges can refer to intrinsic sources. These include looking at sections within an Act to determine the meaning, such as margin notes, footnotes, the definition sections and the object or purpose clause.

Judges will refer to other sections of the Act to interpret the meaning of terms or words in an Act. For instance, judges will refer to the words in the Act, the margin notes, footnotes, the long title and the object or purpose clauses. Most Acts contain a section where words...
used commonly throughout the Act are defined. For example, the *Transport Accident Act 1986* (Vic.) defines a ‘transport accident’ as ‘an incident directly caused by, or arising out of, the driving of a motor car, railway train or tram’. Some Acts also have schedules that may assist courts. The *Road Safety Act 1986* (Vic.) contains a schedule relating a driver’s blood alcohol content to the maximum period of licence cancellation.

### Extrinsic sources

Judges may also refer to a number of sources outside the Act to guide them in the task of interpretation. These include the following.

**Dictionaries**

Courts may refer to authoritative legal dictionaries, such as *Jowitt’s Dictionary of English Law*, or to standard English dictionaries, such as the *Concise Oxford Dictionary*.

**Legislative guidelines**

Legislation has been passed by both the Commonwealth and state parliaments to guide courts. This legislation sets out what other sources judges can use when interpreting legislation.

### 6.5 Legislation provides guides for interpretation

<table>
<thead>
<tr>
<th><em>Acts Interpretation Act 1901</em> (Cth)</th>
<th><em>Interpretation of Legislation Act 1984</em> (Vic.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Commonwealth Acts must be read or interpreted in accordance with the purpose or spirit of the legislation.</td>
<td>• Courts are required to interpret legislation according to the purpose and intention of the statute.</td>
</tr>
<tr>
<td>• Since 1981, all Acts of the Commonwealth Parliament contain object clauses. These clauses are sections within the body of the Act setting out the general aims of the legislation.</td>
<td>• Courts may refer to the following materials in interpreting legislation: parliamentary debates; reports of parliamentary committees, royal commissions, law reform commissioners and commissions, boards of inquiry and other similar bodies; explanatory memorandums or other documents laid before parliament; and extrinsic material.</td>
</tr>
<tr>
<td>• Courts are permitted to refer to the following sources when interpreting legislation: any reports prepared before the provisions were enacted. This includes reports by the Law Reform Commission, Royal Commissions and parliamentary committees; treaties and international agreements referred to in the Act; explanatory memorandums; and records of parliamentary process.</td>
<td>• The Act allows courts to refer to headings, schedules, marginal notes, footnotes, and other parts, divisions or subdivisions within the Act.</td>
</tr>
<tr>
<td>• Courts are required to consider explanatory materials when interpreting legislation.</td>
<td>• Commonly used terms that regularly appear in most Acts of Parliament or are explained or defined within the <em>Interpretation of Legislation Act</em>.</td>
</tr>
</tbody>
</table>

**Previous decisions**

It is possible that words requiring interpretation have already been interpreted by a court in an earlier case. The court may look at that earlier decision to interpret the legislation. Where the interpretation was made in a higher court, and the case involves the same Act of Parliament, then the previous decision is binding—it is a binding precedent.

**Common law principles of interpretation**

Before the passing of the Commonwealth and state legislation described above, judges used traditional common law principles as a guide in the task of interpreting statutes. These traditional approaches were referred to as rules or *legal maxims*. Although these
rules have been largely replaced by the guidelines set out by parliament, it is still important to understand some of the maxims referred to by judges.

The maxim of \textit{ejusdem generis} is particularly important. This term literally means ‘of the same kind’. This rule of interpretation applies when judges are faced with interpreting the meaning of a section of an Act in which a number of specific terms are followed by a general term. This may sound a little confusing. Consider the following hypothetical example.

Parliament passes a law that requires a flagpole to be installed on every ‘house, flat, bungalow or other dwelling’. Mr W owns a caravan that is his permanent home. He refuses to install a flagpole. In deciding whether Mr W has committed an offence the court would need to consider whether a caravan is a ‘dwelling’ referred to in the Act.

According to the \textit{ejusdem generis} maxim, where specific words have been used to form a class, the general words immediately following that class should be given a meaning confined to that class. In this instance, the specific words are ‘house, bungalow, flat’. The meaning of the term ‘other dwellings’ should be confined to dwellings used for the same purpose. A house, bungalow and flat are residential dwellings. Therefore the term ‘other dwellings’ could be seen as applying to buildings used for residential purposes. Mr W’s caravan is used for residential purposes. It could therefore be argued that his caravan is an ‘other dwelling’ for the purposes of this Act.

\textbf{6.6 Other maxims}

<table>
<thead>
<tr>
<th>maxim</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>\textit{expressio unius est exclusio alterius}</td>
<td>The express mention of one term is to the exclusion of others.</td>
</tr>
<tr>
<td>\textit{ut res magis valeat quam pereat}</td>
<td>It is preferable to preserve a piece of legislation than to destroy it.</td>
</tr>
<tr>
<td>\textit{noscitur a sociis}</td>
<td>A word is known by ‘the company it keeps’—or, as some legal texts say, ‘words of a feather flock together’! The meaning of a word is limited by the words immediately preceding it.</td>
</tr>
<tr>
<td>\textit{lex non cogit ad impossibilia}</td>
<td>The law does not expect a person to do that which is impossible (not merely difficult or inconvenient).</td>
</tr>
</tbody>
</table>

\section*{What effect does statutory interpretation have?}

When a court interprets an Act it gives meaning to the words or terms used in the Act. This does not alter the written words in the Act. Statutory interpretation does not amend or change the printed words. The immediate effect of statutory interpretation is that the meaning of the Act is determined in order to settle a dispute.
However, statutory interpretation can also have a number of other effects. Among other things, statutory interpretation can do the following.

- **Form a precedent** When a court decides on the meaning of an Act it must give a reason for the decision. This reason forms a *ratio decidendi*. If the decision has been made by a higher court, it will form a precedent to be followed by other courts in similar cases. The definition will be binding in lower courts on future cases involving the statute that was interpreted.

- **Limit the scope of the legislation** If the court gives a narrow or limited interpretation to words or terms, the interpretation may limit the range of circumstances that the Act may apply to. For instance, the decision in the definition of offensive behaviour did not include chroming.

- **Increase the scope of the legislation** If the court gives a broad interpretation to words or terms, the interpretation may extend the range of circumstances that the Act may apply to.

### Case file

Is a studded belt a weapon?

A young man, aged 20, was apprehended by the police while purchasing food from McDonald’s. He was wearing a black leather belt to hold up his pants. The belt, which he had purchased earlier from a market stall, had raised silver studs. He was charged with an offence under section 6 of the *Control of Weapons Act 1990* (Vic.), which reads:

1. A person must not possess, carry or use any regulated weapon without lawful excuse. Penalty: 60 penalty units or imprisonment for 6 months.
2. A person must not carry a regulated weapon unless it is carried in a safe and secure manner consistent with the lawful excuse for which it is possessed or is carried or is to be used for. Penalty: 10 penalty units.
3. In this section ‘lawful excuse’ includes:
   a. the pursuit of any lawful employment, duty or activity; and
   b. participation in any lawful sport, recreation or entertainment; and
   c. the legitimate collection, display or exhibition of weapons, but does not include for the purpose of self-defence.

On 20 December 1990, the Governor-in-Council made the *Control of Weapons Regulations 1990*. Under these regulations a regulated weapon included any article fitted with raised pointed studs, which is designed to be worn as an article of clothing.

The young man was found guilty in the Magistrates’ Court of possessing a regulated weapon. The young man subsequently appealed to the Supreme Court. The questions to be decided by the Supreme Court were:

- Is a studded belt a regulated weapon?
- Is wearing a studded belt to hold up trousers a lawful excuse for possessing the studded belt?

### Looking at the purpose of the Act

The purpose of the Act was ‘to regulate weapons other than firearms’. What constituted a ‘weapon’ was not defined in the Act, although objects that may be considered to be weapons were listed in the regulations.
Using dictionaries

As the word ‘weapon’ was not defined in the Act, the judge had to refer to other references to determine the meaning: the *Oxford English Dictionary* and the legal encyclopaedia *Halsbury’s Laws of England*. Justice Beach stated:

*The Oxford English Dictionary* defines ‘weapon’ as ‘An instrument of any kind used in warfare or in combat to attack and overcome an enemy’ (Volume XX, page 44).

*That would seem to me to be a particularly wide definition; not one which gives great assistance when construing the provisions of the Act and regulations made under it. Given a literal interpretation it could encompass such things as pieces of timber, lengths of piping, brickbats and the like. Indeed, in one view of the matter, it could include almost any physical object.*

*It would seem to me that a more appropriate interpretation of the word ‘weapon’ is that appearing in Halsbury’s Laws of England, 3rd edition, Volume 10 at page 653. Then, when dealing with the phrase ‘offensive weapon’, the learned author says: ‘Large clubs or sticks are offensive weapons. The expression includes anything that is not in common use for any other purpose but that of a weapon. But a common whip is not such a weapon; nor probably is a hatchet which is caught up accidentally during the heat of an affray.’*

*Justice Beach, Deing v. Tarola [1993] 2 VR 163*

Using precedent

The judge also referred to previous cases that had dealt with a similar problem of interpreting the meaning of ‘weapon’. He referred to the case of *Wilson v. Kuhl; Ryan v. Kuhl* [1979] VR 315, in which the meaning of the term ‘offensive weapon’ was considered. In that case the judge said that:

*Any physical article is an offensive weapon if it is an article of a kind normally used only to inflict or threaten injury. A knuckleduster is an article of this kind. In my opinion, an article such as a sawn-off shotgun is, of itself, an offensive weapon … An article of a kind which is not normally used only to inflict or threaten injury is an offensive weapon only if the person found armed with it had then any intention to use it for an offensive, that is, an aggressive purpose. A carving knife is an article of this kind.*

The decision

Justice Beach concluded:

*The proposition that, without more, the possession, the carrying or the use of such a belt amounts to the possession [of a weapon], is a proposition I feel a reasonable man would regard with derision.*

*The conclusion I have come to in the matter is that a studded belt is not a weapon; although like many other articles in common use throughout the community, may be used as such. In that situation, I consider it is not within the regulating power of the Governor-in-Council to prescribe it as a regulated weapon …*
The relationship between courts and parliament

As stated earlier, parliament is the supreme law-making authority, answerable only to the people. Parliament can pass a law to override the common law made by the courts. The courts can only declare a law made by parliament *ultra vires* when it exceeds the law-making authority set out in the Constitution.

As parliament is the supreme law-making body in its jurisdiction, it may decide to incorporate common law principles within a comprehensive legislative restatement of the law. This process is known as ‘codification’, referring to the fact that the common law has been restated in a statutory code. Parliament may also abolish common law principles it disagrees with, and this is referred to as ‘abrogation’. Parliament’s ability to codify and abrogate common law is an important aspect of the relationship between courts and parliament as law makers. The *Mabo Case* and the *Native Title Act 1993* (Cth) (on pages 185–87) are an example of codification, and the Victorian parliament’s response to the *Trigwell Case* is an example of abrogation.
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Animals straying on highways—abrogation in action
After the Trigwell Case (above on pages 171–3) held that farmers were not responsible for the damage done by their animals that strayed onto roads, the Victorian Parliament acted to abrogate (that is, legislatively abolish) this decision. It passed the Wrongs (Animals Straying on Highways) Act 1984, which altered the law so that farmers were responsible for the actions of their animals on the roads.

6.7 Precedent and legislation

The courts are responsible for determining the day-to-day application of the law. Courts will do this in two ways. First, if a case comes before the court, the court will look at statute law to determine what the law should be. In order to do this, the court will need to interpret or give meaning to the words used in Acts. A court’s reason for deciding the meaning of words or phrases in a statute also forms a ratio decidendi. The decision of a court about the interpretations that should be applied to words or phrases in an Act of Parliament therefore becomes a precedent, which may be used for subsequent cases. Then, the legislation and the precedent must be read together. In many instances, the court’s interpretation may result in the need for amendment to the Act in question.

Second, judges make law when deciding on a case for which there is no existing statute or common law. The reason for the decision, or the ratio decidendi, is binding on lower courts in future cases. In some circumstances, parliament may have failed to legislate on an issue due to the issue’s complexity or controversial nature. Since courts are independent of the political process, they may be able to make laws that parliament finds difficult. Courts thus have an important role of ‘filling the gaps’ left by parliament.

At times, the interpretation given to legislation may not be that foreseen by the parliament, or at least the government, when the legislation was introduced. However, parliament is the ultimate law-making body. If parliament does not agree with a court’s interpretation of a statute, it can amend the legislation to overrule the court’s interpretation. Although the courts cannot change a law made by parliament, the decision made by courts can influence a change in the law.
Why has the law about abortion been so slow to develop?

Up until 2008, section 65 of the Crimes Act 1958 stated that procuring an ‘unlawful’ abortion was a serious crime. However, the Victorian Parliament did not define when an abortion was ‘unlawful’. It left the determination of this controversial and divisive issue (that is when an abortion was unlawful, and when it would be legal) to the courts. The courts came to hold that in Victoria, abortion was legal only in certain conditions—generally where the health of the mother is ‘in danger’. Thus, the real application of the law was set in precedent rather than in statute.

Menhennitt case

In a test case decided in 1969 (R v. Davidson [1969] VR 667), Justice Menhennitt of the Victorian Supreme Court ruled that an abortion was lawful if the doctor ‘honestly believed on reasonable grounds that the act done by him was … necessary to preserve the woman from a serious danger to her life or her physical or mental health’. Although in theory a higher court could overturn the ruling in this case at any time, it was unchallenged for over 30 years.

Following the Menhennitt ruling, abortions were permitted where a doctor honestly believed that it was necessary to preserve the woman from serious danger to her life, or to her physical or mental health.

High Court appeal

In 1996, the High Court faced a potential test case on abortion when an appeal was lodged from an NSW medical negligence case. The case concerned a woman who became pregnant in the 1980s and gave birth to a healthy child. The single mother’s pregnancy was not diagnosed by her clinic until it was too late for her to have an abortion. This, she claimed, deprived her of the right to have an abortion and forced her to have a child.

The woman sued for the damage relating to having and rearing a child. The NSW Supreme Court dismissed the case, ruling that the woman had no right to claim damages because abortion was illegal in that state. This decision was overturned by the NSW Court of Appeal.

A subsequent appeal was lodged with the High Court. The emergence of a High Court test case on abortion again fuelled community debate about the legal status of abortion.

The community debate

It has been suggested that it is not appropriate for the courts to decide cases such as this, which involve complex moral issues. The courts are not in a position to assess community attitudes and it is inappropriate for judges to impose their own personal standards on the community as law.

Others suggest that it is better that the courts interpret laws on abortion. It would be difficult to legislate to ensure that the law reflects the values of all sections of the community and adequately covers all circumstances.

Possible impacts

The difficulties alluded to in these comments are borne out by the events leading up to the High Court appeal. The Australian Catholic Health Care Association was given legal advice that the case could establish a precedent requiring the 57 Catholic hospitals throughout Australia to advise women about termination. This is something that Catholic hospitals are not required to do at the moment—and a legal condition they may find difficult to fulfil. The Association applied to argue their position as a ‘friend of the court’ in the case. They argued that the court should not recognise a claim for the loss of an opportunity to terminate a pregnancy because it is not lawful to terminate.

The Abortion Providers Federation of Australasia also applied for status as a friend of the court. They argued that ‘if the status quo is to be disturbed it should be done by parliament, not judicial decision’.

So with powerful interest groups involved, a medical negligence case was poised to bring the whole abortion issue to a head in the High Court. The High Court was spared the difficult decision when the parties decided to settle the case out of court. However, for the medical profession the law was still unclear. Abortion remained a criminal offence except in those circumstances defined by the common law that made it lawful.

Review and reform

In 2007 Victorian MP Candy Broad proposed a private member’s Bill to decriminalise abortion. The private member’s Bill was withdrawn when the Victorian Premier, John Brumby, announced moves to refer the issue of abortion to the Victorian Law Reform Commission for investigation. The Victorian Government undertook to act on the advice of the Victorian Law Reform Commission, which eventually reported back recommending its decriminalisation. On 10 October 2008 the Victorian Parliament passed the Abortion Law Reform Act 2008 (Vic), which gives women the right to an abortion, free from fear of criminal charge, up until 24 weeks’ gestation. After that period the Act states that abortions may still be performed, but that two doctors must believe it appropriate on medical grounds. There was strong pressure both for and against change in the law, with both pro-choice and anti-abortion protestors attempting to influence parliament.
Activity

Making judgments on abortion

Read the article ‘Why has the law about abortion been so slow to develop?’ and answer the following questions.

1. Briefly summarise the law concerning abortion prior to 2008. How has this been affected by judicial decision? Why do you think parliament left it to the courts to decide when an abortion was unlawful?

2. ‘Making and interpreting laws on abortion have been notoriously difficult.’
   a. What do you think are the weaknesses of relying on court interpretations to determine when an abortion has been unlawful?
   b. If the community became dissatisfied with the way in which the courts have interpreted these laws, what action could be taken? What would be the effect?

3. It has been suggested that the independence of courts makes them the best law-maker to deal with controversial and divisive issues such as abortion.
   a. What are the strengths of including the courts in the law-making process?
   b. Do you agree with the above statement? Why/why not?

Case file

What is native title?—a landmark case

For more than 200 years it was considered that Australia at the time of British settlement was a land without settled inhabitants or settled law. Under the legal concept of terra nullius, the new settlers claimed ownership of the land.

Mabo Case

In 1982, Eddie Mabo from the Murray Islands started a court action against the Queensland Government. This court action involved a claim to the right of ownership over the Murray Islands. The Murray Islands are a group of three islands in the Torres Strait. They had been claimed as British territory by Captain Bligh in 1792, and Queensland became responsible for their administration in 1879, at which point the islands were considered to have become part of Australia. The Meriam people, who are indigenous to the islands, continued to live there in the traditional way. They maintained their communities, lived by their traditional beliefs and customs, and settled disputes between members of the community according to customary law.

Eddie Mabo
In 1985, the Queensland Government passed the *Coast Islands Declaratory Act*. This Act claimed that all rights to the land had passed to the Crown in 1879, that native title to the land did not exist, and that the Meriam people were not entitled to any compensation for the loss of their land. The Act was based on the concept of *terra nullius*.

*Terra nullius* means that Australia was settled as an ‘empty land’. The British did not recognise any existing legal system or government structure of the Indigenous people. Therefore, they didn’t recognise the need to make a treaty for the settlement of the land.

The Meriam people claimed that they had a right to their land under native title. Eddie Mabo (representing the Meriam people) asked the High Court to declare the Queensland law to be invalid because it was inconsistent with the *Racial Discrimination Act 1975* (Cth), as the Meriam people had not been paid just compensation for the loss of title to their land. The Queensland Government argued that the common law of *terra nullius* applied.

**High Court—changing the principle of *terra nullius***

In June 1992, the High Court of Australia handed down a decision about the ownership of the Murray Islands. The High Court changed the common law of *terra nullius*. The decision of the High Court was that ‘native title’ did exist.

The decision was handed down by the full bench of the High Court (seven justices). The judgment took over 200 pages. A 6–1 majority decided that native title did exist when there is a continuous link between the current inhabitants and their pre-invasion ancestors. Some laws and customs associated with the area might have changed but native title exists, provided that the general connection between the Indigenous people and the land remains.

Native title is lost if the group ceases to exist, or ceases to exercise its laws and customs associated with the area, or if its contact with the land ceases.

**Parliament responds**

A series of native title claims were subsequently lodged with the courts. The High Court decision caused concern among a number of groups and industries throughout Australia. Industrial bodies involved in the development of land or natural resources, such as mining companies, were concerned that the deciding of native title should not be left to the courts. Court action can be time-consuming, and the costs and damages awarded can be difficult to calculate. Farmers, particularly holders of leasehold title, wanted the Commonwealth Government to clarify the High Court’s decision.

Clearly, the rights and responsibilities of individuals in relation to native title needed to be clearly stated. To develop the law through the common law would mean a number of cases being heard by the High Court. This would be a very long and expensive process.

On 22 December 1993, the *Native Title Act* was passed. It came into effect on 1 January 1994.

**The Native Title Act**

The *Native Title Act* aimed to provide recognition and protection of native title. It established ways in which future dealings affecting native title may be determined, and set up the mechanism for determining claims of native title. Features of the Act include the following.

- Land that is owned by people cannot be claimed for native title. In other words, property such as homes, shops, factories and farms cannot be claimed under native title. (This applies to all land purchased from the Crown prior to 1993.)
- Indigenous Australians can claim native title to Crown lands where there has been a continuous occupation of the area claimed. Native title may be granted where there is a lease. Indigenous Australians can negotiate regarding the conditions of the lease but cannot veto it.
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- A system of native title tribunals was set up. These tribunals operate at both state and federal levels.
- Limitations are imposed on the situations in which native title can be extinguished. Aboriginal groups can only gain native title by lodging a claim with a state or Commonwealth tribunal. The Act sets up a Commonwealth tribunal for determining native title claims. Aboriginal groups have the option of lodging these claims with either a state or a Commonwealth tribunal.

**The Wik Case**

In December 1996, the High Court handed down a judgment on a case brought before the court by the Wik people of Cape York Peninsula. The Wik people had made native title claims to pastoral lands on the peninsula. The court was asked to determine whether native title actually existed on those leases. The High Court found, in a 4–3 decision, that native title and pastoral leases could coexist. However, they held that where there is a conflict in the two types of title, the pastoral lease would prevail.

The decision reopened many of the questions raised by the *Mabo Case* decision. In 1998, the Commonwealth Parliament amended the *Native Title Act* to further clarify the rights of Indigenous people and leaseholders.

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**Activity**

*Understanding native title*

1. What was the legal principle of *terra nullius*?
2. What was the role of the High Court in determining whether native title existed?
3. Justice Brennan stated:

   > It is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests of indigenous inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country.

   *Mabo and Others v. State of Queensland (No. 2) (1992) 175 CLR 1*

   a. What factors do you think the High Court took into consideration when deciding whether the common law concept of *terra nullius* should be applied?
b Suggest reasons why it is ‘imperative in today’s world’ for the common law not to be seen to be ‘frozen’.
c How far does the set of rules that makes up the doctrine of precedent restrain the courts from changing the law to meet the changing needs of society?

4 In some circumstances, governments and legislatures prefer to leave the determination of a controversial question to the courts. Critically evaluate the strengths and weaknesses of courts as law-makers.

5 What impact did the Native Title Act have on the High Court Mabo Case ruling? In your answer you should refer to the term ‘codification’. Explain the relationship between parliament and the courts in law-making.

An evaluation of law-making through courts

The main role of the courts is to resolve disputes. Precedent develops as judges reach decisions in the disputes heard by the courts, and laws are made as a result. In this sense, law-making is a by-product of the dispute resolution procedures undertaken by courts.

A court has to administer the law. Although it has the power to interpret statutes, it cannot change an Act made by parliament. When dealing with precedent, the courts will usually modify the existing principles rather than develop new areas. When there is a conflict between judge-made law and statute law, statute law will always be given priority.

Strengths

The role of the courts in law-making has a number of strengths. These include the following.

- **A decision must be made** Courts must settle disputes that come before them. Judges may defer bringing down a judgment for a short time while they consider a case, but they must make a decision. In this sense, courts provide an immediate response to what the law should be in relation to a particular case.

- **The courts, in applying the law, determine the day-to-day application of the law** This means that justice can be achieved in individual cases by interpreting the law as it relates to the facts of a case. Courts can distinguish, reverse or overrule decisions that result in a change in precedent. Courts can also interpret the meaning of words in statutes to overcome injustices.

- **Flexibility** Through the application of precedent, courts provide considerable flexibility for the law to adapt to the changing needs of society. For example, the *ratio deciden* of *Donoghue v. Stevenson* has been extended to apply to a variety of situations involving negligence. By distinguishing past cases or reversing or overruling past decisions, a court may change an established legal principle.

- **Independent of the political process** Courts are not subject to political pressures. They need only consider the submissions put forward by counsel acting on behalf of the parties involved in the litigation. Courts may consider the changed values in our society; however, there is far less pressure to do so. The judiciary is independent. Although judges are not elected representatives, they are in an informed position to determine the law. Each party to a dispute has a responsibility to prepare and present their own case to the judge, and each will research and debate the need for change or for a new interpretation in order to win their case. Judges can maintain or change the law as required, without the fear of an electoral backlash.

- **Consistency and fairness** The courts provide for the consistent application of precedent and interpretation of legislation. The application of the doctrine of precedent ensures that cases relating to similar legal issues are decided in a predictable manner. This is a fundamental aspect of fairness.
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- **Predictability**  Parties can reasonably predict how the law will apply by looking back at the previous decisions of the courts in similar cases. However, where the law is unclear, parties may not know how the law will be applied until after a dispute arises.
- **Access to change**  Any individual has the right to take a case to court provided they have standing. This means that they need to be able to show the court that they are directly affected by the issues. Therefore, in theory, we all have the opportunity in matters that directly affect us to take a case that may change the law to court.
- **Courts can identify needs for reform**  Judges deal with the day-to-day application of the law and can identify areas of the law that are in need of reform. In making a decision, a judge may highlight the need for parliament to change the law.
- **Efficiency of operation**  The doctrine of precedent provides judges and the legal profession with principles of law. Consequently, courts and lawyers can refer to previous cases in reaching their decisions. The system ensures that judges are protected from professional criticism, as their decisions have been made while taking account of earlier precedents. Considering each case afresh would most likely result in courts taking longer to reach a decision.

**Weaknesses**

The role of the courts in law-making has a number of weaknesses. These include the following.

- **A case must come before the courts**  Courts must wait until a legal action is brought before them. Even then, their law-making power is restricted by the nature of the dispute: that is, whether there is any existing common law or legislation in the area.
- **The decision in a case only directly affects the parties**  Judge-made law cannot be seen to have the same wide-reaching effect as laws made by parliament. The final decision in a case directly affects only the parties to the case—although the reason for the decision in a case can act as an important influence on people considering a similar action.
- **Time-consuming process**  A decision by a court about what the law should be is not always reached quickly. Courts cannot reach a decision before they hear all the arguments put by both parties. In complex cases, this can take a considerable amount of time. A final determination as to what the law should be may not be reached until after a case has been heard on appeal. This may take a matter of years.
Rigidity  The doctrine of precedent binds courts to decisions made in superior courts. Unless a court is considering a new or novel situation, it must apply the existing precedent. A court may be bound by precedent, irrespective of whether the judge agrees with the outcome of the application of those principles. The doctrine of precedent implies not only consistency, but also a rigidity of the law. However, parliament can override a precedent established by the courts. When a precedent becomes out of date, for example, parliament can make a law to change it.

Undemocratic  Courts are not representative of the community. Judges are appointed: they are not elected nor do they necessarily represent the values and attitudes of the community. Judges are independent of parliament and government, and they are not directly answerable to the electorate. Only in very rare circumstances will a judge be removed from office.

Retrospective  The primary role of courts is to settle disputes. Courts decide a case ‘after the event’. They are always acting retrospectively; that is, they look back over an existing problem and decide how this problem can be overcome. In law, this is known as acting ex post facto, or ‘after the fact’. As the individual parties to a civil dispute bear the costs of the action, this is a costly way for individuals to find out what the law should be.

Precedent may be slow to change  The development of the law is dependent on a case being taken to court. The more conservative judges may be reluctant to change the law by departing from outdated precedents. Even where a new precedent is created it only applies to a limited set of circumstances and it may take many years for a whole area of law to develop. An excellent example of where the courts continued to be bound to an outmoded and unjust precedent was the law relating to the widow’s discount.

Costly  The cost of preparing a court case may prevent individuals from seeking to change the law by judicial precedent. If an individual seeking to bring about a change in the law through precedent loses, they risk paying not only their own costs but the costs of the defendant and the court.

Locating and understanding precedent  Precedents are contained in law reports that record the decisions of courts of record. Tracing cases relating to a particular area of law is time-consuming and requires expertise. Even if you find the relevant cases, you will need to read the judgments and determine the ratio decidendi. The judgments are often complex. When you have identified the ratio decidendi, you will need to be able to interpret the decision and apply it to your particular situation.

Lack of certainty  Precedent is not a concise statement of law, but is based on reference to previous court decisions where the facts of a case are similar. This may result in uncertainty for the litigants, as no two cases are exactly the same. The court may consequently decide that there are sufficient differences to distinguish the present case from earlier cases. Also, a precedent may be overruled, disapproved or reversed. It is often necessary to examine a number of cases to determine precisely the legal principle that is applicable, which may lead to further uncertainty as the outcome of each case may vary slightly, resulting in some conflict within the law.

Courts do not have the resources to research the need for change  The courts can only focus on issues presented by the parties to a dispute, and must rely on the information presented to them in court.
Teresa de Sales

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Activity  Judge-made law and change

A famous English judge, Lord Denning, described the role of judges in changing the law:
‘On the one hand there were the timorous souls who were fearful of allowing a new course of action. On the other hand were the bold spirits who were ready to allow it if justice so required …’

1  What is ‘judge-made’ law? Explain the operation of the doctrine of precedent. How can the operation of the doctrine of precedent result in a change in the law?
2  What factors limit the effectiveness of the courts in bringing about a change in the law?
3  To what extent does the fact that a judge is a ‘bold spirit’ or ‘timorous soul’ affect the capacity of courts to change the law?
4  What is statutory interpretation? What is the relationship between the doctrine of precedent and statutory interpretation?
5  Critically analyse three strengths of the courts as law-makers.
6  Describe the relationship between parliament and the courts in law-making.

Widow’s discount

A Western Australian widow, Teresa de Sales, whose husband drowned, claimed damages under Western Australia’s Fatal Accidents Act 1959. This Act gave widows access to compensation for economic or material disadvantage caused by the death of their spouse. In 2000, the Western Australia District Court reduced the original compensation awarded to her by 5 per cent. In an appeal to the Full Court of the Supreme Court of Western Australia, this reduction was increased to 20 per cent. The Full Court cited ‘remarriage contingency’, known as the widow’s discount, as the basis for the reduction.

The Full Court decision was based on a precedent set by an 1863 ruling in England and Australian legal precedents in the 1930s. England changed its law in 1971 to make remarriage prospects irrelevant in calculating compensation, but the precedent remained in Australia. Early last century, most women were financially dependent on their husbands and widows were expected to remarry to survive economically. Today, most people would see these assumptions as sexist and not consistent with our community values.

An appeal to the High Court in November 2002 reversed this decision, but there was still concern that the widow’s discount could apply to other women in future cases. The Victorian Parliament responded in 2004 by passing the Wrongs (Remarriage Discount) Act to clarify the law in Victoria.
Courts do make laws

COURTS DO make law. Some may argue that courts simply declare what the law is. In other words, they suggest that when the law is unclear the courts hear legal arguments and apply strict legal logic to resolve the dispute, and declare what the law is. This position holds to the view that any change in the law should be left to the elected parliament. However, it is now widely accepted that in resolving disputes, judges exercise a wide range of choices and are making laws, not merely declaring legal principles. In making laws, judges are subject to many constraints. They are accountable in ways that are different from the accountability of an elected parliament.

Interpretation and change

Through the process of statutory interpretation, the courts tell us what parliament meant in Acts. When a judge is faced with circumstances in a case that were not anticipated by parliament, the judge is clearly making law when deciding upon a particular interpretation of the legislation. Bishop Hoadly in 1717 said, ‘whosoever hath the power to interpret the law hath the power to make it’. Should parliament be dissatisfied with the meanings construed by the courts, parliament can pass legislation to correct the interpretation.

Common law and change

However, it is in the field of common law that the law-making role of the courts is highlighted. The common law has evolved from thousands of decisions over hundreds of years. It forms a body of law much larger than all of the statutes passed by Australian parliaments. Common law covers areas as diverse as contract, negligence and nuisance—and it has been made by unelected judges for almost 1000 years.

When a judge decides an established principle of law applies to a particular set of facts, when a court has not considered that question in the past, the judge is making law. The decision made by the judge adds to the body of the law to be used and applied in future cases.

The High Court and change

Sometimes higher courts, particularly the High Court, go further than making incremental changes to existing legal principles. The High Court can overrule previous understandings of the common law and establish new principles. Even in this area, the power of the courts to make law is subject to constraints. Parliament can pass laws to correct or revise common law principles.

The common law develops in a sequential and systematic manner. The common law is formed by the application of existing rules to a series of fact situations, with existing principles being adapted to new situations. It is a gradual change or adaptation over time. Comprehensive, wholesale change to an area of law is left to parliament. Courts do not have the facilities, techniques or procedures to undertake comprehensive review of the need for change in entire areas of law.

However, there are numerous examples where the High Court has ‘modernised’ the common law, such as the abolition of the rule that a husband could not rape a wife and the recognition of native title in the Mabo Case.

In the Mabo Case the High Court decided that the common law principle of terra nullius was no longer law. The High Court recognised that native title exists. This decision exemplifies an important constraint on courts in law-making. The Mabo Case was decided in relation to a specific set of circumstances. Although the court formulated a principle to resolve that dispute, it did not provide a comprehensive code for the regulation of native title disputes. It was parliament that introduced legislation to codify native title law, for the broader recognition of native title in future cases and to establish a dispute resolution process.

Novel cases and change

The operation of the doctrine of precedent provides for continuity and consistency in the application of law to new circumstances. However, it is when a novel situation arises that the law-making role of the courts is most evident and controversial. In the case of Cattanach v. Melchior [2003] 215 CLR 1, the High Court considered whether damages could be recovered by parents for the cost of raising a healthy child born after a failed sterilisation procedure. The case was based on a claim that the surgeon who performed the sterilisation had been negligent. The court decided that the parents could claim damages. The case was decided by a majority of four to three. The majority judgment declared that the principles of negligence applied and the recovery of economic loss was recognised by the law. The case resulted in considerable public comment and criticism. Critics argued that it was not consistent with community values to allow parents to recover damages for the costs of raising a healthy child.

Should courts change the law?

What should a court do when faced with a choice between maintaining an existing legal principle and establishing a new rule? Many would argue that the courts have an obligation to maintain the status quo.

This approach places value on the certainty and stability inherent in the doctrine of precedent as well as the need for substantial change in the law to take into account community views. However, others argue that it is appropriate for the courts to take a more active role in changing the law given that parliament can take action to correct or limit it if necessary.
Parliaments have acted to impose limitations on the common law. They have replaced common law rights with statutory schemes for compensation, set caps on the award of damages and established exclusions.

Both parliament and the courts are accountable in law-making but in different ways. Parliament is accountable through the electoral process. Courts are also accountable. The courts are open to the public and publish reasons for their decisions. This means that our courts are open to scrutiny and criticism. Professor Michael Coper suggests that parliament and the courts are partners in law-making. ‘although their respective roles can bring them into conflict. In particular, they act as a brake on each other, the court interpreting and even invalidating the legislation of parliament, and the parliament modifying and even abolishing parts of the common law when it finds the court to have been too bold or not bold enough’.

Activity

Courts as law-makers

Read the article ‘Courts do make laws’ and complete the following questions.

1. Explain the operation of the doctrine of precedent and the role of the courts in the interpretation of legislation.
2. The article refers to the High Court as a law-maker. Explain the significance of the High Court in the law-making process.
3. What limits the capacity of courts to make laws?
4. Critically analyse the two strengths of the courts in the law-making process.
5. The article concludes that parliament and the courts are accountable in law-making but in different ways. Explain the relationship between the courts and parliament in the law-making process. How are they accountable?

Activity

Law-making by the courts

Prepare a written response that answers the following questions.

‘The concept that the courts merely apply the law is a fairytale. The role of the courts in the law-making process is crucial to the smooth functioning of the law.’

1. Describe the law-making process used by a superior court.
2. Critically analyse two strengths and two weaknesses of the law-making process used by courts.
3. Why is the role of the courts important in the law-making process?
Summary checklist

Do your notes cover all of the following points?

Courts play two roles in the law-making process.

Common law

Common law is the law that has evolved through the decisions of judges. Originally the term referred to the general principles of law that applied throughout the English courts. Common law was developed by judges looking back at previous decisions in past cases to determine what the law should be.

- A precedent is a reported judgment of a court that establishes a point of law.
  - A reported decision will contain three key elements:
    - a decision *inter partes*—the decision between the parties
    - the *ratio decidendi*—the legal principle upon which the decision is based
    - possibly *obiter dicta*—statements of opinion on an aspect of the application of the law that do not form the legal reasoning for the current decision.
  - The operation of precedent is based on the principle of *stare decisis*.

- Stare decisis
  - *Stare decisis* means that a court will stand by what has been decided:
    - a precedent can only be set by a superior court in the same hierarchy
    - for a decision to be considered a ‘binding precedent’ it must be made by a superior court (usually in the exercise of its appellate jurisdiction)
    - all lower courts are bound by the decisions of higher courts in the same hierarchy in like cases
    - decisions of courts at the same level are not binding.

- Binding precedent
  - A precedent will be considered to be binding if:
    - there is a ‘like’ fact situation
    - it is made by a superior court in the same hierarchy.

- Persuasive precedent
  - A persuasive precedent is a convincing argument. It does not have to be followed.
  - A precedent will be considered to be persuasive if:
    - it is the *ratio decidendi* of a court at the same level or lower level in the same hierarchy
    - it is the *ratio decidendi* of a court from another hierarchy.

- Flexibility in precedent
  - Following a precedent—where a subsequent court hears a case and applies precedent judgment to resolve the dispute.
  - Reversing a precedent—where a higher court hears a case on appeal and decides that the lower court has wrongly decided the case, it may reverse the decision.
  - Overruling precedent—where a case coming before a higher court relies on a legal principle that has been formed in an earlier case decided in a lower court, the higher court may determine that the legal principles relied on in the earlier case have been wrongly decided.
  - Disapproving—where a judge refuses to follow the decision of another judge at the same level in an earlier case.
  - Distinguishing—where a judge finds that the material facts of a case are different from the facts in an earlier case and decides that the precedent in the earlier case should not be applied.
Advantages of precedent
- consistency and fairness as the courts will decide ‘like’ cases in the same way
- certainty as the outcome of cases can be predicted based on previous decisions
- allows for the law to grow to meet new situations
- allows for the law to be flexible to meet changing needs
- provides for the efficient operation of the legal system.

Disadvantages of precedent
- rigidity and inflexibility may develop where judges are reluctant to depart from out-of-date or inappropriate precedents
- uncertainty may arise where there is more than one precedent that may apply to a particular set of circumstances
- change may be slow and irregular because change can only occur when a litigant has a significant case that is subject to an appeal. Given the cost of litigation, not all litigants may be prepared to persist with a legal action under these circumstances
- the law develops retrospectively. A problem must exist before the court will consider the circumstances. It does not operate to avoid possible conflicts
- it is inefficient as it provides only for ad hoc development of the law.

Statutory interpretation

Statutory interpretation is the process by which courts determine the application of words, terms and phrases used in Acts of Parliament and delegated legislation. Statutory interpretation decisions are an example of courts making precedents, this time about the meaning of words in legislation.

Reasons for statutory interpretation
- Problems in drafting a Bill:
  - inaccurate directions or instructions
  - difficulties in predicting future circumstances
  - pressure of time may lead to errors or poor expression
  - lengthy Bills or numerous amendments may lead to inconsistencies
  - Bill may relate to a technical area and the parliamentary counsel may not have the technical expertise required
  - lack of communication between the parliamentary counsel and the responsible minister.
- Wording and definitions:
  - disputes about the meaning of terms and phrases
  - words may have more than one meaning or the terms used may be too broad
  - the meaning of words and terms change over time
  - a word may not encompass recent changes
  - possible conflicts with other Acts.
- Other reasons:
  - to avoid loopholes
  - to avoid contradictions between Acts
  - legislation may have become out of date and need to be revised.

Guides to interpreting statutes
- Intrinsic—interpretation of sections within Acts
- Extrinsic—sources outside the Act:
  - dictionaries
  - legislative guidelines: Acts Interpretation Act (Cth), Interpretation of Legislation Act (Vic.)
  - previous decisions.
The decisions made by courts about the meaning of terms, phrases or words in an Act form precedents to be followed in subsequent cases.

Impact of statutory interpretation:
- statutory interpretation does not amend or change the printed words
- the immediate effect of statutory interpretation is that the meaning of the Act is determined in order to settle a dispute
- other effects of statutory interpretation include:
  - form a precedent
  - limit the scope of the legislation
  - increase the scope of the legislation.

Relationship between courts and parliament in law-making

- Where statute law and common law conflict, statute law prevails.
- Courts give meaning to the terms used in Acts in order to apply them to specific cases before the courts.
- The decisions made by courts about the meaning of terms used in an Act form a precedent for future cases. Parliament may legislate to abrogate or codify the decisions made by a court.
- Strengths and weaknesses of courts as law-makers (see table below).

<table>
<thead>
<tr>
<th>Strengths</th>
<th>Weaknesses</th>
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<tbody>
<tr>
<td><strong>A decision must be made</strong></td>
<td><strong>A case must come before the courts</strong></td>
</tr>
<tr>
<td>A court must settle a dispute. It is not possible to defer a decision, nor can a court determine a case before hearing all the submissions put forward by the parties.</td>
<td>Courts must wait until a legal action is brought before them. Even then, their law-making power is restricted by the nature of the dispute: that is, whether there is any existing common law or legislation in the area. However, the decision in a case is only binding on the parties to that case.</td>
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**Flexibility**
Through the application of precedent, courts provide for considerable flexibility for the law to adapt to the changing needs of society. For example, the *ratio decidendi* of *Donoghue v. Stevenson* has been extended to apply to a variety of situations involving negligence. By distinguishing past cases or reversing or overruling past decisions, a court may change an established legal principle.

**Rigidity**
The doctrine of precedent binds courts to decisions made in superior courts. Unless a court is considering a new or novel situation, it must apply the existing precedent.

**Independent of the political process**
Courts are not subject to political pressures. They need only consider the submissions put forward by counsel acting on behalf of the parties involved in the litigation. Courts may consider the changed values in our society; however, there is far less pressure to do so. The judiciary is independent.

**Undemocratic**
Courts are not representative of the community. Judges are appointed, they are not elected; nor do they necessarily represent the values and attitudes of the community.
## Revision questions

1. What is the doctrine of precedent?
2. Define the following terms:
   - binding precedent
   - persuasive precedent
   - *stare decisis*
   - *obiter dictum*
   - *ratio decidendi*
   - overruling
   - reversing
   - distinguishing
   - disapproving
3. How may the application of the doctrine of precedent result in a change in the application of the law?
4. Outline the major advantages and disadvantages associated with the use of the doctrine of precedent.
5. What is statutory interpretation?
6. Describe the role of the parliamentary counsel.
7. Outline the reasons why an Act may need to be interpreted by a court.
8. What guides or rules do judges use to help them in determining the meaning or purpose of an Act of Parliament?
9. Outline and explain the strengths and weaknesses of law-making by the courts.
10. Describe the relationship between parliament and the courts as law-making bodies.
11. ‘Courts are not elected or representative bodies. The role of the courts is to apply the law, not to make laws.’ Discuss.

### Strengths | Weaknesses
--- | ---
Consistency | Costly to individuals
The courts provide for the consistent application of precedent and interpretation of legislation. The application of the doctrine of precedent ensures that cases relating to similar legal issues are decided in a predictable manner. | The primary role of courts is to settle disputes. Courts decide a case ‘after the event’. Therefore, it is argued that law made by the courts is retrospective. As the individual parties to a civil dispute bear the costs of the action, this is a costly way for individuals to find out what the law should be.

Courts can identify needs for reform | Precedent may be slow to change
Judges deal with the day-to-day application of the law and can identify areas of the law that are in need of reform. In making a decision, a judge may highlight the need for parliament to change the law. | The development of the law is dependent on a case being taken to court. The more conservative judges may be reluctant to change the law by departing from outdated precedents. Even where a new precedent is created it only applies to a limited set of circumstances and it may take many years for a whole area of law to develop.
Sample exam questions

The final examination is marked out of 60 marks. In the final examination you will be allowed 15 minutes’ reading time and 2 hours’ writing time. If you want to complete these questions under examination conditions, you should allow 8–9 minutes’ reading time and 1 hour and 40 minutes’ writing time.

1. What is a ratio decidendi? [2 marks]

2. Under what circumstance can a judge distinguish a case? [2 marks]

3. Distinguish between a binding precedent and a persuasive precedent. [4 marks]

4. Why is the principle of stare decisis essential to the operation of the doctrine of precedent? [4 marks]

5. A man who started his car so that a friend could drive him home lost his appeal in the Supreme Court. The man, found by police sitting behind the driver’s wheel with the engine running, had a blood alcohol concentration in excess of 0.05 per cent. He claimed he was not attempting to drive the car. The Supreme Court was asked to consider whether the phrase ‘start to drive’ was the same in meaning as ‘attempting to drive’. The court found that the words ‘start to drive’ mean ‘to cause the engine to fire’. As the man was sitting in the driver’s seat and starting the engine, he was ‘in charge of the vehicle’ within the meaning of the Road Safety Act 1986 (Vic.).

   a. Explain why a court may need to interpret legislation. [4 marks]
   b. Outline the process and sources of information that the Supreme Court judge would have used to interpret the Road Safety Act. [8 marks]

6. Describe the role of judges in relation to the common law and statute law. [8 marks]

7. Do judges make laws through the process of precedent and statutory interpretation? Justify your view. [8 marks]

8. Critically evaluate the arguments for and against the law-making role of judges in relation to common law. [10 marks]