Precedent

The ‘doctrine of precedent’ is the rule that a legal principle that has been established by a superior court should be followed in other similar cases by that court and other courts. The doctrine of precedent was developed to promote consistency in decision-making by judges, on the basis that like cases should be determined in a like manner. There are two kinds of precedent: binding and persuasive.

Binding precedent

A precedent is ‘binding’ on a court if the precedent was made by a superior court that is higher in the hierarchy of courts. A binding precedent must be followed if the precedent is relevant and the circumstances of the cases are sufficiently similar. For example, decisions of the High Court are binding on all courts in Australia, but a decision of the Supreme Court is not binding on the High Court, and a decision of the District Court is not binding on the Supreme Court.

Persuasive precedent

A precedent is ‘persuasive’ if it was established by a superior court that is not higher in the hierarchy of courts. This means that the precedent should be seriously considered, but is not required to be followed. For example, a precedent established by the Supreme Court of New South Wales is persuasive but not binding on the Supreme Court of Victoria, since these courts are not in the same hierarchy and are of equal authority. Decisions of superior overseas courts, particularly the superior courts of the United Kingdom, are persuasive precedents in Australia.

Evidence

Evidence is the information, documents and other material that is presented to a court to prove facts that are an issue in a case. For example, in a case involving a traffic accident, there may be a dispute about facts such as how fast the cars were travelling, or what the weather and visibility conditions were. Evidence to prove such facts might be drawn from sources such as eyewitness accounts of the accident, or weather reports for the location at the time of the accident, and the state of the cars and of the road after the accident (such as the nature of damage to the vehicles, and the length and direction of tyre marks on the road).

There are many rules about what kinds of evidence a court can accept for consideration, and in what circumstances. Evidence that can be taken into consideration (or ‘admitted’) by the court is called ‘admissible evidence’; evidence that cannot be admitted by the court is called ‘inadmissible evidence’. The rules of evidence are designed to ensure that only evidence that is reliable and fair is taken into consideration by the court in determining the factual circumstances of the case. The rules of evidence were developed at common law, but the Commonwealth, New South Wales, Victoria, the Australian Capital Territory and the Northern Territory have enacted uniform legislation that sets out most of the rules of evidence, largely replacing the common law rules of evidence: see, for example the Evidence Act 1995 [2] (NSW).

There are several different types of evidence, such as:

- eyewitness evidence – evidence that was directly observed by a witness giving evidence in the case;
- circumstantial evidence – evidence that can be used to make an inference about a fact for which there is no direct witness. For example, evidence by police of the nature and length of skidding tyre tracks on a road may be used to establish that a car was on the wrong side of the road, even though the car was not seen on the wrong side of the road;
- hearsay evidence – evidence given by a witness of something that the witness has heard but has not seen for himself or herself. For example, a witness may report that someone else who witnessed the accident said that the car was on the wrong side of the road, but the witness did not see this himself. Hearsay
evidence is not admissible to prove that what is reported to have been said is actually true (but may be admissible to prove that what was reported to have been said was actually said); and

- expert evidence – evidence given by an expert in a particular field, such as medical practitioner giving evidence about the nature and effects of an injury, or an engineer giving evidence about a bridge that has collapsed.

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