

# Sydney University

## Faculty of Law

### Legal Writing — Answering Problem Questions

#### Introduction — What is a ‘problem’?

Problem questions are frequently used in teaching law and generally follow the format of asking students to discuss the legal consequences of a particular fact situation — often in the style of advising one or more of the parties. Problem questions exercise, and test, students’ understanding of the legal principles in an area of the law, their ability to apply principles to new facts and to present an answer logically. They are often designed to highlight difficult or unresolved areas in the case law, and so require students to assess the different sides of particular issue.

In many ways, problems help develop the sorts of skills required by legal practitioners who must give advice to clients based on their description of an event or dispute, or, in the case of judges, who must make decisions on the issues. However, hypothetical problem situations differ from the real situation of advising clients because there are a range of other factors which may be equally as important as the abstract application of legal principles — for instance, the cost and inconvenience of litigation may mean that the best advice is not to pursue the matter, or to seek an out of court settlement; or, because in real life the facts have to be proved, weak evidence or witnesses may be detrimental to the case despite the strength of the legal argument. While it is important to remember the full context of real legal problems, students are not generally asked to take these things into account in answering problem questions.

We will now outline some of the basic steps that are helpful to follow in arriving at a thorough and logically presented problem answer. Breaking the process into steps helps avoid the feeling of being overwhelmed by detail and complexity. You may feel that sometimes the process of separation — issues from principles, principles from discussion or conclusion — is a little artificial: you are right, but just bear in mind that it is merely a method or tool to help you think things through thoroughly.

Ideally, writing up the answer is the last step, although you may have to condense these steps in an exam situation.

#### **i. Read the question!**

Read the question slowly and with attention. You pick up most of the nuances of the question when you read it the first time and you should note these as you are reading. Try not to be too critical when you read the question — read for information rather than trying to work out what all the issues are. Do you completely understand the facts? Do any facts appear to be missing or assumed by the question? Do the facts resemble a decided case?

Then read the question again! Pay attention to what it is, specifically, you are asked to do. Do not adopt the role of advocate to party A if you have been asked to advise generally or vice

versa. If something is given as a fact, you do not need to question its validity — e.g., if you are told there is a contract, you do not need to consider the rules of contract formation.

## **2. Who are the parties?**

Ascertain the possible permutations of parties — who has a claim against whom? Some of these may be irrelevant if you are only asked to advise one party. Who will be the plaintiff and defendant in your answer?

## **3. What are the possible causes of action?**

Ascertain the law relevant to each claim. A legal remedy will only be available if the plaintiff's claim can fit a particular "cause of action", such as trespass to land (torts) or promissory estoppel (contracts). At this stage, brainstorming is better than trying to narrow down the answer — list all causes of action which you think might even vaguely be relevant. Even if it's unlikely that claim will be successful in the end, marks are often awarded for recognising the possibility of a particular claim.

## **4. What are the requirements for each action?**

Summarise the elements of each cause of action and note the relevant case authorities. If the choice of principle depends on how the facts are interpreted, or the principles are unresolved in the case law, list them all — i.e., don't get ahead of yourself by guessing which principles will or won't be relevant before you try applying the law to the facts. Are there any defences available, or any special issues relating to remedies?

## **5. Are the elements satisfied?**

Apply the law, element by element, to each set of facts and assess whether each is satisfied (yes, no or maybe). Even if there is an obvious yes or no answer to one element (e.g., the entry of Zula into the house of Yorrick clearly satisfies the 'land' element of trespass to land, as houses are fixtures), include it anyway. If the answer is less obvious, but there are no ambiguous issues, cite the case which supports your application of the law. If the answer to one element is 'yes', continue working down the list. If one element of a cause of action is not satisfied, then it will fail and you should move onto the next cause of action. But be careful in reaching this conclusion, particularly where the limits of elements such as duty of care in negligence (torts) or unconscionability (contracts) are notoriously uncertain and well worth arguing about.

If there is a 'maybe', an issue arises which will require interpretation of the law and/or the facts. Issues are thrown up where the law is ambiguous and because the facts of the problem are usually chosen to highlight that ambiguity.

It may be appropriate to speculate about facts which are not given or which are unclear as this may change the application of the law and the nature of your advice.

## **6. What are the issues?**

Where it is unclear whether a particular element will be satisfied on the facts, formulate the issue as a question which identified which facts need to satisfy the element. Try to express the question at the most detailed level possible, e.g., instead of "is Michael trespassing in Janet's

room?” put “Does Janet, as a child in her foster parents’ house, have sufficient possession of her room to support an action of trespass against Michael?”

In identifying the issues, consider the range of possible meanings for the statutory provision or common law principles and how they relate to the possible interpretations of the facts. You may also consider the generic usage or dictionary definitions of particular words in order to set up arguments for an against each meaning of the ambiguous statement.

Use common sense with regard to the amount of time/space you spend on the various issues — obviously you will get more credit for how you discuss more difficult or controversial issues. Your knowledge of the course will help you recognise these. *Where marks are assigned to each part of a question, use these as a guide for how much emphasis you give to the issues.* If a section is only worth 2 marks, even a Nobel winning account of the issues will not get you more.

### **7. What is the law relevant to the issues?**

Set out the principles of law that are relevant to the issues you have identified. Including the cases from which they are drawn. Again, for your own benefit, write down as many as you think *may* be relevant without jumping to the conclusion about which principle will be applicable.

### **8. Apply the law to the facts.**

Fact scenarios in problem questions often resemble decided cases, but are deliberately different in key aspects. Consequently it is usually not possible to directly apply the principles from 7 to provide a conclusive resolution of issues. Instead, you will need to make your own argument about which precedent, if any, should be followed, and why. Akin to judicial reasoning, your arguments will be based on an analysis of precedent, and/or an appeal to policy (in fact, looking at the way judges write their decisions will be helpful in learning this skill). Ask yourself — is this fact situation more like the one in case X or case Y? How do they differ? Do they differ in relevant or irrelevant ways? What is the important underlying principle which should be applied (or not)? Don’t forget the basic rules of precedent, such as being aware of which jurisdiction the cases come from, or whether they are Supreme or High Court decisions.

Do not launch into an undirected discussion of principles, cases, social policy, etc.; rather, refer only to these sources to set the scene before discussion of an issue or in the process of assessing the various arguments.

### **9. What is your conclusion?**

Although it is not always necessary or possible to give a confident answer to the legal position of parties, *you should express an opinion as to the likely result* if the matter was before a court, or, if you are advising a client, her strongest argument for success. Remember not to be too certain about your conclusion — express it in terms of likelihood or probability. It may be appropriate to refer to academic commentary and policy discussions in supporting your answer.

If there is more than one issue for a particular cause of action, state a conclusion for the cause of action as a whole.

## 10. Setting out the answer.

Since most of the steps above are to help you work out the answer thoroughly, you do not need to write out the entire process in the answer.

- Organisation is important — use headings and sub-headings for different parties, causes of action and issues:

### ***Zig v Algernon***

#### **Trespass to land**

Possession: Does Zig's temporary presence on the land as a camper amount to possession?

- As with essay writing, use “signposts” in your language to help the reader — e.g., “The central issue is ...”; “The only way that the contract will be enforceable is if ...”
- If asked to give advice, write in third person — e.g., “B will have an action for trespass/breach of contract if ...”
- As a guide to how much detail or explanation to include, assume that the reader is a lawyer, but one without detailed knowledge of the area of law under consideration
- In discussing the facts, it is sufficient to refer to the facts as stated in the question. ***Do not transcribe or summarise the facts! Do not invent additional facts!*** (This is distinct from considering the possible facts and their different outcome where there are insufficient facts given in the question to enable you to come to a conclusion.)

Structure ... be comprehensive and coherent:

1. Give a brief introduction to forecast the issues — e.g., to indicate that the main focus of the problem will be on assault/restitution, with uncertainty as to how particular facts may be interpreted etc.
2. For each party or cause of action that you are dealing with, state briefly the elements of the cause of action, citing relevant case or statute.
3. Briefly state which elements are clearly satisfied or not satisfied. This indicates that these points need no further discussion. (State possible defences at this stage, and if issues arise with these, use the same techniques following to discuss.)
4. Indicate that the remaining elements give rise to issues and briefly identify the issues. Then, under separate headings, discuss each issue in turn:
  - (i) Start with a state of the issue in terms of law and the facts at issue;
  - (ii) State the range of possible meanings or interpretations of the ambiguous provision or common law principle;
  - (iii) State arguments for and against each meaning, including a discussion of the relevant authorities;

(iv) Evaluate these arguments.

5. The process of stating issues and facts may be replaced as you refine the issues, and reinterpret facts in light of the cases, etc. Don't forget to give the most space in your answer to the most controversial issues.
6. State an opinion or conclusion for each issue and then one for each cause of action overall, if required, in the form of advice to the party.

In written problem assignments, use the Faculty's Guide to Formal Presentation of Written Work. The names or titles of primary (cases and statutes) and secondary (books, articles, reports etc.) sources should be given in full, together with a complete reference or citation, and page or section number where relevant. Case names and book titles should be underlined or *italicised*; titles of journal articles should be in "double quotes". Abbreviations for cases or statutes can be used *after* the first full citation, as long as you indicate that that is the form you will use (e.g., *Motor Accidents Compensation Act 1999* ('MACA') or ('the Act')). In an exam, you should still underline case names and other sources for clarity, but full references are not necessary.

### Quick tips

- Plan your answer
- Use headings
- Note what the question asks you
- Raise all the issues, even if they seem unimportant
- Don't repeat the facts unnecessarily
- Cite case authorities for propositions of law
- Don't go into all the legal principles or cases in detail unless crucial to resolving the issue