General Mooting Manual

Macquarie University Law Society
General Mooting Competitions Manual

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Acknowledgments

The compilers of the Mooting Manual would like to acknowledge the following sources from which they have gathered information.

- The previous editions of the Macquarie University Law Society Mooting Manual, which were compiled by Danielle See, Edward Martin, Aaron Cornish, Teresa Chan, John Reid, Patrick Loffel, Polina Oussova, Alessandra Yen, Kathy Molla-Abbasi and Elysse Lloyd.s
- The Australian Law Students Association Mooting Competition Bank.
- Terry Gygar and Anthony Cassimatis (1997) Mooting Manual. Butterworths Publishers: Sydney.

FAQs

What do I wear?

For the preliminary rounds, smart casual is fine. For the final rounds, business attire is appropriate. Grand Finalists MUST wear business attire.

Where/ when are the rounds?

The rounds are usually held on weeknights and subject based moots intensively over a designated weekend. The locations are in the city campus of Macquarie University, and the Ryde Campus. Rounds run for approximately 2 hours. Please give yourself 15 to 20 minutes, at least, to set up for the moot.

What should I do to be prepared?

Attend the workshop, read the competition rules, judges' manual and marking guide, appeals and forfeiture policy as well as this mooting manual. When you receive the question, sit down with your team, work out who the speakers are, start researching, write your submissions, send them by 5pm the day before your competition round, and practise!

Where can I find competitions related materials?

All competitions related materials and information can be found at www.muls.org.

How will I be contacted?

We will email you numerous times per week, so please check your emails constantly. If you receive correspondence, please inform your teammates. We will send you the draw for the entire round, and it will tell you your location, round time and date, and opposing side. We will also send you the moot problem(s).

What can I take into the moot?

Written submissions, water, writing materials, laptop, stopwatch, and competition rules.

Will the rooms be set up?

You will have to set the room up yourself and unpack at the end (see below for diagram).

What if I cannot attend a round?

Please ensure you attend each round on time. If you are more than ten (10) minutes late, you will be deemed to have forfeited. If you cannot attend, please notify the competitions officers as soon as possible (so as not to risk being banned from further rounds or competitions). If there is an emergency, please let us know so we can contact the opposing team and the judge(s). If you cannot attend a scheduled please notify us in advance so that we may reschedule your round, but only if resources permit it.

Who do I contact?

In the first instance, the competition coordinator, at either:

compsadvocacy@muls.org

compsadvocacy1@muls.org

You may also contact the Director of Competitions at:

competitions@muls.org

Who are the judges?

Student judges, barristers, solicitors and academics.

Who to Contact

If you have any questions or queries at all about the mooting competition feel free to contact Competitions Department:

MULS Competitions (Advocacy) Officers:

compsadvocacy@muls.org

compsadvocacy1@muls.org

MULS Director (Competitions)

competitions@muls.org

Where to find us

The MULS office is located on the ground floor of the Law Building, W3A 332.

Where to find the Mooting Rules

All rules for Championship and subject based moots are available from the MULS website at www.muls.org.

Competition Locations

Macquarie University (North Ryde Campus)

Rounds held at the North Ryde Macquarie University Campus will be in the Trevor Martin Moot Court on the ground floor W3A, the Blackshield Room on Level 6 and other rooms as may be required.

You can access this location by catching a train to Macquarie University, or driving. If you decide to drive, the most convenient car park is the X car park. You can access the X car park at the end of Link Road off Culloden Road, or turn left from the beginning of University Avenue.

Access is restricted after 6pm. If you are judging or competing in a late round, you will need to ensure that someone inside the office lets you in. For more information and for a campus map, go to:
http://www.ofm.mq.edu.au/maps_campus.htm.

Introduction

What is a Moot?

A moot is a simulated appeal case to a superior court, based on a fictitious fact pattern and judgment of a lower court. Students appear as barristers before a mock judge or a mock panel of judges, to argue the law. As the moot is an appeal, the focus is not on adducing evidence, but on the law. There are no witnesses in a moot, as the facts have already been decided. The issue within the moot is instead whether the law was interpreted and applied correctly in the judgment from the lower court. Mooting tests many different practical legal skills and is one of the largest and most prestigious competitions that MULS has to offer. Finalists are lucky enough to present in front of actual members of the Judiciary and legal practitioners!

Within a moot, there are two teams pitted against each other. One team acts for the appellant (the party bringing the appeal) and the other acts for the respondent (the party responding to the appeal). Each team consists of two barristers: a Senior Counsel and a Junior Counsel. Teams are also allowed up to two solicitors, who act as research assistants. Teams are supplied with a set of undisputed facts, from which a range of appeal issues will arise. Students present these legal arguments both in their written submissions and their oral submissions to the judge or the judging panel, who then decide what team won in regards to the law and what team mooted the problem the best.

Why moot?

Mooting is a fantastic way for students to develop a variety of practical legal skills that are not only essential to a law student's education but to all legal practitioners, as well as other professionals. These skills not only include legal research skills and oral advocacy skills, responding to and rebutting the submissions raised by the opposing side, but most important of all, the ability to formulate a persuasive legal argument.

Students do not only gain many great skills and graduate capabilities, but also gain valuable legal knowledge that will definitely prove to be advantageous come exam time! As many exam questions will be hypothetically based, a moot is in essence a practice exam question in an array of different subject areas.

Mooting will not only help you improve your results your practical skills but also gives many graduates an advantage over non-competitors in the employment market. Employers realise the benefits that students can gain from mooting,

but also appreciate the hard work and dedication that students put into competing, and they understand how these are essential qualities to have in an employee.

Excluding all of these practical examples of the benefits of mooting, it is also just a really good way to get involved in your university, make new friends (or potentially create some friendly rivalries!) and to have fun. Students are also given the opportunity to travel domestically and internationally to compete in all different types of moots through our external competitions. These can be some of the most rewarding opportunities as well as being lots of fun!

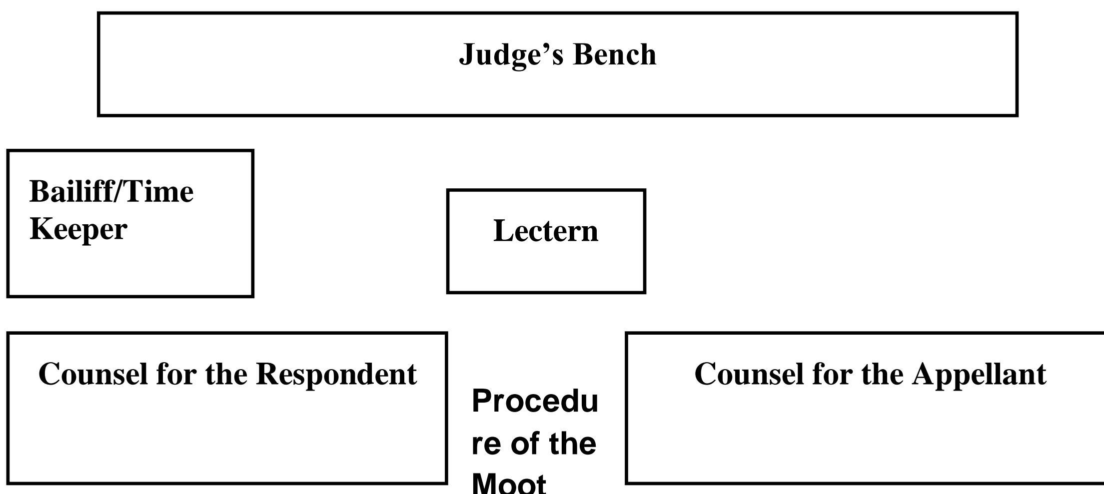
The Procedures of Mooting and Courtroom Etiquette

Why is mooting so formal?

Despite the fact that the moot is a mock appeal, it is extremely formal in structure and competitors must adhere to the same etiquette as they would if they were presenting in a real courtroom. Although many of the preliminary rounds are heard in front of student judges or people within the Law School, finalists will be presenting in front of prominent legal professionals, including members of the judiciary. It is therefore important to establish good habits from the beginning, as it may not seem important to remember the formalities when presenting in front of a peer; however, prominent members of the judiciary and members of the legal community expect and deserve respect the same level of respect that they would receive from barristers presenting before them in reality.

Physical Layout of a Moot Court

Although some moot courts may be arranged slightly differently, generally the layout will be as below, as it is in the Trevor Martin Moot Court located in W3A. The appellant must always sit on the Judge's left and the respondent must always sit on the Judge's right. In preliminary rounds, the judge may be the one timing the moot, and therefore there may always not be a timekeeper. There can also be different configurations of the lectern from which the competitors will speak. Here is a diagram from the mooter's perspective of the courtroom:



Procedure of the Moot

1. The Bailiff stands and states: "Silence. All stand."

2. The judge or judging panel will enter the room.

3. The Bailiff will then announce: “The court is now in session. The Honourable Judge X presiding in the matter of A v B.”

4. The judge bows before sitting and *all* those in the courtroom (including spectators) must bow and then sit. Some judges may specifically inform you of when to sit down, but in the absence of such a statement the general rule is to bow then sit, making sure that you do not sit down before the judge.

5. The Judge will then ask for “Appearances.” This is where the Senior Counsel for both sides will introduce themselves and their Junior Counsel. The Senior Counsel for the Appellant will stand first and say: “May it please the Court, my name is X and I appear on behalf of the Appellant in this matter with my learned Junior Y.”

6. The Senior Counsel for the Respondent then stands and says: “May it please the Court; my name is ______and I appear on behalf of the Respondent in this matter with my learned Junior _________.”

7. The way in which you state your name is up to you, i.e. “May it please the court my name is Smith/Mr Smith/Jane Smith etc”. You may also choose whether to refer to your teammate as your “Junior Counsel” or “Co-Counsel”.

8. After the Appearance, the judge will call on the Senior Counsel for the Appellant to present their oral submission. The Counsel for the Appellant then has 30 minutes between both Senior and Junior Barristers to present their team’s submissions. This time can be divided between the two barristers in any way the teams choose, as long as each barrister speaks for at least 10 minutes and they write these time divisions in their written submissions. However, generally teams will divide the time evenly, allowing each team member to speak for 15 minutes each. During the submissions only the judge is allowed to interrupt Counsel to ask questions. No comments or objections by the other side are permitted in an appeal case.

9. If Counsel exceeds the given time limit, an extension of time may be granted if it is requested when their time has expired. Even if counsel is in mid sentence he/she should stop and request an extension of time. Counsel should simply state: “Your Honour, I see that I am out of time; might I have a few moments to finish this submission.” Generally the judge will allow the extension and may indicate a time, e.g. one minute.

Counsel should complete their submission as quickly as possible once an extension of time has been granted.

10. Following the Appellant's submissions the judge will ask for the submissions of the Respondent and the same process as in 6 and 7 will be repeated.

11. After the Respondents have presented, the Appellants may request a right of reply. This is where the Appellants are able to respond to the submissions made by the respondent. No new material can be introduced, as this is generally an opportunity for the Appellant to correct any mistakes in fact or in law made by the Respondents. The right of reply can be presented by either Counsel and will be for a maximum of 2 minutes.

12. The Respondent may also have a right of reply, if the judge chooses to grant this privilege. The Respondent may only respond to the submissions made within the Appellant's right of reply.

13. After the replies, the judge or the panel will leave the courtroom to deliberate. The same formalities that apply to the judge entering the room again apply to the judge leaving the room. The Bailiff will instruct everyone to stand. The judge will stand and bow. Following this, everyone in the court will bow and the judge will leave the room.

14. Once the judge has made their decision, the judge will enter the room again to deliver the court's decision and the winner of the moot. The same formalities apply again, with students needing to stand, bow, and then sit after the judge has been seated. Once the judge has delivered their decision and adjudication, the moot is finished!

Courtroom Etiquette

Dress

Although mooting is the most prestigious of MULS Competitions, we would like you to feel the most comfortable as you can in the preliminary rounds. This means that you do not have to dress up! However, if you feel that you would be "in the zone" by wearing your sports jacket or Mary Jane shoes then go right ahead!

For all finals, we ask that students dress up in business attire, as this is when we will be asking more prestigious members of the legal community to adjudicate.

Punctuality and Non-Attendance

It is essential to arrive to your moot at least 15 to 20 minutes early! This will give you the opportunity to calm your nerves, and go over any last minute alterations with your team before the moot commences. It is extremely unprofessional to be late for your moot, as it would be to show up late to a real court appearance. No matter whether it is a student judge or a judge of the High Court, you should respect them by arriving early as they have taken time out of their busy schedule to adjudicate your moot!

If you are unable to attend your moot for whatever reason, you need to let either the Competitions (Advocacy) Officer or the Director (Competitions) know as soon as possible. If MULS Competitions are going to continue and increase the numbers of legal professionals involved in adjudicating Competitions, then we do not want to be cancelling on them at the last minute. For the full policy for forfeitures please see the rules above.

Modes of Speaking

Mooting has a unique way of speaking, different from debating or public speaking, as it is based on courtroom etiquette, and is supposed to reflect the formal presentation of a legal argument through the interaction between the bench and counsel. Therefore, mooters should not be overly emotional or enthusiastic when speaking, as they are speaking to members of the judiciary. Judges are to be addressed with respect, and their questions must be answered in the proper manner with correct courtroom procedure.

Mooting is also very different to a speech and instead should be thought of as a formal conversation between the bench and counsel. Mooters should be prepared to be interrupted, and therefore need to be flexible, so that the judge may test the strength of your argument. Although this may seem disconcerting, it is merely an opportunity for mooters to demonstrate the strength of their submissions through oral discourse.

It is important to ensure that you do not use any colloquialisms, abbreviations or improper language when addressing the bench. Although you may be nervous, you need to address the bench correctly. Saying things such as “Sorry,” “Um,” “Gonna,” “Okay” can be seen as offensive to judges and so it is a good thing to remove them from your mooting vocabulary so that you are as formal as possible.

Here is a table of common mooting phrases that illustrate proper courtroom etiquette and references.

Phrase	How to use it	Use instead of

“May it Please the Court”	A polite introductory phrase used at the beginning of submissions, in between submissions and at the conclusion of the oral submissions.	“Um”; “Ladies and Gentlemen”; “Good Afternoon” etc.
“Your Honour”	To address a judge.	“Sir”; “Madam”; “You”
“My learned friend”	To refer to the opposing counsel, e.g. “My learned friend suggested that there was no duty of care. However, we submit . . .”	“My opponent”; “The opposition”; “him/her”; “he/she”; “my colleague”; “John/Jenny”.
“My learned senior/junior” or **“My learned Co-Counsel”**	To refer to your co-counsel.	“My colleague”; “John/Jenny” etc.
“We submit”	To introduce any submission, point or argument, e.g. “We submit that Mr. Smith breached his duty of care.” **N.B.** Do not say “counsel submits.”	“I/We think”; “I/We feel”; “I/We believe”; “I/We would argue.”
“I cannot assist the court on that matter”	Where you do not know an answer to a question. **N.B.** Use sparingly if at all, it is your role to be prepared to answer the court’s questions!	“I don’t know”; “I’m not sure”; “um….”
“I will now turn to my first/next submission”	To introduce a new submission	“My first point is...”; “the first/next thing I wish to say is...”
“With respect your Honour”	To correct the bench or disagree with them, e.g. “with respect your Honour, that is not correct/not our submission.”	“I disagree”; “You’re wrong.”
“If I could be heard for a moment longer...”	Where the judge is pressing you to move on but you are not ready to do so or you have not finished your submission), e.g. “your Honour, if I could be heard for a moment longer on the point of breach of duty, we submit...”	“I need to finish my point”; “I have not finished”
“If your Honour is content to accept that without further submission”	Where a judge agrees with the submission and does not need to hear more, e.g. “If your Honour is content to accept without further submission that there was a	“Okay, if your Honour is happy with that, then...”; “Um, ok then.”

	breach of duty, then I will now turn to my submission on causation.”	
“I withdraw that”	To retract an incorrect statement, e.g. “your Honour, in that case the High Court held – I withdraw that – the Court of Appeal held...”	“Oops...”; “Sorry”; “Can I take that back”; any swear words etc.
“I don’t press that point”	A graceful way of making a concession, after the judge has revealed weaknesses in your argument, e.g. “your Honour, I don’t press that, but I would move to my alternative submission which is...” N.B. If the point is essential to your case, you cannot concede this point!	“Oh well, when you put it that way . . .”; “Don’t worry about that point, your Honour.”
“I embrace/adopt that”	Where you agree with a comment the judge has just made, e.g. Q. “It seems to me that she fails on a ‘but for’ analysis”; A. “I adopt what your Honour says and this is why we submit the ‘normative’ test should be rejected.”	“I agree”; “That’s right, your Honour”.

Case Citations

One difficult aspect of oral pleadings is the case citations. For example, many students would logically think to read a civil case such as, *Cole v Whitfield* (1988) 165 CLR 360, as “Cole versus Whitfield.” Although this is how cases are pronounced in the US, Australian and English civil cases pronounce the “v” as “and.” This is because early English cases were written as “Between X v Y,” causing for the v to be pronounced as and. Therefore the correct case citation would be “Cole and Whitfield.”

Case citations for criminal cases are completely different. For example, the criminal case of *R v Ireland* (1970) 126 CLR 321, is supposed to be read as “The Queen against Ireland” or “The Crown against Ireland.” The *R* indicated that it is a criminal law case, and stands for the Queen or the Crown. Students can say *R* as either the Queen or the Crown; however, be aware that some earlier cases would have been decided under a King and not a Queen.

Civil cases – “v” is read as “and”
Criminal cases – “v” is read as “against”

Citing Judges

When reading cases, judges will be written as Kirby J or as Gleeson CJ. They should be referred as such in your written submission, unless the sentence begins with the judge's name. Then students would write, "Justice Kirby stated at . . ." instead of "Kirby J stated at . . ."

When there is more than one justice it should always be written as, for example, Gummow and Hayne JJ, instead of Gummow J and Hayne J.

Although these are accepted legal abbreviations for written submissions and legal writings, they should *never* be read aloud as such. Kirby J should always be read as "Justice Kirby" and Gleeson CJ should always read as "Chief Justice Gleeson," as opposed to "Kirby Jay" and "Gleeson CeeJay."

Legal abbreviations and titles for English judges differ considerably from Australian judges. In England, there are two classes of judges, the most senior of which are appointed to the House of Lords. There is generally no abbreviation for these judges and are always referred to in full, for example, Lord Atkin. The second class of judges are appointed to the Court of Appeal and act as Lord Justice of Appeal. They will be read as Lord Justice Denning, for example, and will be abbreviated to Denning LJ in writing.

For a full list of judicial officers and their accepted legal abbreviations, see the *Australian Guide to Legal Citation,* at page 56.

Courtroom Manners

When your opponents are presenting their argument, try to be as respectful as possible. You should listen in a respectful silence and ensure you pay attention to them whilst they are speaking, so that you can comment to the bench on the points that they raise. It is best to avoid making loud noises, such as loudly ruffling papers, even if you are in dire need of a case note you made late last night! If you need to make notes, or communicate to your partner by discreetly whispering, so that you can prepare your own submission, do so respectfully and without drawing attention to yourself. Refrain from making any suggestive gestures in response to your opponent's submissions, as you are always in view of the bench!

Approaching the Moot

Approaching the Problem

It all begins with the facts of the case. Every moot is based in the facts of the case, and these facts will tell you everything that you need to know. Mooting is not merely about legal arguments, but how authorities and legal arguments apply to the facts of the case in hand. Therefore, it is important to know exactly what the facts of the moot problem are. As a moot is arguing points of law at an appellate level, it will be easy to identify the legal issues and the applicable law from the lower court's judgment.

It is important to read the problem thoroughly, with an open mind frame. Although the law may favour the opposing team, this does not mean you have lost already, as there will always be legal arguments for counsel to submit. When reading the facts, it may be helpful to create a chronology or flowchart of events to help break down the facts of the moot question. Once you have identified the facts, identify which are more persuasive to your side, and how these may fit into a legal argument. It is important to identify the weaknesses in your case, as you this is where you will be questioned by the judges. Once you have done this you should determine what team member is researching what issue, and then begin.

Approaching Case Law

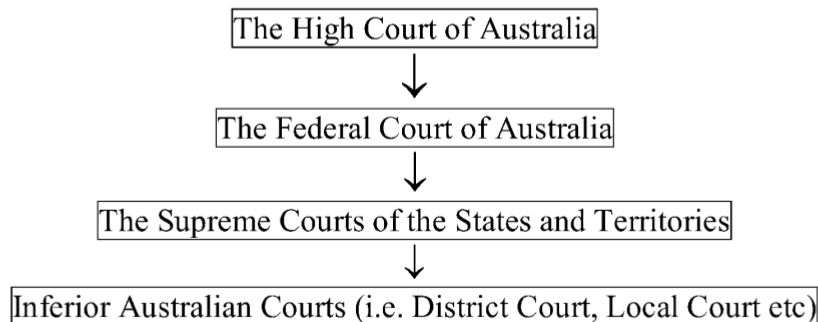
The most important authority within mooting is case law. The appeal judges are required to consider the way that the lower court judges have interpreted and applied the law. Therefore, your job as counsel is to present the information to the court and suggest how it should or can be used.

To use case law, it is important to understand the doctrine of precedent. The doctrine of precedent and the hierarchical court system determines whether the case is **binding** or **persuasive** upon the court you are presenting in. This difference is crucial, as it will determine whether the court must follow an argument, or whether the court has discretion whether to follow the decision or to take a different direction. Decisions will be binding if they are within a higher court within Australia. Decisions are persuasive if they were decided in a lower court, a court of similar standing (such as a Supreme Court of another state), or a court of another country (such as the US, Canada, England or New Zealand). Decisions from a similar legal system, such as the English system, will also have more weight than decisions from a different legal system, such as the US. It is also important to note that the High Court is not bound by any prior decision, even if it is a previous High Court decision. Even so, the

doctrine of precedent is extremely influential, and the court will not depart from earlier decisions without good reason.

The goal of researching a moot is to find the most recent and influential decision to support your case.

A simplified Australian court hierarchy will be as follows:



Reading Case Materials

Once you have found relevant cases, you often find that the report of the case is divided into sections. At the beginning there will generally be a “head note” that briefly outlines the key facts and the decision. Following this will be the written judgments, either joint or individual judgments, from the judges that heard the case. It is important to distinguish whether it was a unanimous decision, or whether there were any dissenting opinions. Although the majority decision is the decision of the court, dissenting judgments can be used as persuasive material before the court. It is important to realise that although there may be a majority decision, they may have come to that decision with different reasoning within their individual judgments. This is important to realise when using the case in your moot.

Having said all that, the *best* way to read a case is to read it thoroughly from beginning to end. This way you shall be able to see the common thread that will join different individual judgments into one majority decision. Also, you will often find some sections will be more relevant than others; however, sometimes these sections require a second reading, just in case they are relevant!

A warning to all mooters: do not take shortcuts when reading cases! A secondary source, such as a textbook, will never be as good as reading the case thoroughly and carefully yourself. This is especially important for seminal cases, where the judges will know when you do not fully comprehend something.

Important Terms

Ratio decidendi – means the reasons for the decision. The ratio is therefore anything that is said by the judge within a judgment that is indispensable to the reasoning for the decision. This reasoning is what is binding on subsequent courts. In a case where there are multiple judgments, which follow different reasoning to reach the final decision there may not be a clear ratio.

Obiter dictum – means a remark in passing. This is any statement that is not used within the reasoning for the final decision. Unlike ratio, obiter statements are not binding on subsequent courts, but they can be used as persuasive material. Obiter statements are often made on issues not directly relevant to the decision. They often begin with phrases such as "although consideration of this question is not necessary" or they may be presented as a hypothetical.

Using Cases with Similar Fact Patterns

When reading different cases, it can be useful to attempt to find cases that have a similar fact pattern to your mooting questions. Sometimes mooting questions will be written with a specific case in mind, and therefore will have a similar fact pattern to a real case. The best way to use these cases is to show that way the judges applied that law to that case is still relevant to the mooting problem at hand. It is important to ensure that you are using the application of the law, and not simply saying that it is has similar facts, as the judge's are interested in the application of the law.

Distinguishing Cases

Although you can use cases with similar fact patterns, generally one should not dwell too much on differences between the fact scenario between the moot question and the authorities you find. Many judgments will consider how the law applies generally, as opposed to a specific factual scenario. General statements of the law by judges are what may be the most useful within a moot, as they are not specific to a set of facts.

However, cases that can be distinguished in law or in fact can still be used. To do so, you must show the court that the previous case was so different to the current factual scenario that the case is of no relevance to the current matter. Another way is to say that although there are similar facts, the law that was applied within the previous case is not applicable to the facts of the case at hand. This is an extremely useful tool for a mooter to use to avoid a precedent that may be harmful to your case. Remember though that the court may not accept your attempts to distinguish the case, so always have a backup plan!

Other ways to avoid settled precedents – public policy argument

You may not be able to distinguish the case in fact or in law, but you may be able to argue that due to changes within the social circumstances the precedent no longer should apply. This is what is referred to as the public policy argument. To make this argument, you must prove to the court that the decision in the previous case was made in reliance upon a different social standard than is in practice today. Although this is a good argument in certain cases, it will definitely not always apply, but situations in which it will apply will be clear. Perhaps the most famous example was the decision in *Mabo v Queensland* (1992) 175 CLR 1 where Brennan J stated at page 42: “Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.”

The use of precedents in mooting grey areas of law

It is important to realise when researching a moot that, more often than not there will not be any binding precedent to directly support your argument. This is generally because moot questions are based on grey areas of law, and therefore there are no direct precedents for you to rely on, only persuasive materials. It is important to remember that your role as an advocate is to convince the court that the authorities you rely on are the most relevant and that they, as opposed to the authorities of your opponents, should be applied to the facts.

Use of legislation

The moots that you will be exposed to at Macquarie will be primarily based on case law. Legislation will not be a necessary consideration unless the question expressly states otherwise. However, some moots do involve the interpretation of a particular section of legislation, such as constitutional law moots. Try not to get sidetracked by spending too much time looking at legislation unless the question requires you to do so.

Legal Research

Researching the Problem

It is important when researching a moot to start with an open mind and to work from the more general to the more specific. Remember to try and use all the facilities that are available to you, including textbooks, annotated legislation, scholarly articles, case law and online materials. Have a look around on www.lib.mq.edu.au to have a better understanding of the resources available at Macquarie.

Textbooks and Encyclopaedias as starting points

Begin by reading a legal encyclopaedia or textbook on the area of law. It is important to find the most recent text for this, as older texts may have become obsolete. This will help you understand the general principles of the law, and point you in the direction of the seminal cases and legislation in this area. Also remember that you do not have to read the entire textbook but simply the relevant section. Although they are useful, textbooks can only ever be used as a starting point, and cannot be used as an authority in court. The most important source that you have instead will be the cases that the textbooks direct you to.

To find textbooks, use the library catalogue, which is accessible from the library homepage. You can search for areas of law, such as **Contracts** under a **Subject Heading** search. This will direct you to numerous texts. Handy hint: look for the most recent publications, and the simplest titles, such as “Contract Law,” “Law of Contracts,” “Contracts: Cases and Commentaries,” “Australian Contract Law” etc.

Another approach – annotated legislation

If you want another approach to find cases in one particular area of law, look at the annotated legislation within that area. Although you will more often than not be able to use the legislation, annotated legislation is extremely useful. You generally can only use this in pieces of major legislation, such as the *Crimes Act 1900* (NSW), as other legislation will not have been annotated. An example of using this method is if your case is dealing with murder. What you would need to do would be to look at section 18 of the annotated legislation, and this would have all of the major cases that are seminal in interpreting that particular area of law.

Case Law

After you have read through the textbook and have an understanding of the areas of law, make a list of the cases that you need to read through and then you must go about finding them.

To find a case you will need the full reference of the case, for example *Cole v Whitfield* (1988) 165 CLR 360. The name of the case is followed by the year in brackets after which is the volume number, the reporter and the page number. *Cole v Whitfield* therefore was decided in (1988) and is reported in Volume 165 of the Commonwealth Law Reports, starting at pg.360. Not all references are the same as this though. Another type is *Donoghue v Stevenson* [1932] AC 562, a case you will either be very familiar with or will come to be familiar with. This is an English case and you will notice there is no volume number. Also the year is in square brackets instead of round. The square brackets indicate that the reporter the case is found in is catalogued by year not volume numbers. *Donoghue v Stevenson* was therefore decided in 1932 and is reported in the 1932 edition of the Appeals Cases at pg. 562.

After a while reading case references will become second nature. The only difficult thing may be learning the abbreviations. An easy way to get around this is to look them up on a legal abbreviation website e.g. http://guides.lib.monash.edu/content.php?pid=265196&sid=2189821

Using Databases to Find Cases

The Library subscribes to a number of legal databases, which can be accessed through the Library homepage. Choose the **Databases** option on the homepage. Next select the **Subject Area** option. A list of subject areas comes up. There are two alternatives at this point. Select **Law** to view the available legal databases, including:

- Austlii. (Can also be accessed at www.austlii.edu.au) – This is one of the most useful research tools as it contains full text copies of all Australian legislation, all High Court and Federal Court decisions as well as many decisions from State Supreme Courts.
- LexisNexis AU and CaseBase
- LexisNexis (US version)
- Firstpoint
- Legal Online
- LegalTrac
- Westlaw international
- CCH Online and more.

NB: not all of these will be helpful for every moot. They are all useful research tools however they also contain much of the same information. Which one you

decide to use is really a matter of personal preference. It is advisable that you have a quick glance at each of them to decide which one works best for you.

To access these databases, all you need to do is click on the database you wish to view. It will then redirect you to a page to enter your Username and Password. Your username is your student number and the password is the one as your Student Portal password. This will allow you access to anything that the Library has subscribed to.

The most useful database that you will use will be ***CaseBase*** when researching a moot. CaseBase allows you to search for materials using various categories. You can search with key words or legal concepts but there is also a facility to allow you to search using a specific case name. This allows you to see if there are subsequent decisions relating to that case and if there are any relevant journal articles, which may be useful to help you understand the decision in the case.

Once on CaseBase, you will find certain options for your search, including:

- Case or Article Name
- Words & phrases
- Catchwords
- Court
- Legislation Judicially Considered

An example search:

Case or Article Name search: Mabo v Queensland

Results in 12 articles/cases relevant to this case name – brings up all the times a case of this name is heard

Choose Mabo v Queensland (No.2) (1992) 175 CLR 1 (The High Court decision)

This bring will up a screen that will outline the following in the case:

- Subsequent consideration of this case,
- Journal articles dealing with this case,
- Legislation considered,
- and more.

Written Submissions

What is a written submission?

Within a moot, students are required to submit short written memorandums to the judge and the opposing team, which outline the structure of the arguments and the cases or authorities that their arguments will be relying on. Written submissions allow for a skeleton argument for students to outline the direction of their argument. This is done to allow the judges and your opposition to have time to consider and examine the general arguments you will be making before you have been presented them to the court. You are expected to follow your written submission as closely as possible when making your presentation to the Court.

Competitors must send their written submissions in soft copy to the Competitions (Advocacy) Officer (compsadvocacy@muls.org) and the opposing team by **5pm** the day before the moot. Students will receive an email before the moot, which will provide the email addresses of the opposite team. When students send the email to the opposite team, they must send to the Competitions (Advocacy) Officer in the same email, so that they can send this onto the judges.

As the competition is held in the evening, this gives each team a day to do any final research to combat any unexpected arguments that are included within the written submissions. It will also allow judges to understand the arguments before so that they have an idea of what they will be challenging. The judge or the judging panel pose many of their questions to attack the validity of the arguments presented, and therefore play Devil's Advocate to find flaws in the legal arguments submitted. Therefore the written submissions play an important role in outlining the basic arguments of law, whereas the oral submissions gives the opportunity for the students to understand and submit the nuanced and complicated arguments of law to a judge.

Written submissions should include:

- The title of the case and the side you are appearing for,
- Names of Counsel – Senior and Junior Barristers and the time for which each will be speaking. You should also include the name of the instructing solicitor.
- A brief statement of facts – no longer than half a page
- The questions presented. Outline the major questions that must be resolved by the court – usually only 2 or 3 questions are at issue in any moot
- Arguments and relevant authorities is a sample submission on page 37 of

this manual.

NB: Note this is only an indication of the format that your submissions should take and it will obviously change depending on the points of law you are presenting. This submission is also shorter than most as it only deals with two appeal grounds.

Divide up the issues

One of the most difficult tasks in moot preparation can be dividing up the problem into two logically distinct sections. Sometimes the grounds of appeal allow an easy division of the problem. For example, Senior Counsel takes the causation issue and Junior Counsel takes the damages issue. How logically and clearly you divide up the problem will affect how easily the judge follow your submissions.

Try not to divide the issues between Senior and Junior Counsel prematurely. It is usually best to do at least some preliminary research together, so that both counsel have a basic idea of the issues to be covered by the other speaker. The more research and preparation that is done together, the easier it will be to decide upon a logical division of issues between Senior and Junior Counsel.

Structure of the arguments

Make it as clear as possible – space it out to make for easy reading, you want the judge to be able to understand exactly what you will be attempting to prove. Clearly state the point you are submitting to the Court and then list the authorities that you will be using to support this submission. The format of individual submissions may differ, however, it is best to use a simple formula, stating each submission point by point, starting with your strongest argument. For example:

1. It is submitted that the judge was incorrect in his direction on the issue of assumption of care.
2. It is submitted that the judge failed to correctly or sufficiently direct the jury on the issue of causation.

Under each of these points you may have sub-points that pertain to that particular argument. Following this you must list the relevant authorities supporting this argument. For example:

1. It is submitted that the judge was incorrect in his direction on the issue of assumption of care.

1.1 The test for the assumption of care is......
1.2 It is submitted that the direction of the judge in relation to this test was insufficient
Nydam v R [1977] VR 430
R v Taktak (1988) 14 NSWLR 226
R v Hallett [1969] SASR 141

Authorities

While you may have used secondary sources to aid your research, these sources are not authorities that are recognised by the court. Rather, you should use these sources simply to guide you to cases which will provide the authority for your arguments. As such you should not cite textbooks as authority in your submissions or in court.

Be cautious of listing too many authorities. While it is good to have a large body of law supporting your submissions, make sure you know the details of the cases you list and how they relate to your submission. It is helpful to make small case summaries of each case you are seeking to rely on. These will include the facts of the case, what court it was heard in and a brief description of the Court's findings. It is most impressive if the latter can be summarized with a quote from the majority judgment.

Oral Submissions

Duty to the Court

As an advocate of the court you have a duty to assist the judge and conduct yourself in an honest and respectful manner. As such you have a duty to present all relevant information to the court even where it may be damaging to your case. The skill of advocacy is to convince the court that such information is irrelevant or unhelpful in the present case. Remember your only job as an advocate is to persuade the judge to accept your argument and rule in favour of your client.

Use of a speech

Mooting is not about reading a speech but rather about a dialogue with the Bench. Thus counsel is not giving a speech but creating a dialogue with the Bench. As such there is no need for you to prepare a speech. Indeed a prepared speech is often more of a hindrance than a help. Once the Bench questions you it is difficult to resume a prepared speech. A better system is to work from points as it is easier to return to a point after a question, than to a particular position in a prepared speech. A good system is to have a detailed set of points you are presenting, mark each once clearly so that you can easily move between points where necessary. One way to do this is to have each appeal ground on a separate piece of paper. Under no circumstances should you have palm cards, these are far too difficult to use in a sufficiently flexible manner.

Summary of facts

It is polite, particularly for the Appellants, to offer the bench a summary of the facts in the case. The Bench will generally decline, however, if you make this offer then it makes the bench aware of the fact that you know you are there to aid them in any way you can. A summary of facts should be as brief as possible, highlighting the most relevant facts. Do not read out the facts verbatim. If the bench declines be sure not to summarize the facts anyway as this indicates to them that you are not listening. If the Appellants have offered the facts to the bench there is no need for the Respondents to offer them also.

Outlining the argument – Allocation

Senior Counsel for both sides should always allocate the submissions. That is outline which grounds of appeal they will be dealing with and which grounds the Junior Counsel will address. This makes it clear to the bench who will address each submission and will hopefully avoid then asking questions of you that should ideally be directed to your Junior. Allocation should be at the

beginning of your submission, following the summary of facts. It should take no longer than 30 seconds. For example:

> "May it please the court I will be dealing with points one and two of our submissions, that is that the Respondent owed the Appellant a duty of care and secondly that he breached this duty of care by failing to provide adequate supervision. My learned Junior will address points three and four of our submissions namely that the harm suffered by the Appellant was caused by the Respondent's breach and that this harm was reasonably foreseeable."

Don't make any attempt to argue your submissions when you are outlining them otherwise the judge may ask you questions at this stage. You want to ensure that all the formalities are satisfied before you give the bench an opportunity to question you.

The Junior Counsel can also start their submission with an allocation, in a sense they can allocate to themselves. While this is not necessary it does achieve a number of things. It solves the problem of how to start your submission and it makes the bench aware of exactly what you will be dealing with. For example:

> "May it please the Court I will continue the submission for the Appellant by dealing with points three and four of our submission; that is, the harm suffered by X was caused by the Respondent's breach and that this harm was reasonably foreseeable."

Oral Submissions

There are as many styles of mooting as there are mooters. The key stylistic points to note are to speak slowly and simply, to maintain eye contact with the judge, not to fidget during your speech, and, as much as possible, try not to be flustered when you are interrogated by the bench.

Your oral submission should generally follow a similar structure to your written submission. This ensures that the judge is easily able to follow your oral submissions. Work through your submissions points in you presentation. You will be questioned and at times it may feel as though you are not controlling your submission. Be sure to regain control where possible. Also be flexible if a judge questions you on your second or third submission move directly to that submission. For example if you have just been asked a question regarding causation and your second submission relates directly to that issue offer to move to that submission.

> “Your Honour if I might move to my second submission which deals with that issue, namely that the injury suffered by the Appellant was caused by the Respondent....”

Questions from the bench are often an indication of what they consider to be most important to the case therefore try to read the bench in this way. If they ask about an issue that you are dealing with at a later stage it is a good indication that they want to hear you submission on this issue now rather than later.

It is always difficult to end your submissions, particularly if you have been fielding questions from the bench for the last 10 minutes and you no longer feel in control of the submission. If you have finished your submission, don’t just sit down. There are a number of ways to finish your submission. Two ways are: Simply “May it please the Court” Or “If there are no further questions your honours”, to which they will hopefully respond in the negative, and you may sit down. You could also do both. These are not the only ways, but at all costs avoid Americanisms, for example, “the Appellant rests”.

Questions from the bench

The answering of questions from the Bench is the biggest test for mooters and often a thought that strikes fear into the heart of mooters. What will they ask me? What if I can’t answer? However, questions from the Bench are not something to be feared. Indeed, they can be very helpful in developing your case. The best way to approach this is to remember that your role as an advocate is to aid the Court and, consequently, many of the questions they will ask are designed to help them clarify the issues of the case. Try not to get flustered when asked a question by the bench. If necessary, pause before you answer. This is not a sign of weakness but rather indicates that you are considering the question just posed to you. Also, whenever possible, respond to questions by immediately referring to an authority. This gives your answer more weight before the court. However, be sure to apply the authority to which you refer to the present case. It is also not enough to refer to the facts of the present case as an authoritative answer to a question, unless of course the question was about the facts of the case. Remember that questions from the Bench are not always intended to trap you but may be designed to help.

Some important things to remember:

- You can ask the Judge to repeat or rephrase the question if you are unsure of what they mean.
- Always give an honest answer and acknowledge where the difficulties in your case lie.
- Always try to refer to authority in your answer.

- As a **last resort** you can confer with your team. To do this ask permission from the Bench – e.g. "Your Honour, may I please confer with counsel?"
- This should not be done frequently as it indicates a lack of preparation.
- If you don't know the answer to a question and you think any answer you try to give would be dishonest you can respond by saying "I apologise your Honour but I am unable to assist the court on that matter at this time." Again, try to avoid this but it is sometimes better than fumbling around for an answer you are never going to find.

Use of quoting

When using an authority you may quote a judge, however, make sure it is strictly relevant to your submission and be sure to refer the quote directly to the facts of the present case. Don't use a series of quotes and then refer them to the present case as this reduces the effect of a good quote. Don't quote for the sake of quoting.

Knowing the facts – Case Notes

One of the most standard questions a judge will pose to a mooter is – What are the facts of that case? If you are relying on a particular case then the judge will often ask you if you know the facts. This is a question designed to ensure that you have read

the case and can apply it correctly. If you know the facts of a case you can answer a question about them immediately which looks extremely impressive. However there is no need for a detailed set of facts in this situation, as long the circumstances of the case are clear.

A good way to ensure that you know the facts and the important principles of a case is to write brief case notes for the major cases you are relying on. These need not be any longer than half a page. Generally a case note of this nature will include:

- The full name and citation of the case
- A summary of the facts
- A summary of the judgment – either judge by judge or majority judgment only
- Important principles of law, which may be summarized by a relevant quote

The right of reply

Finally, the Appellant has a right of reply. There is no requirement that you take this right, it is a RIGHT. Only use it if you really need to, that is if you have some information that specifically counters what the respondents have said.

Do NOT use it as an opportunity to summarize your case. If you do this it will put the bench off side. They know what you have said they don’t need or even want to hear it again. The ideal reply has one or two points. These will be short and need to be, wherever possible, supported by authority. Never speak for longer than five minutes, and you should ideally limit your reply to two minutes. There is nothing wrong with waiving a right of reply and this can often be a sign of confidence, as you are effectively saying to the bench that you do not consider that the Respondents have said anything which damages your case.

Sample Moot Question

This question was used in the Grand Final for Junior Mooting in 2010.

New South Wales
Court of Appeal

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

2010/92819

IN THE MATTER OF

ERNEST HENRY DOTAGE, AS EXECUTOR IN THE ESTATE OF MAISY DOTAGE

V

WRINKLETOWN PTY LTD t/a HALFWAY TO HEAVEN

STATEMENT OF AGREED FACTS

1. The Appellant, Ernest Dotage, is the executor under the will of the late Maisy Ellen Dotage, who died in 2004 whilst a resident of the “Halfway to Heaven” Nursing Home run as a commercial enterprise by the Respondents, Wrinkletown Pty Ltd. Following her death, the solicitors administering her estate discovered that the vast majority of Maisy’s estate, which consisted of some $450,000 in a savings account with the Commonplace Bank, was missing. Police investigations led to a Mrs. Serena Todd, a former nursing assistant at the Nursing Home, who, in 2005, was jailed for five years for fraud as the result of her dishonest use of Maisy’s chequebook and bank card.

2. Maisy had suffered from dementia for the past few years of her life, and for the whole of the period during which Todd was able to misuse her bank documents. As a nursing assistant, Todd’s duties consisted of assisting Maisy with her everyday personal needs, providing her with daily company and supervising her meals at the Home. It was the Home’s policy that every resident should be allocated an assistant such as Todd, and its somewhat expensive fees were justified on the basis of the personal care and attention received by each resident under this policy.

3. During her police interview, Todd admitted that she had found it too tempting to be placed in such an advantageous position of authority in respect of an elderly and infirm patient with a sizeable sum of money in the bank, and had fallen prey to temptation when her husband became unemployed at the same time that she (Todd) required to undergo private cosmetic surgery. Having discovered how apparently easy it was to “get away with it”, she had continued to plunder Maisy’s bank account for a period of some eighteen months, although she denied having defrauded any other patient in the Home.

4. It was either proved or admitted during the subsequent civil action brought by the Appellant against the Respondent company that Todd had first begun as an employee under a fulltime contract of employment with the company, but that following several complaints from relatives of patients regarding the state of cleanliness of their loved ones, all of whom had been allocated to Todd, it had been decided to terminate Todd’s employment contract, and replace it with a “service contract” under which Todd was to be hired as a contractor to the Home on an hourly fee basis. It was further agreed that Todd would continue to wear

the Home's uniform whilst on duty, and would be supervised in her patient duties by the Senior Nurse on duty at any given time. Otherwise, there was no noticeable change in her working conditions, and even some of her colleagues at the Home remained unaware of the new arrangement, which the management had implemented on legal advice, "to absolve us from liability should anything go wrong again in the future" (the words used by the Respondent's CEO during cross-examination at trial).

5. It was further admitted during the trial by the Respondent's Human Resources Officer that part of the reason for not simply dismissing Todd outright at the time of the complaints was the difficulty in obtaining qualified and experienced staff in this area. All the acts of dishonesty committed by Todd occurred during this new "service contract period", as it was referred to during the trial. Todd's contract was eventually terminated completely once she was arrested and charged by the police.

The action in the court below

6. The causes of action at first instance were:

    a) Ernest Dotage, on behalf of the estate, sued the Respondent company for its negligence in allowing Todd to have such close access to his mother Maisy that she was able to dishonestly obtain so much of her savings, none of which has been recovered. It was argued on behalf of Dotage at the original trial of the matter that the Respondents were vicariously liable for Todd's actions, as she was either their servant or agent.
    b) Alternatively, it was argued that the Respondents owed a "non-delegable duty" to all residents under their charge and protection.

7. The Respondent counter-argued that it was not vicariously liable for Todd's actions, since she was neither an employee nor an agent, but simply an "independent contractor" at the time of her dishonesty. Alternatively, its counsel argued, Todd could not be said to have been acting in the course of the duties which she was hired to perform at the times when she took it upon herself to defraud Maisy. It further denied that it owed its residents a non- delegable duty of care.

The decision at first instance

8. At first instance, Chesterfield J, in the Supreme Court, dismissed Dotage's claim on the grounds that:

   a) Since Todd was not an employee of Wrinkletown at the time of her dishonesty (according to the test laid down by the High Court in *Hollis v Vabu* (2001) 207 CLR 21), and could not be described as acting as its "agent" at that time, the company was not vicariously liable for her actions.
   b) Even if Todd could be described as an "employee" or an "agent" at the relevant time, she was not acting within the course of her employment when she took it upon herself to behave dishonestly. Wrinkletown did not owe any "non-delegable duty" to its residents to ensure that they were not the victims of criminal behaviour by staff at the Home, following the decisions in *Burnie Port Authority v General Jones* (1994) 179 CLR 520 and *New South Wales v Lepore* (2003) 195 ALR 412. However, even if such a duty were owed, it did not cover non-physical injuries or loss.

The appeal

9. Dotage appeals to the New South Wales Court of Appeal, on the grounds that the learned trial judge:

   a) erred in holding that Todd was not an employee of Wrinkletown;
   b) erred in finding that even if Todd were an employee, she was acting outside the course of her employment when she stole from Maisy Dotage;
   c) erred in finding that Wrinkletown did not owe a non-delegable duty to its residents;
   d) erred in finding that even if such a non-delegable duty were owed, it did not cover non-physical injuries or loss.

Note to Competitors

- Arguments at the appeal must be restricted to the above grounds
- Arguments cannot be solely reliant upon legislation.
- The use of case law which discusses, refines, interprets and applies certain sections of appropriate legislation is permissible and expected in areas where legislation is dominant.
- Submissions must not exceed six pages
- Rules and procedure can be located on-line at www.muls.org

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL
2010/92819

IN THE MATTER OF
ERNEST HENRY DOTAGE, AS EXECUTOR IN THE ESTATE OF MAISY DOTAGE
v
WRINKLETOWN PTY LTD t/a HALFWAY TO HEAVEN

SUBMISSIONS OF THE APPELLANT

COUNSEL OF THE APPELLANT
Senior Counsel: *Name of Competitor*
Junior Counsel: *Name of Competitor*
Instructing Solicitors: *Name of Competitors*

STATEMENT OF AGREED FACTS

1. In 2004, upon the death of Ms. Maisy Dotage, it was discovered that the majority of her estate, which consisted of some $450,000," was missing. Ms. Dotage, who suffered from dementia, was a resident of "Halfway to Heaven, a nursing home ran by the commercial enterprise Wrinkletown Pty Ltd. Ms. Dotage was allocated nursing assistant Mrs. Serena Todd as her personal carer under the Home's policy of personal care and attention where each resident was allocated someone who would assist the resident with their everyday needs, provide them with daily company and supervise their meals. During police investigations Mrs. Todd admitted to defrauding Ms. Dotage over an 18 month period through the dishonest use of her cheque book and bank card.
2. It was revealed that Ms. Todd began working at the home as an employee under a full time contract of employment. After several complaints from families that their loved ones were receiving poor care and had a constant lack of cleanliness, Mrs. Todd's employment contract was terminated and replaced with a service contract. This contract allowed her to be hired as a supposed contractor to the Home, to be paid on an hourly basis. There were not any noticeable changes to her duties, as many of her colleagues were not aware of the new employment arrangement. Under this contract Mrs. Todd continued to

wear the homes uniform whilst on duty and was supervised by the Senior Nurse on duty at any given time.

3. It has been stated by the respondent's CEO, that this arrangement was implemented on legal advice "to absolve [Wrinkletown Pty Ltd] from liability should anything go wrong again in the future." It was also stated by the Respondent's Human Resources Officer that the reason why Todd was not dismissed at the time of the complaints was due to the apparent difficulty in obtaining qualified and experienced staff in the area. Furthermore this Officer stated that the fraudulent acts committed by Mrs. Todd occurred during the new service contract period. Mrs. Todd's contract was terminated when she was arrested and charged with fraud.
4. It was found by the trial judge that: firstly, Wrinkletown was not vicariously liable for the conduct of Mrs. Todd as she was not their employee, and she was not acting within her course of employment; secondly, that Wrinkletown owed no non-delegable duty to its residents to ensure they were not victims of criminal behavior by staff; and, thirdly, that even if such a duty existed, it did not cover non-physical damage or loss. Ernest Dotage, as the executor of Ms. Dotage's estate is appealing all of these findings.

MEMORANDUM OF COUNSEL FOR THE APPELLANT

Submission One: *Name of Competitor*

Wrinkletown Pty Ltd is vicariously liable for the fraudulent and negligent acts of Mrs. Serena Todd, as she can be deemed under law to be an employee, and the acts were within the course or scope of her employment.

1. To establish vicarious liability, an individual must be considered an **employee** and not an **independent contractor**.

    a. The fact that a company has called an individual an independent contractor, and not an employee, does not make them one: *Massey v Crown Life Insurance Company* (1978).[1]

    b. To establish what type of relationship there was between the parties, one must look at the **"totality of the relationship"** by examining the combination of certain *indicia* that determine the

[1] (1978) 1 WLR 676, .

nature of the contract: *Hollis v Vabu* (2001);[2] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986).[3]

i. Although the main test used in Australia is to apply the multiple factors to the facts, the **control test** is still important as an element of *indicia*. If the employer has the **right to exercise control,** then the individual can be deemed an employee, not an independent contractor: *Zuijs v Wirth Bros Pty Ltd* (1955);[4] *Humberstone v Northern Timber Mills* (1949);[5] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986).[6]

ii. The case of ***Hollis v Vabu* (2001)** establishes examples of *indicia* to be taken into consideration when determining the nature of a relationship. These *indicia* include: the ability of the individual to **freelance their labour**; the **control** that the employer or principal has over the manner of the individual's performance; the **presentation** of the individual to the public; policy interests in **deterrence of future harm**; the form of **payment**; the provision of **equipment**; and, the employer's or principal's **scope to exercise control** over the individual.[7] When applying these *indicia* to Mrs. Todd's circumstance she can be deemed an employee, not an independent contractor.

2. For an employer to be vicariously liable for an employee's negligent acts, these acts must be **within the course or scope of employment.**

   a. It must not be on a "frolic of his own": Joel v Morrison (1834).[8] It therefore must be **authorized by the employer,** or it must be an **"unlawful mode"[9]** of performing the act: *New South Wales v Lepore* (2003);[10] *Starks v RSM Security Pty Ltd* [2004].[11]

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[2] (2001) 207 CLR 21, [48]-[57].

[3] (1986) 160 CLR 16, 29.

[4] (1955) 93 CLR 561

[5] (1949) 79 CLR 389, 404-5.

[6] (1986) 160 CLR 16, 29

[7] (2001) 207 CLR 21, [48]-[57].

[8] (1832) 6 Car & P 502, 503.

[9] (2003) 195 ALR 412, [42].

[10] (2003) 195 ALR 412.

[11] [2004] NSWCA 351, [13].

i. Regardless of whether they are **dishonest acts**, to prove vicarious liability they simply must be **linked with the employee's duties or responsibilities:** *New South Wales v Lepore* (2003);[12] *Ffrench v* Sestili [2007];[13] Morris *v C W Martin & Sons Ltd* [1965];[14] *Deatons Pty Ltd v Flew* (1949);[15] *Lloyd v Grace, Smith & Co* [1912].[16]

ii. An act of **intentional wrongdoing or of criminal conduct** can be deemed within the course of employment: *New South Wales v Lepore* (2003);[17] *Morris v C W Martin & Sons Ltd*;[18] *Ffrench v Sestili* [2007];[19] *Dubai Aluminium Company Ltd v Salaam* [2003].[20]

iii. Under policy reasoning, an employer should be vicariously liable for a **risk** that they **create or exacerbate,** as long as it is in **close connection** with their scope of employment: *Bazley v Curry* [1999];[21] *New South Wales v Lepore* (2003).[22]

Submission two: *Name of Competitor*

Wrinkletown Pty Ltd owes its residents a non-delegable duty of care, due to the special nature of the relationship between themselves and residents. As this such a duty of care exits Wrinkletown cannot delegate their responsibility of care and as such will be held liable for the actions of their employee Mrs. Todd.

1. To establish the existence of a non delegable duty of care a **relationship of a special nature** must be shown to exist.

    a. There must be one party in a particularly **vulnerable position**, reliant on the other party: *Elliot v Bickerstaff* (1999);[23] *Burnie Port Authority v General Jones Pty Ltd* (1994).[24]

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12 (2003) ALR 412, [42], [51].
13 [2007] SASC 241, [72].
14 [1965] 2 All ER 725 at 738
15 (1949) 79 CLR 370, 378-80.
16 [1912] AC 716, 730.
17(2003) 195 ALR 412, [47].
18[1965] 2 All ER 725, 730.
19[2007] SASC 241, [72].
20[2003]1 All ER 97, [121].
21[1999] 2 SCR 534 at 557, 559.
22(2003) ALR 412, [65], [220].
23 (1999) 28 NSWLR 214, 240-1.
24 (1994) 179 CLR 520, 551.

b. There also must be an **imbalance of power**: *Commonwealth v Introvigne* (1982);[25] *New South Wales v Lepore* (2003);[26] *Northern Sandblasting v Harris* (1997).[27]

2. The duty arises from the fact that one party has “A responsibility to take reasonable care for the safety of another, or a **responsibility to see that reasonable care** is taken for the safety of another”: *New South Wales v Lepore* (2003).[28] The “duty arises because the person on whom it is imposed has undertaken the **care, supervision or control of the person or property** . . . and assumes a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised”: *Kondis v State Transport Authority* (1984);[29] *Northern Sandblasting v Harris* (1997).[30]

3. This duty is **not delegable** to another due to employment: *Fitzgerald v Hill* [2008];[31] *New South Wales v Lepore* (2003);[32] *Commonwealth v Introvigne* (1982).[33]

4. This duty extends to cover **non physical injuries and losses** and as such Wrinkletown will be held responsible for the fraud of Mrs. Todd: *Caltex Oil (Australia) Pty Ltd v Dredge “Willemstad”* (1976);[34] *Beaudesert Shire Council v Smith* (1966);[35] *Anns v Merton London Borough Council* (1978).[36]

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[25] (1982) 150 CLR 258.
[26] (2003) 195 ALR 412.
[27] (1997) 188 CLR 313.
[28] (2003) 195 ALR 412, [30].
[29] (1984) 154 CLR 672, 687.
[30] (1997) 188 CLR 313.
[31] [2008] QCA 283.
[32] (2003) 195 ALR 412.
[33] (1982) 150 CLR 258, 270-1.
[34] (1976) 136 CLR 529.
[35] (1966) 120 CLR 145.
[36] (1978) A.C. 728.