A GUIDE TO RESEARCHING AND FORMULATING ARGUMENTS

Why this guide?

This guide addresses the following needs:

- Providing scaffolding instructions on how to prepare an appeal case submission;
- Describing the analytical process involved in legal arguments;
- Being explicit about the nature and level of research and preparation involved in case-file work at an undergraduate level.

1. Get a good handle on the facts.

When preparing for an appeal case it is very important to understand the facts at first instance as well as the position of the judge with respect to those facts at all prior instances.

- If you were counsel in the original decision then you’ll understand the background facts;
- If not, then you’ll want to talk to the client, or instructing counsel to understand what happened;
- But, unless the facts are in contention you should really focus on the facts discussed in the first instance decision, as this is what appeal judges will use!
- Read and re-read the facts from the first instance decision. Try to visualise what happened – construct it as a story in your head.

Consider what the main legal issues are (in seminars we have identified them for you) so you can later consider what the judge(s) may have missed or not put enough focus on.

Before you even go on to the judgment, try to make your own decision and think about what conclusions you would have come to had YOU been the judge (but don’t tell your client what you think, especially if your decision would have gone against them). This will help you identify what might be controversial about the prior instance decision.
2. Understand the prior instance judgments.

Only once you have a good handle on the facts should you move on to the judgement(s). Please note that throughout the below tips I have not even suggested you consider your client’s arguments and position (you need to start from a dispassionate and objective position).

- Read through the prior instance judgment(s) and have a thorough understanding of the position of the judge and what compelled them to make the decision they did.
- Make sure you have a good handle on what was ratio and what wasn’t.
- Try to work out what was controversial or challengeable about the prior instance decision. Often this will be indicative as the judge takes special care to respond to counsels’ arguments in the text of the judgment, or they will spend a large amount of time examining prior authorities and their relevance to the facts at hand.

Look for opinion without legal basis. That is ratio or obiter which is influential on the ratio that are more the judge’s opinion in the absence of any law or legal argument (this are often great ‘hook’ s to challenge a decision).

Consider the main issues as YOU identified them and the judge(s) identified them.

- Do the judges views as to their importance differ to yours?
- What tests did the judge use? Do you agree with the way she/he applied these tests? Are there any other tests, which might apply that weren’t used?

If there are a series of prior instances read them all. Understanding how differing judges have approached the case will assist you in finding the arguable matters of law.

Note above: I have not even mentioned your client’s position in relation to the case. Of course you will already know where they stand about the decision as a whole but this does not provide you with a basis to argue against the reasoning of the prior instance judge. You need to consider the judges arguments on their merits and try to deconstruct their legal basis before framing them within the positional needs of your client. Furthermore, you should consider all the counter arguments that the other side will raise. In both cases it is important to approach the prior instances decision in an objective critical manner. Once you have deconstructed the finding and found its strengths and weaknesses you can consider how you will approach it, how the other side will approach it and your responses to their arguments.
3. Get a good handle on the case law!

Once you have identified the major (and particularly contentious) issues / tests used at prior instance you need to get a handle on the (usually varying) approaches taken to each.

If you have specialised in an area of practice knowledge of the issues and relevant cases will already be in your head. Obviously, if you were part of the prior instance decision or were briefed on the area you will also be aware of the more relevant cases etc. In other situations however, it may take some review or may even involve learning about a new part of the law altogether. Using a textbook might help give you a broad overview, but they rarely, if ever, gives you a proper understanding of the varying legal approaches taken by successive High Court benches – something you’ll need to understand and possibly exploit in the running of your case. That said, they can provide you with a broad overview of the issue, and more importantly help you identify the relevant cases in the area (although most of these will have already been identified in the prior instance judgments!).

- Another great place to find the most relevant cases is to use the case digests. They list all the cases under specific topic / issue headings. In the old days these were printed volumes with appendices and updates (a nightmare). With the internet things have become much easier and finding the most recent, relevant cases is now much easier. The Law Library provides a list of digests here -> http://utas.libguides.com/content.php?pid=26281&sid=192118

- My preference for both citator / digest is Firstpoint. You’ll find this under ‘F’ in the Library database catalogue. Others prefer Casebase. You should probably become familiar with both as they have different reports available to them and some firms only use one or the other.

- The online digests also now include case citators – an absolutely fantastic resource for both practitioners and students – these give you a short overview of the case and the findings but more importantly an overview of how the cases which influenced the decision and how the decision has been responded to / applied / overturned by later courts.

If you are running an appeal case and sufficient time has elapsed between prior instance and the present you may actually find that other courts have considered that case.

One particularly effective way to use the digest / citators is to identify the most recent decisions about a particular topic (especially those from the High Court). If you are running several files (or undertaking many courses) you may not have the time to read each and every case in detail, especially where they are very long. Finding the most recent judgment from the High Court often helps provide
you with an overview of the law leading up to that decision as the Judges will consider the influences and precedents leading up to the current position in their judgments.

This is not to say that you should rely completely on one judgment, but rather that a recent High Court case, a Control F [find] button on your computer and an effective use of keywords are a great efficiency tool in your legal research arsenal that will provide you with the best springboard towards more involved research!

Reading through the judgments you should be identifying the current position of the High Court on each issue you wish to address. Rarely is there a consistent line of judgment, although it is imperative that you recognise what the majority positions are and what the minority positions are (sometimes there will be several differing approaches in each of these categories).

4. Think objectively before arguing subjectively

At this point you should start considering which positions help your client and which ones help the other side.

Consider whether the prior instance judge’s position accords or is contrary to the majority or minority judgments.

If you have to rely on minority judgments consider how you might distinguish the majority judgments in respect to the facts at hand; or consider how you might suggest to the Court that there is a lack of agreement or consistency in majority judgments; or, as a last resort, consider how you might evidence the severe problems which result from the application of the majority in ratio (remember Cole v Whitfield) but this may require a long case history in the area; depending on which court you are in front of you may try to argue that the majority ratio is simply unfair on your client and a minority position should be adopted, but this is rarely, if ever, successful as a standalone argument!

• Make sure you understand the TESTS or elements constructed by the High Court to apply express or implied constitutional provisions.

• Make sure you can actually apply them to your facts!

• Consider how you will use the tests in a way which produces a positive outcome for you client.

• Consider how the other side will use the tests in a way which might produce a negative outcome for your client. Consider how you will respond to these (using the varying approaches noted above).
5. Map and simplify

Now map out your arguments against / in favour of the prior instance judge. Consider which are the strongest and put them at the top of the submission.

Map out the opposing side’s arguments and prepare responses to each as the court is likely to ask you about these – especially if opposing counsel puts a convincing argument to the bench. This is a predictive exercise and the basis of every good submission no matter what area of law.

You should be familiar with legal analysis from your earlier law studies. In our case it will require objectively considering the issues from both the Applicant and Respondent’s side. That is:

- What will each side need to convince the court of?*
- What law will they use?
- Is the law certain relating to this issue?
- Where is the uncertainty?
- How does that create further arguments for each side?
- What tests could be applied to the issues?
- Is there one agreed test or differing tests?
- If there is only one test, what are its elements and what are the different approaches taken to each?
- If there are different tests, which one would benefit which party?
- If there are no tests what legal principles can be used?
- How would you answer the issue if you were the judge?**

You should be able to do this based on your reading and notes up to this point. Use that preparation to answer the questions above to the best of your ability, identifying the holes in your knowledge or the uncertain areas of law for each side and flagging those areas for targeted research.

* Note also that you don’t always need to win all of the arguments: indeed in some circumstances you may only need one of your arguments to convince the judge make a decision in your favour.

Go over the map and simplify it. Overly complex or long arguments just confuse you and your submissions.

If this process hasn’t completely familiarised you with the issues (it should, but just in case …) go over your submissions until you know all their strengths and
weaknesses and feel like you are so familiar with them that you could talk to a
member of the opposite sex, whilst drunk at a particularly loud party about them
without sending them to sleep! You are now ready to appeal your case ....