HYPOTHETICAL CASES AS A PEDAGOGICAL TOOL IN CONTRACT LAW STUDIES

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Abstract

The pedagogy that underpins the method of teaching from cases is eponymously known as 'the case-method' (or 'case-analysis'). First year law units, including contract law, are commonly taught by the case-method in Australia.

The case-method potentially causes difficulties because of first year law students' inability to harmonise the principles invoked in discrete topics of study as a coherent body of doctrine, and then to appraise their application to the facts of their legal problem. These difficulties are particularly conspicuous in contract law because topics in contract are taught in a customised sequence which invoke principles which first year law students find very difficult to assemble as a coherent whole.

We suggest that bespoke hypothetical judgments, specifically drafted to attract the analysis of doctrine studied in different lessons where recurring difficulties have been encountered, be adopted as a supplement to case-analysis. This method can be readily integrated within the contract law curriculum.

I Introduction

There are two central themes in this paper. The first theme is that the case-method is a logical way to teach fundamental legal doctrine yet is, at the same time, an inherently deficient method to teach its mastery as a coherent body of principle in contract law.[1] The second theme is that it might be a beneficial adjunct to the case method for the lecturer to create hypothetical cases, based on authentic legal doctrine, to address the deficiency of the case-method in teaching fundamental doctrine in contract law. A 'hypothetical case' for the purposes of our analysis, is a bespoke creation to confront such difficulties already identified by the lecturer beforehand. Our model comprises a fundamental judgement upon which we engraft 'alternative' scenarios for the students to consider, using the 'comments' function on a conventional 'Word' program, and finally, a commentary at the foot of the document addressing the legal issues enlivened by those alternative scenarios.

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1 It is not suggested that these comments are *not* relevant to other law units but that these shortcomings are less conspicuous than in contract law. So, in say, criminal law, modules are less interdependent. For example, offences are taught as discrete elements. By comparison, modules in first year contract law tend to be more interdependent and form part of the building blocks of an indivisible whole of the topic 'contract formation'. This short discussion is as much as this paper can conveniently cover of the situation with other law units.

In the next section below, we explore selected pedagogical aspects of legal education, especially the nuances of using the case-method in teaching contract law. The section thereafter is about *Hypothetical Cases: a Beneficial Variation to the Orthodoxy of Teaching and Learning Contract Law?* This is divided into three sub-parts: in the first, we identify the pedagogy which underpins the hypothetical case. In the second, we describe the practical steps to create a bespoke hypothetical case. In the third, we offer some suggestions as to the time and place for the application of our method. The end of the paper contains Appendices which contain a selection of hypothetical cases.

II Teaching Contract Law

A *The 'Case Method' or 'Case Analysis' Generally*

This paper is posited on the basis that law is learnt from cases, and so this requires us to explore carefully what it means to 'learn law from cases' in the first place. Although we nowadays have clinical courses for law students and most of us supplement law lessons with other material, the predominant mode of teaching law, especially in introductory classes, is case-analysis, a point which Professor Molly Townes O'Brien noted.[2] Professor Townes O'Brien described appellate decisions as: 'the meat and potatoes of legal education'.[3] First year law lecturers would likely agree. Whilst many lecturers do use other material, in particular lecture summaries and texts, most would still regard court decisions to be the staple diet (Professor Townes O'Brien's figurative 'meat and potatoes') of legal education.

The method of learning law from cases is historically attributed to Professor Columbus Langdell, dean of Harvard Law School in the 1870s, who believed that law should be studied as a science and that the process of dissecting a case was a scientific method similar to dissecting a mouse in a laboratory. Discussion via his 'case-method' by Socratic dialogue involved the student in this process and was an integral ingredient of it.[4] A specifically intended outcome of Langdellian case-analysis was that students should learn to 'harmonise' the outcomes of various cases. Professor Kuan-Chun Chang summarised and described this process and its objectives thus:

> [G]uided by the instructor, students learn how to dissemble a decision and analyse its component parts. Students also learn to relate one case to another, to harmonise the outcomes of *seemingly inconsistent cases so that they are made to stand together.*[5]

Professor Chang further elaborated that:

> A student must also learn to brief a case, to recognise what the important facts are, what the court decided and why. [I]n addition, the case-method facilitates students' skills to synthesise cases, fitting several together to explain what the law is. All these techniques are the foundations of becoming a lawyer.[6]

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2 Bethany Rubin Henderson 'Asking the Lost Question: What is the Purpose of Law School' (2003) 53 *Journal of Legal Education* 48, cited in Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37 (1) *Monash University Law Review* 43, 48.

3 O'Brien, above n 2.

4 Adapted substantially from Myron Moskovitz, 'Beyond the Case Method: It's Time to Teach with Problems' (1992) 42 *Journal of Legal Education* 241, 243; see also the introduction to Kuan-Chun Chang, 'The Teaching of Law in The United States: Studies on the Case and Socratic Methods in Comparison with Traditional Taiwanese Pedagogy' (2009) 4(2) *National Taiwan University Law Review* 1.

5 Chang, above n 4, 7 (emphasis added).

6 Chang, above n 4 citing Suzanne E Rowe, 'The Brick: Teaching Legal Analysis through the Case Method' (1998) 7 *Perspectives: Teaching Legal Research and Writing* 21 (emphasis added).

B *Particular Shortcomings of the Case-Method in its Application to Teaching Contract Law*

Subsequently, the failure of Langdellian case-analysis to achieve the specifically intended outcome of teaching students to synthesise cases so as to harmonise their outcomes, became an oft-quoted criticism of the method. Professor Byron Moskovitz here said as follows:

> Under the case-method, students were not only to derive the holdings from the cases but were critically to appraise the application of the legal principles involved, both to the given situation and *to other possible variant situations.* But we realise now that much of this theory of the case-method *has not in practice been realised.*[7]

Not all Australian law lecturers teach Socratically. The first author personally does so, but not all colleagues, even in the first author's own corridor, do. Nonetheless, as noted by Professor Townes O'Brien earlier, 'case-analysis' or 'the case-method', namely learning law from a study of cases, remains the figurative 'meat and potatoes' of legal education.[8] In analysing the benefits or otherwise of learning the law from cases, we thus need to quarantine the effects of Socratic dialogue from any discourse, of the shortcomings of case-analysis, given that Socratic dialogue was an integral component of Langdellian case-analysis.[9] This paper thus next discusses the pedagogy that underpins the idea of 'learning the law from cases' in that more restricted sense.

Professor Kuan-Chun Chang said that the 'main focus' of the case-method was on 'original sources of the law and on the methods of case-analysis and legal reasoning in case law.'[10] Professor Chang noted also that Professor Langdell had himself rationalised his method on the basis that the development of doctrine should be traced via the cases through which it evolved, and so the only way of mastering doctrine was by studying the cases in which it had evolved.[11] Further, that only a 'small portion' of cases reported were useful and necessary for the purposes of analysis, and so these would be the ones selected for study.[12]

Professor Scott Anderson provided the following broadly similar rationalisation of why one should learn the law from cases:

> The casebook method focuses on cases – judges' written interpretations of the legal authorities they used to decide concrete legal disputes. By reading these cases, the law student is shepherded into the fold of legal reasoners. The lesson is: as judges think, so you must think also. Law students learn to reason by ferreting out the rationales lurking within these cases. [13]

In exploring the idea that learning the law from cases was unsuited to an understanding of the application of the legal principles involved to 'other possible variant situations',[14] it is helpful in turn to digress to discuss cursorily some rudimentary aspects of judicial decision writing. Professor James Raymond of the University of Alabama suggests that judges should: 'begin their judgments with a story, that is, tell who did what to whom.'[15] Given that judgments,

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7 Moskovitz, above n 4, 245, quoting verbatim from the *Report of the Committee on Teaching and Examination Methods, Handbook of the Association of American Law Schools,* 85, 87 – 88 (emphasis added).

8 O'Brien, above n 2.

9 Chang, above n 4.

10 Chang, above n 4, 12.

11 Ibid.

12 Ibid.

13 Scott A Anderson 'A Novel Teaching Practice: Using Nonlegal Fiction to Instil Legal Values' 21 (2012) *Perspectives: Teaching Legal Research and Writing*, 28 (emphasis added).

14 Moskovitz, above n 4, 245, quoting verbatim from the *Report of the Committee on Teaching and Examination Methods, Handbook of the Association of American Law Schools,* 85, 87 – 88.

15 Professor James C Raymond 'The Architecture of Argument' (2004) 7 *The Judicial Review* 39, 50.

at least of superior courts, are intended to be available to the public, it makes sense for the reader to know what the underlying facts of the judgment were all about.

This being so, the obvious difficulty for our first-year student is that the court's discussion of doctrine would necessarily be confined to those principles which would be enlivened by the 'story' told by the judge. That restriction would mean that the discussion would provide limited guidance as to the application of those principles to situations which factually are at variance from that story, at least for a novice law student. This would arguably perhaps or inevitably result in one of the shortcomings said to arise from learning the law from cases, namely that the case-method presented a 'limited and inaccurate view of the law', and that it is thereby 'ill equipped' to teach students to deal with situations which are at variance from the facts in the case law.[16]

A related point is that it is the treatment of case law as being the primary source of doctrine for the purposes of legal education, rather than the Socratic examination of those cases, which is the case-method's primary failing. Professor Moskovitz opined that Langdellian case-analysis did turn out better lawyers, but this was because of 'interaction with a Socratic teacher' rather than learning law from cases as such, and that the case-method was 'ill equipped' to teach students to solve legal problems, and that it was 'not primarily designed to improve lawyering skills.'[17] He explained that this was because the problems that lawyers had to resolve had not been deconstructed into the 'short, coherent narratives' contained in cases.[18] Professor Chang similarly noted that by confining the study of cases to those which were considered to be 'fundamental' to the doctrine under consideration, the student would only perceive a 'limited and inaccurate view of the law'.[19]

The good Socratic teacher might thus, by a study of cases regarded as 'fundamental' to the doctrine under consideration, succeed in guiding students towards a relatively deep understanding of the principles *within* the module then being covered, and students might thereby learn how to harmonise those principles as a coherent body *within* that module. But even such a skilled Socratic teacher would likely struggle to teach students to harmonise the legal principles in the cases being studied in the module then being covered, with principles which are contained in cases *outside* that module.

The student could as a result, experience difficulty in identifying the rule of law which is properly applicable to facts which are at variance from the facts in the 'story' in the case-law. Thus analysed, it is the very pedagogy which underpins the selection of the cases for study, namely that they should be limited to those regarded as 'fundamental'[20] to a study of the module then being covered, which has itself caused or contributed to this shortcoming. The first author's experience in teaching contract law suggests that this shortcoming is particularly acute in contract law, because it is the contract law curriculum which has itself exacerbated it.

Experiences of teaching contract law indicates that the failure to *appraise the application of the legal principles involved, both to the given situation and to other possible variant situations*[21] typically becomes more perceptible when students are confronted with a problem that requires them to consider the application of principles taught within discrete topics of study, and to isolate from them the principle(s) which they consider applicable to their problem. Consistent with case-methodology, cases selected for study are confined to the ones considered

16 Chang above n 4, 17 citing Russell L. Weaver, 'Langdell's Legacy: Living with The Case Method' (1991) 36 *Villanova Law Review* 517.
17 Moskovitz, above n 4, 244.
18 Ibid 245.
19 Chang, above n 4, 17.
20 Ibid.
21 Moskovitz, above n 4.

to be 'fundamental' to the doctrine under consideration so that students would only perceive a *limited and inaccurate view of the law.*[22]

Let us explore this alleged shortcoming more deeply via a lesson which typically takes place close to the start of the semester, namely 'contract formation': Chapter 4 of *Gooley, Radan and Vickovich, Principles of Australian Contract Law*[23] is titled *The Fact of Agreement.* In that chapter, *Offer*[24] and *Acceptance*[25] are discretely covered, and *consideration* is addressed as a discrete topic in chapter six. Chapter three of *Cheshire and Fifoot*[26] is similarly structured, and is divided into: *Agreement – Offer and Acceptance. Consideration* is likewise subsequently addressed.[27] The order of treatment in *Carter – Contract Law in Australia*[28] is broadly similar.[29]

The sequence is logical. Acceptance must correspond with the offer[30] so that, until offer is understood, the concept of acceptance is meaningless. In turn, consideration must be 'bargained for'[31] so that without an understanding of 'bargain', the study of consideration is sterile. A problem question involving the creation of an agreement by offer and acceptance could attract scrutiny of the following principles: first, that a promise to keep an offer open is not binding unless supported by consideration;[32] second, that an offer if accepted whilst open becomes binding upon acceptance;[33] third, that an offer can be withdrawn at any time before acceptance;[34] and fourth, that acceptance of an offer is effective only when communicated.[35] The inability to harmonise these principles as a coherent whole and appraise their application to a problem, potentially causes confusion which is often expressed in the following puzzled enquiries:[36]

> If the offer can be withdrawn at any time, then how does that fit in with the fact that if it is accepted whilst the offer is open, a binding contract is formed? Why is it that a promise to keep an offer open must be supported by consideration, yet if it is accepted whilst it is open, a binding contract is formed?

The first hypothetical judgment in this paper's Appendix (*Shonky Pty. Ltd. v John Smith)*, was created specifically to confront this particular confusion. Once the law lecturer is conscious of these types of difficulties, it is quite easy to find more examples in lessons in first year contract; to illustrate the ease of this exercise, we will explore another example.[37] The principles

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22 Chang, above n 4, 17 (emphasis added).
23 J Gooley, P Radan & I Vickovich, *Principles of Australian Contract Law* (LexisNexis Australia, 3rd ed, 2014). This is the prescribed text in my own contract unit.
24 Ibid [4.9].
25 Ibid [4.74].
26 See generally, N C Seddon, RA Bigwood and MP Ellinghaus, *Cheshire and Fifoot Law of Contract* (LexisNexis Australia, 10th ed, 2012), Chapter Six.
27 Ibid.
28 JW Carter, *Contract Law In Australia* (LexisNexis Australia, 6th ed, 2013).
29 Ibid, Chapter Three, 'Formation of Contract' generally; 'Offer' [3-07]; 'Acceptance' [3-18]; Chapter Six 'Consideration.'
30 *Turner, Kempson & Co Pty Ltd v Camm* [1922] VLR 498. This is a 'standard' case and one likely to be studied by the student; see eg Gooley, Radan and Vickovich above n 23, 63.
31 See eg *R v Clarke* (1927) 40 CLR 227; *Australian Woollen Mills Pty Ltd v Commonwealth* (1953) 92 CLR 424, which is another standard case.
32 *Dickinson v Dodds* (1876) 2 ChD 463.
33 *Household Fire and Accident Insurance Co v Grant* (1879) LR 4 ExD 216.
34 *Routledge v Grant* (1828) 130 ER 920.
35 *Tinn v Hoffman* (1873) 29 LT 271.
36 These are actually minimally modified and paraphrased from authentic student responses.
37 These are just a few examples. Once you are looking out for these issues, you should find it quite easy to create your own cases, with a bit of imagination. Please email the author for more illustrations.

are fairly fundamental and would be known to a contract lecturer, so we hope that the somewhat incomplete treatment will nevertheless suffice to enable the reader to follow the reasoning. Consider the following facts:

> Adam has lost his dog. He attaches 'flyers' to lamp posts in his locality, offering a reward of $25 for anyone who finds his dog and brings it back to his home (and the flyer contains a detailed description of his dog and address). Janice sees the flier. Janice as it happens, is an acquaintance. Additionally, she happens to know Adam's dog and has seen it at a local park. She therefore telephones Adam and advises 'I know where your dog is. If you pay me $500.00 I promise to go and look for your dog and bring it back'. Adam agrees. Is Janice bound to 'go and look for' Adam's dog and bring it back*?*

The following is a relatively unretouched answer from a student in week two[38] of the first semester of law:

> No, Janice is not bound to look for Adam's dog. This is because Adam's offer led to a unilateral contract – see *Carlill*.[39] Applying the principles of a unilateral contract in *Carlill,* if Janice finds Adam's dog, Adam is bound to pay her the reward. But she is not bound to go and look for Adam's dog.

The answer is incorrect; as a result of studying 'offer' and 'acceptance' as discrete modules, a first-year student might commit the error of conflating the respective principles applicable to the creation of a bilateral contract, with executory obligations on the one hand, with the principles applicable to a unilateral contract on the other hand. This would explain the flawed response that as a result of applying the famous principles in *Carlill v Carbolic Smoke Ball Co,*[40] Adam's offer could have led to a unilateral contract. If so, then consistent with the principles in *Carlill*, Janice would not have been bound to do anything, but Adam would have been bound to pay the reward if she found his dog.

The likely explanation is that *Carlill* was transported to the forefront of the student's mind, as the question involved a 'reward' of some sort, as did *Carlill.* The student likely performed a piecemeal application of the principles in *Carlill* and thereby failed to harmonise the principles relating to an *offer* as a coherent whole, and to appraise the application of those principles to the problem. The correct answer is that Janice accepted Adam's offer. At that stage, a bilateral executory contract came into existence, as her promise to look for Adam's dog was supported by consideration, namely Adam's promise to pay her the reward. Leaving aside the complications concerning enforcement and damages and whether specific performance would be available, and based only on first principles of contract law, Janice is contractually bound to look for Adam's dog.

II Hypothetical Cases: A Beneficial Variation to the Orthodoxy of Teaching and Learning Contract Law?

A *The Pedagogy of the Hypothetical Case*

The discussion of the pedagogy here is intended to provide us with practical guidance for the creation of our model of the hypothetical case as covered in the next part of this paper. From the first author's personal experience, the use of hypothetical cases is uncommon, a fact which

38 This is consistent with the conventional program of study, with *offer* and *acceptance* typically covered in the first two weeks.

39 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

40 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

Professor Scott Burnham of Montana School of Law also noted.[41] Unsurprisingly then, there is a limited amount of literature on the topic. Professor Burnham suggested that an author should cut and paste parts of real opinions, then rewrite and embellish those parts with language that serves the author's educational objectives.[42] Professor Burnham also said:

> As the authors of one casebook lament, 'judges rarely write opinions with the needs of law students uppermost in their minds … some professors have remedied this problem by constructing hypothetical cases complete with hypothetical judgments for instructional purposes… Of course, our hypothetical is usually a variation on the facts of an actual case. *How much more efficient the process is when the judges say exactly what we want them to say for the purposes of analysis and synthesis.* [43]

Professor Burnham's commentary serves as a useful launchpad in the search for the pedagogical underpinnings of our model. 'Synthesise', by definition, means *to combine so as to form a new, complex product.*[44] Our model was designed to assist students assemble a coherent body of applicable principle from the content of case law. This process literally is synonymous with 'synthesis' and our model thus shares this same fundamental objective as Professor Burnham's. Professor Burnham's suggestion to cut and paste from a real judgement and embellish those portions to make more efficient the process of analysis and synthesis,[45] points to the fact that his particular model, was likely created with the aim of simplifying the process of extracting the essence of doctrine from case law.[46]

This paper has already introduced the idea that knowing how to extract legal principles from a case is an essential lawyering skill.[47] Professor Moskovitz, though a staunch proponent of problem-based learning,[48] nevertheless accepted that *case-analysis is part and parcel of the problem method.*[49] The authors respectfully agrees with Professor Moskovitz. Our model is thus dissimilar to Professor Burnham's because, although ours does refer to the content of doctrine, it is not *nuanced* toward providing an *explanation* of doctrine. Rather, our model was created to provide a template to analyse discrete principles to demonstrate how to construct a coherent body of principles from them, and to assist with the appraisal of their application to the facts of the problem. Our model is not designed to simplify the process of case-analysis but contemplates – in fact demands, that we apply it. A preliminary understanding, at least of doctrine, gained by case-analysis, is thus needed, before the student can follow the reasoning in our model.

In the continuing search for our model's pedagogy, the authors consider if our model should be classified as problem-based learning. 'Problem-based learning' ('PBL') is characterised

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41 Scott J Burnham 'The Hypothetical Case in the Classroom' (1987) *Journal of Legal Education* 405. He was talking about using the method to teach *doctrine,* since using hypothetical cases to teach *skills* is very common. Consider M. Sanson & T. Anthony, *Connecting with Law* (Oxford University Press, 3rd ed, 2014) uses a hypothetical case involving an insurer to teach ratio and obiter dicta, and another called Lottie v Lottie to teach how to write a case-note. C. Turner and J. Boylan-Kemp, Unlocking Legal Learning, (Hodder Education, United Kingdom, 3rd ed, 2012) uses hypothetical cases to teach stare decisis. K. Laster, Law as Culture (Federation Press, 2nd ed, 2001) discusses Regina v Ojibway, a well-known fictional case, to illustrate the absurdity of legal logic.

42 Burnham, above n 41, 408.

43 Burnham, above n 41, 405 (emphasis added).

44 Sourced from *The Free Dictionary* <www.thefreedictionary.com/synthesize>.

45 Burnham, above n 41.

46 Or, to use an awful, hackneyed colloquialism, to *dumb it down*. I have inserted it in footnotes – and reluctantly as I loathe the expression, but people seem to understand it well!

47 Above nn 10, 13 and 14.

48 As evident from the title of his work – Moskovitz, above n 4.

49 Moskovitz, above n 4, 262.

by the presentation of a problem as the start of the learning process and the organisation of learning processes in response to those problems.[50] Some primary characteristics of PBL are the presentation of a problem as a simulation of a real-life problem,[51] and to support the development of abstract thinking and critical thinking.[52]

Our model cannot be characterised as PBL, as the information in it is presented entirely within the text of the fictional judgement, and thus would not invoke a process of abstract or independent thinking. The 'alternative' scenarios in the 'comments' loosely do create 'problems'. In our model, students will however continue to learn the content of basic doctrine via the case method. Our model is designed to be adopted only *after* the content of fundamental doctrine has been introduced, and further, does not have the characteristics of abstract or critical thinking which characterises PBL, as the resolution of the hypothetical problems that they raise require the application of clearly defined doctrine from several stark choices. Our model accordingly does not have the characteristics of PBL.

Since the word 'hypothetical' does appear within the name of our model, this paper now turns to the pedagogy of the hypothetical to explore if it shares its pedagogy, which Professor George Raitt described as follows:

> The most common method of teaching that I have used in training law graduates in-house is the hypothetical case study. More effective than simple problem-solving, it involves *identifying options and both creating and evaluating choices*.[53]

The choices of the applicable doctrine in our model are: not 'open', do not 'test the indeterminancy' of legal analysis, and do not require the reader to 'create and evaluate choices'.[54] They are starkly expressed statements of principle and require the student to select the rule that is applicable to their problem. Knowledge of doctrine is needed, but the process does not invoke the creation and evaluation of choices, as the choices are set out at the outset.

One of the alleged shortcomings of Langdellian case-analysis was its failure to achieve its intended outcome of enabling students to 'harmonise the outcomes of seemingly inconsistent cases so that they are made to stand together.'[55] The 'alternatives' in our model represent a specific attempt to overcome that shortcoming. It however does not do so via the same pedagogies as the various problem-solving methods, or the hypothetical.

Ultimately, the pedagogy of our model can best be described as being an adjunct to case-analysis, as it supplements but does not displace case-analysis. Professor Chang, whose useful work has been cited in some detail earlier,[56] would likely regard our model as being a pedagogy 'influenced' by the case-method[57]and we respectfully adopt his description.

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50 C E Eng '*Problem-based learning – educational tool or philosophy'* University of Newcastle, Australia <http://www.tp.edu.sg,> citing D Boud, *Problem-Based Learning in Education for the Professions* (HERDSA, 1985).

51 D Boud & G Feletti, *The Challenge of Problem Based Learning* (Kogan) Page Ltd, 2nd ed, 1997, p 2.

52 J. Mackinnon, 'Problem-based Learning and New Zealand Legal Education' [2006] 3 *Web Journal of Current Legal Issues* < http://webjcli.ncl.ac.uk/2006/issue3/mackinnon3.html> (emphasis added).

53 George Raitt, 'Preparing Law Students for Legal Practice: Or how I learned to stop worrying and embrace uncertainty' (2012) 37 (4) *Alternative Law Journal* 264, 267 (emphasis added).

54 Ibid.

55 Chang, above n 4.

56 Ibid.

57 Ibid.

B *The Practical Steps Explained*

Since our model is created for the specific objective of helping first-year law students overcome difficulties which have arisen because of their inability to recognise and apply contractual principles covered in separate topics of study, the first substantive step is to actually identify such difficulties. This paper refers to the illustrations above which have tried to show what this means.[58]

Having done so, one needs to give some thought to the physical anatomy of the fictional judgement. Professor James Raymond of Alabama University suggests there is a 'seven step recipe' in writing a judgment.[59] Whilst perfection in judgment writing is not the intended outcome of our model, there are three steps in Professor Raymond's recipe which should usefully be adopted for our purposes:

- First identify the issues.[60] This informs the reader of what our 'judge' is directing his or her mind to.
- Second, prepare an analysis which identifies the 'flaw in the losing party's position'. There is actually a dedicated acronym for this type of analysis, namely 'FLOPP'![61] A FLOPP analysis enables the reader to work out why a particular argument was rejected which is nothing more than an inherent aspect of the process by which the reader would ultimately appraise the application of principle to the problem.
- Third, set out a 'conclusion'. This is critical because the model to be useful obviously must identify the 'winning' argument.

We also suggest that our hypothetical case be written in language that *approximates* judicial language – accepting that judges do express themselves differently. The justification for doing so is found in the rationale that underpins the casebook method, namely that students should thereby be 'shepherded into the fold of legal reasoners' and that 'as judges think, so you must think also.[62]

If adroitly drafted in the sense of approximating the language and technique that an authentic judicial officer might have applied, our hypothetical judgment *should*, like the real judgments on which they are based, demonstrate just how judges go about the process of applying the law (and policy) to the facts before them.[63] The student then comes closer to an understanding of the application of the doctrine. This is an acknowledgement of the justification for learning law from cases in the first place, namely that the student should thereby become 'shepherded into the fold of legal reasoners'.[64]

Next, we consider the creation of the 'alternative' factual situations in the 'comments'. Recapping that these were created to invite a legal consideration of alternative facts, and are designed to overcome a recognised shortcoming of the case-method of being ill-equipped to train students to apply doctrine to fact scenarios which vary from facts in case-law.[65] To create these alternative scenarios, it is suggested to dabble with the facts in the original scenario, rather like the way one chooses one's adventure using a technique popular in contemporary fiction![66]

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58 See the cases the subject of Appendices A, B and C.
59 J C Raymond "The Architecture of Argument' (2004) 7 *The Judicial Review* 39, 42.
60 Ibid.
61 Ibid 44.
62 Anderson, above n 13.
63 Brenda Midson 'Teaching Causation in Criminal Law: Learning to Think Like Policy Analysts' 20 *Legal Education Review* 109.
64 Anderson, above n 13.
65 Ibid.
66 Source <https://en.wikipedia.org/wiki/Choose_Your_Own_Adventure>.

Finally, our model incorporates a 'commentary', containing suggested resolutions to the questions posed in the 'alternative' scenarios. This is an integral aspect of the reinforcement of the learning cycle; in our model, the authors suggest that the document incorporating the entirety of the judgment 'alternative' scenarios and associated commentary, be made available to students before class for in-class Socratic discussion in the lecture (not tute). The next part discusses the reasons for this suggestion.

C *The Pedagogical Home of the Method – Where and How?*

The authors suggest that in-class Socratic discussion is the most appropriate time and place for the model to be discussed. The process of conducting in-class Socratic discussion of the hypothetical case essentially brings our model full circle to the original Langdellian model of case-analysis with which it shares its pedagogical underpinnings, including the idea that interaction with a Socratic teacher should 'turn out better lawyers'.[67]

The template of our model, in its present incarnation at least, is nuanced towards this mode of delivery. Attention in this regard is drawn to the fact that the 'alternative' scenarios and the commentary to them, do not contain the full doctrinally complete explanations to the problems posed. This is because consistent with the pedagogy which underpins our model, it is not intended to *replace* case analysis nor to simplify that process, but rather to assist students harmonise the principles associated with discrete modules, so as to facilitate their understanding as a *coherent* body.[68]

The authors also suggest that the fact that the 'commentary' to the 'alternative' scenarios is already given to the students before class, should not detract from the usefulness of the subsequent in-class Socratic discussion of the same. The commentaries in our own examples, as will be noted from the examples in the Appendix, were drafted in fairly general and loose terms. Consistent with the underpinnings of the method, including in particular the assumption that students would beforehand have at least familiarised themselves with the broad doctrinal content of the applicable principles, expressing the 'alternatives' and their associated commentary in this more rudimentary way, would continue to pose a challenge even to those students who have at least familiarised themselves with the associated doctrine, such that Socratic discussion of their content should reinforce their ability to harmonise the associated principles as a coherent whole.

The idea is that the method be offered for in-class Socratic discussion is admittedly nuanced towards the first author's own teaching methods (the first author teaches Socratically). This paper suggests briefly, that the model can nevertheless quite readily be adapted to other modes of delivery, although the means by which this can be achieved cannot be conveniently explored in an article this size. Simply as food for thought, for the benefit of colleagues who do not teach Socratically, a variation of the method might be to offer the fundamental template, inclusive of the 'alternative' scenarios, but *sans* the associated commentary – and to direct the students to provide responses to the 'alternative' scenarios as an exercise and thereafter to provide the associated commentary as a sample answer. A more comprehensive answer, than the fairly succinct content of our own model, might be needed if this method is adopted, to give the students adequate guidance, as Socratic discussion of the alternative scenarios would not have taken place in this model.

III Conclusion

PBL cannot easily be engrafted within the parameters of the extant legal studies curriculum, as noted by Professor Paul Maharg, whose online blog refers in some detail, to the efforts by

67 Moskovitz, above n 4, 244.

68 This is the central theme in Part II 1A above, generally.

his team at the Australian National University, to implement a problem-based JD.[69] Professor Maharg said:

> It's been a huge team effort over a number of years (to implement the program) and that these efforts were made necessary amongst other things by having to: [d]esign the arcs of problem narratives…whilst attending to the regulatory demands of Priestley, the CALD guidelines and much else.[70]

Empirical evidence is presently absent to support the claim that the methods described here will in truth lead to enhanced learning outcomes, and presently at least, the authors cannot point to any such evidence. It is likely that the reason for the absence of such evidence is the very paucity of its use, a point already noted by Professor Burnham.[71] Our argument that the method will enhance the achievement of learning outcomes in contract law is presently posited on two propositions: *first*, our own knowledge of the difficulties that first-year law students frequently confront as a result of the organisation of the contract law curriculum, and *second*, the expectation that a competent contract law lecturer, with more or less the same experience and familiarity with the curriculum as the authors, will likely recognise the same difficulties that we did, and appreciate that the creation of a bespoke hypothetical case might assist their resolution. Whilst first year law students will differ in their levels of experience and legal knowledge, our argument is posited on the expectation that, by and large, the Australian contract law curriculum is relatively ubiquitous, and that Australian first year contract students will likely face common difficulties.

Finally, regarding the time and effort that it might take to create a typical hypothetical case, the authors noted the time that it took to create Appendix C (*Hoon v Speedy*), which was around three hours. The time taken to create the other examples was not noted, but reconstructing events as best as possible, it probably took a little less time, perhaps closer to two hours for each as *Hoon* covered more areas of controversy. That said, the physical process of drafting the case itself was never the most challenging part of the exercise. Rather, the challenge is in actually identifying the troublesome modules of study where the lecturer feels students might be assisted by the creation of a bespoke hypothetical case.

In turn, the process of identifying these areas of difficulty essentially takes place over a period of years, and is a function both of a lecturer's experience, as well as the responses of their students over that time. The nature of the exercise is that it cannot readily be quantified in terms of a discrete apportionment of time or effort. It is hoped that an opportunity will arise to conduct a more formal evaluation of the method, perhaps as early as next semester 2018 – and if such an opportunity does arise, the outcomes of this evaluation will certainly be shared. Some hypothetical cases have already been prepared with a view to road-testing them in the next semester for this purpose.

Appendix A

Shonky Pty. Ltd. v John Smith – [2016] Timbuktu Law Reports 300.

JUDGE NERVY

Shonky Pty. Ltd, the plaintiff in this action, is in the business of selling computers. *Shonky* sold a quantity of computers to the defendant, John Smith, for the sum of $20,000.00. The defendant – let's call him 'John' – at the urging of his wife, Mary, declined to pay the invoiced amount,

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69 Paul Maharg, 'Our online PBL JD at ANU College of Law: A Personal History' (31 May 2016) <http://paulmaharg.com/2016/05/31/our-online-pbl-jd-at-anu-college-of-law-a-personal-history/ >.

70 Ibid.

71 Burnham, above n 41, 405.

alleging defects in workmanship and negligence. John and Shonky and their solicitors attended a mediation shortly before the scheduled trial. Mary did not attend.

The mediation lasted a day. Mentally and physically exhausted, John offered to settle the action on the basis of a payment of $18,000.00, being a paltry $2,000.00 less than Shonky's entire claim of $20,000.00. *Shonky* did not then accept, but hoping to 'squeeze' a bit more out of John, went through the motions of 'reluctantly considering their position'. John ultimately agreed to keep his offer open for 10 days whilst *Shonky* considered it. The mediation terminated then.

Mary was very unhappy when related these events by John and felt that he had been 'railroaded' by *Shonky*. She urged John to instruct his solicitors to immediately withdraw his offer to pay $18,000.00 and to advise *Shonky*'s solicitors as such. The following crucial telephone conversation took place the next day between John's and *Shonky*'s solicitors, who simply for convenience are referenced by their respective clients' names:

John: "Good morning, *Shonky*, listen, the offer we made yesterday is withdrawn."

Shonky: "Are you nuts? Where did you get your law degree from? Woolies? That dopey client of yours was going to keep his offer open for 10 days. There are 9 days to go. I will put you out of your suspense. I've taken instructions. Your client's offer to pay mine $18,000.00 is accepted. As far as we're concerned, we've got a deal."

The fundamental issue is whether a binding contract came into existence. The competing propositions are: for *John*, that his offer was withdrawn prior to acceptance; for *Shonky*, that acceptance took place whilst John's offer was open with the result that there is a binding contract that John was to pay $18,000.00 to *Shonky*. The relevant legal principles are:

- A promise to keep an offer open is not binding unless supported by consideration – *Dickinson v Dodds* (1876) 2 ChD 463;
- An offer, if accepted whilst it remains open becomes binding upon acceptance: *Household Fire and Accident Insurance (Ltd.) v Grant* (1879) LR 4 ExD 216;
- An offer can be withdrawn at any time before it is accepted; *Routledge v Grant* (1828) 130 ER 920; and
- Acceptance of an offer is effective only when communicated: *Tinn v Hoffman* (1873) 29 LT 271.

Here, the facts are that John's promise to keep his offer open for 10 days was gratuitous. *Shonky* actually did not suggest that John's promise was supported by consideration, but argued simply that John had promised to keep it open for ten days, and that it was accepted during that time, so that, consistent with the principles in *Household*, a binding contract came into existence.

Shonky's argument is incorrect. John's offer was withdrawn before acceptance, and as the promise to keep it open was not supported by consideration, no agreement could come about by Shonky's purported acceptance. Consistent with the principles in *Tinn*, acceptance could only have been effective when communicated, and here, *Shonky*'s purported communication took place only when John's offer had already been withdrawn. Judgment should be entered for the defendant.

Comment

Alternative 1: consistent with *Dickinson*, the result of John's agreement to *Shonky*'s suggestion that he should be given an IPad if he promised to keep his offer open for 10 days is that the promise to keep the offer open is now supported by consideration. John cannot now withdraw the offer and a binding contract would be formed by *Shonky*'s acceptance.

Alternative 2: In this instance, the offer has not in fact *been* withdrawn, although in the absence of consideration to support the promise to keep the offer open, John *could* have withdrawn the offer. *Shonky* however, beat him to the draw, albeit by the proverbial split second – literally – with the result that a binding contract resulted.

Appendix B

The following principles are again de rigueur in early contract law studies, and part of classic contract theory.

First, one of several definitions of 'consideration' is that it is a right or profit accruing to the promisor, or a forbearance, loss or detriment suffered by the promisee.[72] Second, the payment of part of a debt or to promise to do so, does not amount to good consideration to support a promise to discharge the whole debt.[73] Third, the right to litigate is regarded as something of value.[74] First year law students not infrequently get the wrong end of the stick by simply confusing the roles respectively of the promisor and promisee, which would then lead to confusion as to the identification of the party which would need to support the promise of the other by furnishing consideration, as a result of which a totally incoherent answer might result.

An experienced practitioner is unlikely to have difficulty; therein lies part of the problem; the first-year student, confused, and frustrated by their inability to understand fundamental concepts, might just discontinue their studies before much longer. The difficulties are easier explained by illustration, as appears in the following hypothetical case which has been created to identify and confront these difficulties. The scenario involves one party 'settling' a claim with another and the principles are so trite that the very fact that students could even be confused might surprise some lecturers. But this does happen.

You will see that our fictional judge there has to confront the difficulty caused by the fact that one of the parties (*Slipshod*) has quite erroneously (and irrationally) put their argument on the basis that the other (*Gullible*) cannot resist its claim because the other has promised to pay a lesser sum and that the promise to pay a lesser sum cannot be good consideration to support a promise to pay the whole debt. Putting ourselves in the shoes of our novice first year student, they have failed to understand that it is not *Gullible* who is trying to compel *Slipshod* to keep its promise to accept a smaller sum to discharge the whole of the debt. Rather, it is *Slipshod* who is trying to compel *Gullible* to pay a sum of money and therefore it is *Slipshod* who would need to show that the promise to pay that sum is supported by consideration.

Slipshod v Gullible – [2015] Blackstump Law Reports 201.

JUDGE SHAKY

Daniel *Slipshod*, the plaintiff in this action, who we will call '*Slipshod*', is an accountant. The defendant, Victor *Gullible*, is, or rather was, his client (the relationship ceased not long after the events in question). We will call him '*Gullible*'.

Slipshod claims that he was engaged to prepare *Gullible*'s 2016 tax returns, for which he rendered an account of $10,000.00. There was evidence given at trial, which I accept, that *Slipshod* did not lift a proverbial finger to prepare *Gullible*'s tax returns, and did no more than to take instructions from him. The evidence suggested that Slipshod had simply forgotten to prepare *Gullible*'s tax returns. Nevertheless, *Slipshod* belligerently and persistently harassed *Gullible* for payment.

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72 *Balfour v Balfour* [1919] 2 KB 571.
73 *Pinnel's Case* (1602) 77 ER 237.
74 *Wigan v Edwards* (1973) 1 ALR 497.

The crucial events arise from a brief meeting in which Slipshod claimed that *Look, I can take you to court, but just to save us both the trouble, if you pay me $8,500.00 we will call it quits. All I need to do is produce my invoice and you will lose if we go to court.*

Gullible protested that *why should I pay you anything for doing nothing* but his protests fell on deaf ears. Rather foolishly, as he himself candidly conceded, *Gullible* agreed to pay *Slipshod* the sum of $8,500.00. Somewhat belatedly, although perhaps better late than never, *Gullible* sought legal advice, and as a consequence of such advice, has now declined to pay *Slipshod* the sum of $8,500.00 or any part of it.

The contentions of the parties can be starkly put: *Slipshod* contends that *Gullible* owes him the sum of $10,000.00 but remains prepared to accept $8,500.00. He contends that as *Gullible* is 'indebted' to him in the amount of $10,000.00 the promise to pay less does not discharge the obligation to pay the full $10,000.00 but nonetheless is prepared '*as I am a generous soul, and I want to let bygones be bygones*' to accept the sum of $8,500.00 in lieu of the invoiced sum of $10,000.00.

Slipshod accordingly sues for the sum of $8.500.00 and argues that *Gullible* cannot resist the payment of the same as the promise to reduce the claim is unsupported by consideration on his (*Slipshod*'s) part. *Gullible* contends that *Slipshod* never did any work, and obviously knew full well he did not do any work, and consequently that *Slipshod* never had the right to recover the sum of $10,000.00 or any part of it. He argues that as a consequence he is not bound to pay the sum of $8,500.00 or any sum and would resist any action to recover that, or any sum at all.

First, I will set out the propositions of law, which are fundamental indeed, but a misunderstanding of them has now led to much fruitless waste of everyone's time, particularly mine.

Consideration can be some right or profit accruing to the promisor, or a forbearance, loss or detriment suffered by the promisee – *Balfour v Balfour* [1919] 2 KB 571. The payment of part of a debt or to promise to do so, does not amount to good consideration to support a promise to discharge the whole debt, that being the primary contention advanced by *Slipshod*. The proposition is both trite and fundamental – see *Pinnel's Case* (1602) 77 ER 237, a classic case in contract. Finally the right to litigate is regarded as something of value. Thus, if A 'settles' an action on the basis that A agrees not to sue B if B pays A some money, less than the amount allegedly 'owed' by B, A provides consideration to support the promise to pay him those monies provided that A ever had a genuine belief that he would succeed at the end of the day against B in the first place – *Wigan v Edwards* (1973) 1 ALR 497.

Slipshod's argument simply starts off with the wrong end of the proverbial stick. The point in contention, unlike *Pinnel*, is that the fact of the debt is the very thing which the parties have put in contention. It is not a *Pinnel*-type case, where the fact of the debt is not in dispute but where the promisee has done nor more than pay, or promise to pay, part of that debt, and whereby he then seeks to enforce a promise on the part of the creditor to discharge the whole of the debt.

In this case, *Gullible* does not seek to argue that *Slipshod* is obliged to accept the sum of $8,500.00 such that the entirety of the debt is discharged. *Pinnel* was a case in which the promisee was seeking to enforce a promise to discharge a debt because of his (the promisee's) promise to pay a lesser sum, or the payment of that sum. *Gullible*'s position is not the same – rather *Gullible* is trying to argue that he is not bound to pay the $8,500.00. This being so, *Pinnel* is of no relevance at all.

There is another way of putting this argument, namely that the true characterisation of the dispute is that, as it is *Slipshod* who seeks to recover the sum of $8,500.00, he is in truth the promisee of the obligation to pay it. The question then becomes whether the promise to pay the sum of $8,500.00 is enforceable.

The facts are that *Slipshod* did not work on *Gullible*'s tax returns, did not believe he did any work, and it could not be said that he believed that he could ever succeed at the end of the day if he had sought to recover the alleged debt.

Slipshod thus never gave up anything of value within the meaning of the definition of consideration as set out in *Balfour*. More specifically, he did not give up a right to litigate, there being none that he enjoyed, within the meaning of *Wigan*. Rather, his entire cause of action is based on a total misconception of *Pinnel*.

I find that *Gullible*'s promise to pay the sum of $8,500 is unsupported by consideration with the result that *Gullible* is not obliged to pay *Slipshod* that sum or any part thereof. *Slipshod* may well wish to take his chances at trial to sue to recover payment for the work that he says he did, but given my judgment, he would be brave to do so.

Comment

Alternative 1: This puts the boot on the other foot and invokes a straightforward application of *Pinnel*'s case. Unlike the primary scenario, there is here an acknowledged debt. The debtor (*Gullible*) is the promisee who seeks to enforce a promise by the creditor to discharge the whole of the debt by the promise of the payment of a lesser amount. He cannot do so as the promise to discharge the whole of the debt is unsupported by consideration.

Alternative 2: Here, again, turn your mind initially to the question of the identification of the promisee and the promisor. *Who is trying to enforce a promise, and <u>what</u> promise? Gullible* does not really have a defence and does owe the money to *Slipshod*. From here, you should be able to determine that it is *<u>Gullible</u>* who is trying to hold *Slipshod* to a promise to accept less than what is due. That would make *Gullible* the promis*<u>ee</u>* (because the promise to is). 'I, *Slipshod* will discharge the debt you owe me if you pay me $1,500 a month for the next four months.' In turn, you need to address the question of whether by accepting a smaller amount and thus avoiding the trouble and expense of getting any monies at all if *Gullible* went bankrupt, *Slipshod* did obtain a 'practical benefit' within the meaning of cases like *Williams v Roffey, or Wolfe v Permanent Custodians.*[75]

Alternative 3: Again, who is the promisee? Can you see now that the person who is trying to hold the other to the promise, is *Gullible* who is trying to hold *Slipshod* to a promise to accept a smaller sum of money. *Gullible* therefore needs to show that in foregoing a bona fide defence, he has provided consideration to support a promise to accept a smaller sum. To answer the question fully, you need to consider the principles in cases like *Nissho Iwai v Shrian Oscar*[76] and *McDermott v Black*.[77] Once you have identified the promisee as *Gullible*, the remainder of the analysis should fall into place. The question of whether *Gullible* can resist a claim for the full amount would depend on whether Slipshod's promise to reduce the debt is supported by consideration, which itself will turn on whether *Gullible* had a genuine belief in the bona fides of his own defence.

Appendix C

It is *de rigueur* in early contract law studies for students to cover offer, acceptance, counter-offer.[78] This fictional case and the 'alternatives' to it test carefully test students' understanding of each of

75 *Williams v Roffey Brothers & Nicholls (Contractors) Ltd* [1991] 1 QB 1; *Wolfe v Permanent Custodians Ltd* [2013] VSCA 331. These cases are likewise de rigueur in first year contract and will be typically covered early in the semester.

76 *Nissho Iwai Australia Ltd v Shrian Oskar* (1984) WAR 53.

77 *McDermott v Black* (1940) 63 CLR 161.

78 Above nn 34 – 40,

these concepts and the fine distinctions between them. Once again, the experienced practitioner unlike the first year law student will likely have no real difficulty; the misunderstanding noted in the fictional case concerning *Financings v Stimson [*1962] 3 All ER 386 for example is a particularly remarkable illustration of an error a novice law student would commit, but not an experienced practitioner. The error of confusing the roles of the parties who might be entitled to rely on its principles happens quite frequently and the discussion based on *Financings* in the case replicates authentic arguments which students have put in class.

Hoon v Speedy [2014] – Timbuktu Law Reports 201

JUDGE ASSIDUOUS

It is alleged that it was a term of a contract between the plaintiff and defendant that the plaintiff would sell to the defendant a car whose air-conditioning worked. The resolution of this case demands a careful analysis of a conversation between the two, which is recounted in full as follows:

The plaintiff: *Are you thinking of selling your car?*

The defendant: *Yep, you thinking of buying?*

The plaintiff: *How much do you want?*

The defendant: *You can have it for $5,000.00.*

The plaintiff: *Sounds good. I will buy it if the air-conditioning works.*

The defendant: *For goodness sake, which car doesn't have working air-conditioning these days?*

As it turned out, the defendant's car did have air-conditioning – but it did not work.

The first question arising from this conversation is whether the defendant's statement that *you can have it for $5,000.00* was an 'offer'.

Whilst there are numerous acceptable definitions of an 'offer', we will adopt the following simple one, namely that an 'offer' is a statement of a manifestation of an intention to be bound if acceptance was forthcoming within the time open for acceptance – *Dysart Timbers v Nielsen* [2009] 3 NZLR 160.

The defendant's statement probably does have the character of an offer within the meaning of the *Dysart* definition. There is no suggestion of any ambiguity in its making. The defendant thus likely made an offer to sell his car for $5,000.00.

The next question logically is whether the plaintiff accepted that offer; the resolution of this question in turn requires an examination of his responsive words *Sounds good. I will buy it if the air-conditioning works*. An acceptance needs to be unequivocal, correspond with the offer and leave nothing to be negotiated – *Turner Kempson & Co Pty. Ltd. v Camm* [1922] VLR. If however the words were in fact unequivocal, those words would not cease to have the quality of an acceptance if (say) the words of acceptance happened to include also words of request – *Dunlop v Higgins* (1848) 9 ER 805. Finally, a purported acceptance, coupled with the imposition of condition has the character of a counter-offer – *Turner Kempson*. A counter-offer is an implied rejection of an offer – *Hyde v Wrench* (1840) 49 ER 132.

In the present case the plaintiff clearly did not accept the defendant's offer. Rather the tenor of his words is that he was imposing a condition on any purported 'acceptance', namely that the air-conditioning worked. The imperative tenor of his words *I will buy it if the air-conditioning works* would not be consistent with the proposition that they were words of unequivocal acceptance, but which also included words of request. The plaintiff thus made a counter-offer, and consistent with *Hyde*, it amounted to an implied rejection of the defendant's offer.

We now turn to the defendant's response: *For goodness sake, which car doesn't have working air-conditioning these days?* The defendant contends that by those words he did no more than make a derisory observation concerning the fact that cars these days were invariably sold with air-conditioning and that he did not mean thereby to be accepting any offer or counter-offer.

We repeat the same legal principles as stated in our discussion of the plaintiff's first response above, and add, further, the proposition that an acceptance requires there to be a *consensus ad idem*, namely the communication of intention as it would be communicated and understood by the other – *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 All ER 34.

We are confident that the tenor of the defendant's words were unequivocal. They were conveyed in layperson's language and were colloquial but conveyed the positive intention to accept the plaintiff's counter-offer. The clear purport of the words – notwithstanding anything that the defendant might have actually intended – was that they would have been understood by the plaintiff as an acceptance of his counter-offer.

In the end result, then, the plaintiff and defendant made a binding contract whereby the plaintiff would buy the defendant's car, and it was a term of that contract that the car would have working air-conditioning. That *should* bring us to the end of the matter, but the defendant in the course of argument also raised a novel point which will now be addressed: the defendant contends that a condition attached to the plaintiff's offer to buy his car, namely that it would have working air-conditioning, and that as it did not, the condition lapsed with the result that he (the defendant) was not bound to sell his car at all.

The defendant insists that his argument is supported by principles contained in *Financings v Stimson* [1962] 3 All ER 386, in which it was stated as follows: an offer might be subject to a condition that a state of affairs would remain unchanged until acceptance. In that case, the relevant offer to purchase a car was said to have been subject to an implied condition that the car would remain unchanged, which lapsed when the car was significantly damaged in the interim.

With respect to the defendant, *Financings* is of no relevance whatever; one surmises that the fact that the subject matter was there a car, as it is here, might have brought the case to the forefront of the mind of the defendant or their solicitor. For a start, the relevant offer in *Financing* was to *buy* a car on the basis that it would remain unchanged until the offer was accepted. In the present case, the defendant is the *seller* who made no relevant 'offer' to sell a car on the basis that the air-conditioning worked! The true characterisation of the transaction here is that the plaintiff and defendant had simply made a contract for the plaintiff to buy the defendant's car on terms that its air-conditioning worked. Thereby analysed, the present case invokes the question of whether an offer (or counter-offer) was made at all, and if so, on what terms – and not, whether an offer was made on some condition and if that condition then lapsed.

Comment

Alternative 1: A useful case that you should have read in last week's lesson is *Harvey v Facey* [1893] AC 552. There, the court made the point that an offer is to be distinguished from a mere provision of information in which case the supposed offeror makes no offer to sell, on the basis of the information provided. In such a case, the mere provision of information as to the price would not be an offer by definition, as there is no promise made to sell at that price. By parity of reasoning if the defendant had said *I won't sell it for anything less than $5,000.00*. then we might have some argument that no offer was made. The facts in the original scenario thus are significantly different from *Harvey*. The words *you can have it for etc* are significant as they very likely indicate a manifestation of intention to be bound rather than a *mere* indication of the price at which the defendant would be prepared to sell; now hopefully you can see how you need to be very careful in examining the precise words that the parties said in your question.

Alternative 2: Why *might* it make any difference if the subject matter was more complicated?

Your attention is drawn to *Pattison v Mann* (1975) 13 SASR 34 where Bray CJ talked about the fact that the absence of reference to matters which one would normally expect to be the subject of negotiations is a strong indication that no concluded agreement has been reached by purported acceptance of such a statement. If the car indeed was overseas and had to be shipped to Australia, one might expect that there would have been some discussion over who would be responsible for organising its shipment and its cost and for attending to any formalities required etc. etc The absence of any such discussion might in this case be an indication that no offer was made to sell the car.

Alternative 3: You have already covered the point that an offer needs to be unequivocal. The vague words here just do not have the ring of unequivocalness but were somewhat vague at best. On the basis of this alternative, it is unlikely that there was any acceptance – not that any counter-offer was made – simply that in the end result, there was no acceptance.

Alternative 4: Ask yourselves – *what is the difference between this alternative and the fundamental scenario?* The difference is that in this alternative, an argument could be made that this was simply a case of an acceptance coupled with a request. *Dunlop v Higgins* (1848) 9 ER 805 contained a discussion of such a case and you need to be conscious of the differences between that type of case, and where there was a full-blown counter-offer which is the subject of the original scenario.

Alternative 5: On the basis of this response, the question that you ask yourself is if there was, in truth, a *consensus ad idem* (meeting of the minds). The defendant would have a significantly stronger argument based on these facts that he did, in truth, do no more than offer a view on the custom these days that cars were invariably sold with working air-conditioning, rather than accept the plaintiff's counter-offer to buy his car with working air-conditioning.