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LAWS1201 Foundations of Australian Law 1st Semester 2006

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Question 1

85/100

Statutory Interpretation Problem (Part A)

Part A: Can Rosemary be prosecuted under s4 of the Ministers (Prevention of Harm) Act 2006 (the 'Act')?

Was the Act in Operation?

S 5(1A) of the Acts Interpretation Act ('AIA') stipulates that an Act will come into force on the 28th day after Royal Assent unless the contrary intention appears. We know from the facts that it received Royal Assent on 1 April 2006, so became operational on 29 April 2006. Rosemary's 'job' occurred on 20 April 2006, so the Act was not in force.

Retrospectivity?

We now must consider whether the 'contrary intention' appears, i.e. whether the Act was meant to operate retrospectively. Rodway v R established that where an Act was substantive in nature and affected the rights of the individual, the presumption against retrospectivity could be rebutted by express words or necessary implication. This Act clearly affects the rights of the individual (maximum of 20 yrs imprisonment) so we can consider retrospectivity. There are no clear words to indicate retrospectivity, and no real necessary implication. By contrast, s 4 states that "it is an offence", and the purpose states that "the purpose is to protect", which seems to convey a 'present tense' and no implication that this applies to the past.

We can therefore reasonably assume that the Act was not meant to apply retrospectively, thus Rosemary cannot be prosecuted under s4. [✓✓]

Part B: Can Simon be prosecuted under s5?

Was the Act in operation?

As discussed above, the Act came into operation on 29 April 2006. Simon threw the eggs on 15 May 2006, so the Act was clearly in operation.

Are the elements of the offence satisfied?

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For Simon to be able to be prosecuted under s5 of the Act, it would need to be shown that he:

- (a) threw, projected, launched or otherwise propelled,
- (b) a weapon that harms or has potential to harm,
- (c) the PM of Australia or other Minister of the Cth.

(a) Did Simon throw, project ...etc.?

We know from the facts that Simon 'threw' the egg that hit the PM, so this element is satisfied.

(b) Was it a weapon that harms ... etc.?

We are provided with a definition of 'weapon' in the Act which is exhaustive, so can use it to determine whether an egg would fall under this. An egg is clearly not a missile, bomb or ammunition, so is it an object capable of causing injury? The facts would suggest that the egg caused the 'red mark' on the PM's neck, but this could have been caused by another means – perhaps the mark was already there.

Applying the ordinary meaning of an 'egg' would suggest that it is not an object capable of 'causing injury'. We can also apply the maxim *noscitur a sociis* (R v Ann Harris) which would suggest that the meaning of 'object capable of causing injury' can be derived from examining 'missile, bomb, ammunition'. This would also seem to exclude egg from this definition. However, maxims must be applied with caution as they are valuable servants but dangerous masters (*Colquhoun v Brooks*) and so we must cross check [√] this meaning against the purpose of the Act though (s15AA of AIA).

The purpose is clearly to protect the 'health' and 'safety' of every Minister of State of Australia. It could be argued that while an egg does not appear to fall within the definition of 'weapon', it could constitute a threat to the 'health' and 'safety' of a Minister if it is thrown from a distance of 2 metres.

If a meaning generated from a contextual approach to interpretation is inconsistent with one from the purposive approach, we must prefer that which accords with purpose (*Brookes Pty*) [√]. However, we can only 'construe' an Act, not 're-write it in light of its purposes' (*Mills v Meeking*) [√]. On balance therefore, it seems likely that an egg would not constitute a 'weapon', thus Simon would not be able to be prosecuted under s4. However, in case this conclusion is wrong, [√] I will move to part (c).

(c) The Prime Minister of Australia?

It is clear from the facts that Simon's eggs hit the PM, thus this element is satisfied [dignity?]

Conclusion

Although the other elements are satisfied, it appears that an 'egg' would not fall under the definition of a weapon, therefore Simon could not be prosecuted under s5. This is further supported by the fact that penal provisions must be strictly construed (Smith v Corrective Services), even though this is a weak provision (Newcastle City).

Part C: Can Don be prosecuted under s5 of the Act?

Operation?

As discussed above, the Act was in operation at the time of the protest.

Are the elements of s5 satisfied?

(a) Did Don 'throw, project, launch or otherwise propel...etc?'

We know from the facts that Don threw the flour 'bombs' so this element is satisfied.

(b) Was the flour 'bomb' a weapon that harms oretc?'

Once again we can turn to the definitions section to determine whether Don's flour 'bomb' would fall under s5. Although Don's item is termed a flour 'bomb' it may not fall under the definition of 'bomb' in s3. We can refer to a dictionary to determine the literal meaning of 'bomb' here (State Chamber Commerce). The Macquarie Dictionary defines 'bomb' as 'a hollow projectile filled with an explosive charge'. Given that a flour 'bomb' is filled with flour, not an 'explosive charge', it is likely that it would not fall under the definition of 'bomb'.

Is it an object capable of causing injury? Once again, we know from the facts that Tony Blair 'coughed' a little, but this may have been an ongoing complaint for him. In addition, neither Tony Blair nor the PM required medical attention suggesting that they may not have been injured.

We can also cross check this interpretation with the purpose of the Act (15AA of the AIA). As mentioned above, the purpose of the Act is to protect the 'health' and 'safety' of a Minister of

State of Australia, so it could be argued that a flour bomb is a threat to 'health' and 'safety'. However, flour in a bag could be said to constitute less of a threat than an egg which has a hard shell and surface, whereas flour makes little impact when it lands, and even inhaling it is unlikely to cause a serious health threat.

In addition, there is a common law presumption which holds that penal provisions should be strictly construed (*Smith v Corrective Services*). Although this is a weak provision (*Newcastle City*), it could still serve to suggest that a flour 'bomb' would not fall under the definition of an object capable of injury.

(c) PM of Aust. or other Minister of Cth?

Tony Blair clearly is not the PM of Australia, so it remains to be determined whether he is a Minister of the Commonwealth. The AIA defines the Commonwealth as 'the Commonwealth of Australia' but says it does not include any other external territory (s17(a) of AIA) [√].

This would suggest that Tony Blair would not fall under s5. We can also consider the purpose of the Act (s15AA of AIA) which says that every Minister of the State of Australia is protected.

We can confirm this meaning by consulting extrinsic materials (s15A B(1)(a) of AIA). The second reading speech of the Bill suggests that Tony Blair would fall under s5 of the Act because it is supposed to ensure the health and safety of "all public officials no matter where they are from".

However, a Minister's words cannot be substituted for the text of the law (*Re Bolton*) [√] – thus Tony Blair would probably not be covered under s5 of the Act [√]. As mentioned above, penal provisions must be strictly construed, however, this is a weak presumption and must give way to the purposive approach (*Newcastle City*).

On balance therefore, it appears that Tony Blair would not fall under s5, and therefore Don could not be prosecuted under s5.

Conclusion

Although Don did throw a flour 'bomb' at Tony Blair, it is unlikely that he could be prosecuted under s5 because this is probably not an object capable of causing injury, and it did not hit the Prime Minister of Australia or any other Minister of the Commonwealth.

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Semester 1, 2006

Mark: 75

Short Essay Question (Part B)

Q2. The doctrine of precedent holds that the law expounded in a case should be followed in later similar cases to ensure ‘certainty, equality, efficiency, and the appearance of justice’ [√] in the operation of the law (*Telstra Corporation v Treloar* 2000). However, as I shall argue, while the doctrine of precedent does work to ensure these four qualities, it also operates to allow the law to develop according to ‘changing values and needs’ (*Parkinson TCAL* p.71).

Nowhere is this better demonstrated than in Lord Atkin’s ‘landmark’ decision in *Donoghue v Stevenson* (DvS) (*Twining and Miers*, p.320).

As *Twining and Miers* argue, the doctrine of precedent is deliberately ‘permissive or vague’ [√] and allows a ‘considerable leeway for varying, sometimes conflicting’ interpretations of past cases (p.331). [√]

Lord Atkin used this to his advantage in DvS in deliberately establishing an entirely new area of tort law. The relevant precedents at the time of the case were seen to ‘stand firmly against’ the establishment of a duty of care for manufacturers towards the ultimate consumers (see *Twining and Miers* p.328) [√] but by arguing that the past precedents were too narrow, or that they had not articulated the precise legal issue at hand, and following the precedents that supported his decision (such as *George v Skirvington*) [√] Lord Atkin could make use of the doctrine of precedent to extract the principle that ‘he knew was in there somewhere’ (*J Tooher*, *Still silvery* article p.38) [√] – that of a duty of care to one’s neighbour (see judgement p.580).

In stating that no English authorities had ‘defined the relations between parties that give rise to duty’ (see p. 579) Lord Atkin demonstrated the absence of a truly persuasive precedent. In his treatment of *Winterbottom v Wright*, he argued that the decision was not particularly relevant because it concerned a duty arising out of a contract (see pp.587 – 589). And finally, where he found a supporting case, *George v Skirvington*, he demonstrated the analogy between the two (see p.594). Thus in conclusion, he managed to work a ‘legal revolution’ without showing a ‘disregard’ for the doctrine of precedent (*J Tooher*, p.379). [√] He actually used it to his advantage.

In this way DvS demonstrates that the doctrine of precedent, while connecting a current case to past authorities (and retaining a foot in the past, so to speak) still manages to change and develop, and lead to the development of entirely new areas of law.

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Semester 1, 2006

Mark: 80

Short Essay Question (Part B)

Q.4 (i) The High Court ('HCA') may reasonably be considered a 'political' institution in light of the consequences of its decisions. As R Sackville has argued, speaking in general terms of all justices, their 'policy-making role' has long been obscured by the 'myth' that they merely 'declare' the law ('Activism' 2001 p.7). [✓]

The nature of their 'political' role however, concerns the result of their decision – i.e. there are many examples of where HCA decisions have considerable political affects (such as Mabo). [✓]

The HCA is not a 'political' institution in the sense that it makes decision based on politics. As Coper [✓] argued in 'Encounters with the Aust. Constitution', the decision of the HCA in Cth v Tasmania was not 'political' in the sense that the judges were 'influenced or determined' by the politics 'conservation v development' (p.38). Indeed, if they were, it would undermine the authority of the HCA, by demonstrating that their decisions are not 'apolitical' and, as was argued in State Govt. Insurance Commission v Trigwell (1979), 'how well placed are judges to determine which policies are worthy of pursuit?

The dispute in Cth v Tasmania had considerable and far-reaching political consequences because it effectively increased the power of the Cth to legislate on matters under the corporations power of the Constitution (s51xx) [✓] and the external affairs power [✓], which, as Coper argued, effectively gave the Cth power to legislate on 'any topic whatsoever – so long as that topic is the subject of an international agreement' (p.45). [✓] This also impacts on the States' powers to legislate, effectively crippling them.

In conclusion, while the HCA is clearly a 'political institution' in the sense that its decisions can have far-reaching consequences, it is not a political institution in the sense that it's members are influenced by the workings of politics, or their own political beliefs or policy ideals. [✓ good]