

Legal Problem Solving: a framework

Chapter 11 of *Connecting with Law* introduced you to numerous classifications of law: civil and criminal, civil law systems and common law systems, substantive and procedural systems, and so on. This chapter also explained the basics of the kinds of topics that you will study in a law degree.

This note is to get you to think about a framework for solving those legal problems. After all, one of the many purposes of legal systems is to solve legal problems. It is important when thinking about a legal career to remember that although you are an advocate within a largely adversarial system (the 'hired gun'), you are engaged to solve problems for your client. You may not realise this, but this skill is being taught to you every week at Law School in your tutorials, seminars and assignments.

Below is a suggested framework for resolving legal problems. It works whether you are solving problems as a law student or as a lawyer. This suggested approach is just that, a suggested approach. Feel free to modify it, adopt it or ignore it.

One Approach to Solving Legal Problems

1. Take careful instructions from your client. Ask open-ended questions to gather knowledge. Clarify issues later with closed questions. If the problem is set at law school read it carefully then re-read it and highlight key facts that you think will have a bearing on legal issues. Always follow any instructions you are given. Facts are either contained in the problem, or where you interview a client, facts must be elicited from the client. Facts are important because problem solving depends on you having an excellent understanding of the facts of a dispute. A change in a fact may mean a different legal issue or defence can be raised.
2. Take some notes about the problem, or if you are dealing with a client ask them what they believe the problem to be. Are other clients or parties involved? Do they also need legal advice?
3. Try to work out the appropriate legal classification of the problem. Is the problem about tort, criminal law, administrative law, to name a few? (See *Connecting with Law* at pp265). If you can, narrow the problem to the relevant sub-classification of that legal area (e.g. negligence within torts, criminal negligence within the criminal law...) Make some notes.
4. Conduct your legal research (see chapter 5).
5. Work out the options for resolving the problem. In doing this you should consider:
 - What is the client's timeframe for resolving the problem? Is the matter particularly urgent or not? Is the client able to cope with protracted litigation and appeals?
 - What kind of outcome does the client want? Do they want an apology, a letter, the truth, information, compensation...? In a legal problem you should consider these factors when advising the client or writing your answer to law school assessment.
 - Litigation is costly, so one key issue is whether the client has the means to pursue their goals. You are responsible for providing such information and advice. Just about any course of action involves fees (lawyers' fees, court fees, tribunal fees) and court action exposes one to the possibility of having to pay the other party's costs.

- Is the matter one for a court, a specialised branch of a court, a tribunal, a complaints office, or better suited to third party arbitration, mediation or conciliation?
- Other complaints mechanisms include relevant government departments, statutory authorities, members of parliament, or the media.

So, when looking at a legal problem you first need to be trying to marry relevant facts to law, but the above questions will also influence the course and outcome of a particular dispute.

Problem

Ellie is a mother of two children who lives with her husband Tom in Kangarilla, just south of Adelaide. They live in a house on a rural property and have over 100 cows. Their only neighbour is 77 year old Jim. Jim decides that it is time to move to a retirement home and sells his farm. The new owner is Bart who plans to host a bed and breakfast business and to run chickens. Bart tells Ellie and Tom that Jim mentioned that the fence line may not be accurate. Bart explains that he believes he is entitled to a metre of their land over a distance of 500m, meaning that he is claiming 500 square metres of Tom and Ellie's land. Bart also wants an easement (a legal right of way) through Tom and Ellie's property so that he can drive to town faster. Tom and Ellie had granted Jim a limited right of access but told Jim that this right was to end when he sold up. Bart also wants them to share the cost of surveying and possibly relocating the fence line and also to share the cost of a better fence to keep his chickens in. Bart also wants a shared rainwater tank on the border to fight fires. Bart tells Tom and Ellie that he is legally in the right and that he will commence legal action if need be. One day Bart yells at and threatens Tom while brandishing a shotgun. Tom is worried for his family's safety and consults you. Advise Tom and Ellie about how this dispute can be resolved.

Approaching a Solution

First you need to select the material facts. These are facts that are crucially linked to legal issues. These relate to the property dispute and to the assault. It is not important that Ellie is a mother of 2 children. Highlight these facts.

Second, try to make a rudimentary assessment of the legal issues. Work out broadly what kind of dispute or disputes these are: i.e. property and criminal law. These are areas of substantive law. Within property law the issue is really about the legal right to property and the right to pass through another's property (an easement).

Third, try to work out what must be done to resolve the dispute. At its heart, the property line must be accurately surveyed to assess who has legal right to the land as described on the property title. Pegs will then be placed by the surveyor to accurately mark the real boundaries of the land. It is an offence under s 52 of the *South Australian Survey Act* to 'interfere' with these pegs unless building a fence over them. This surveying could cost \$10,000.00. Who should pay for this? Can parties be forced to contribute to this? Should they share the cost? Should Ellie and Tom be forced to subsidise a long stretch of fence merely because it was inadequate for running chickens? These are all issues that are at the heart of the dispute. Then, there is the issue about the right to pass on a neighbour's land (the easement). The validity of the easement will require an analysis of the land title, legislation case law, the prior history of any grants of any rights to cross land and so forth. The second part of the issue is really an offence – that of assault. There may also be a firearms offence there too (look in Firearms legislation and the criminal law). Here it is up to the police to look into prosecuting the firearms and assault offences, and they will

need information about what happened from both parties. Assault can also lead to civil compensation through the tort system.

Fourth, you have to work out whether to use a legal mechanism to resolve your dispute. If choosing a legal path, then you have to look at the existing legal options: can the matter go to court, can it go to a tribunal, and what ADR (alternative dispute resolution) options exist. You have to consider which tier of the court is the appropriate one for the dispute (as many impose monetary caps on their jurisdiction) and also consider whether there is a specialist tier or division of the court that is set up to deal with such disputes. This requires some research and an appraisal of what the best option is for the client (taking into account cost, time, emotional costs, the merits of the parties' case, etc).

There may also be a tribunal that can also be used to resolve such disputes. While the appropriate tribunal will probably be a State one, there are many Commonwealth tribunals. Tribunals frequently employ mediation as a core part of the way proceedings. (See the textbook at p280). Have a look at some key tribunal websites like:

VIC: **VCAT** <http://www.vcat.vic.gov.au/>

NSW **ADT**: <http://www.lawlink.nsw.gov.au/adt>

WA: **SAT**: <http://www.sat.justice.wa.gov.au/>

CTH: **AAT** <http://www.aat.gov.au/> (there is an excellent flowchart on this website showing the flow of a case through the AAT)

The Federal Court has an excellent list with links to courts and tribunals across Australia: <http://www.fedcourt.gov.au/legalinks/links.html>

See also *Connecting with Law* at p283.

Increasingly, courts also use mediation as an integral way of resolving disputes, or elements of disputes before a case is set down for hearing.

Fifth, disputes are usually distilled to the key issues in dispute. Courts and tribunals always try to get the parties to try and limit the grievances to those that are critical for external review. In doing so, they encourage mediation and settlement of other issues. So too, in this case, the parties will have to see which issues can be agreed upon and which require adjudication, and to what extent they are prepared to compromise or pay for a third party to settle them.

As you can see, settlement of disputes by recourse to the law involves complex assessments of fact, law, strategy and other wider concerns. Being a federal system means that Australian lawyers and students must be mindful of the differences in the resolution of disputes from State to Territory, and also that there is a Federal system of law.