**Podcast 10 – On the Case – How to Read Judgments**

**Professor Forcese**

Welcome back to our series of podcasts in Orientation for the University of Ottawa’s JD program. In this podcast, I discuss the issue of reading cases with Professor Jennifer Chandler. How does one read these core sources of law, why are they important? What are their key components and features? I began by asking Professor Chandler about her teaching and career.

**Professor Chandler**

I’m Jennifer Chandler. I’ve been teaching here at the University for just over 10 years. My background before law was in the bio sciences, in bio chemistry. I law studied at Queen’s and in France at Lyon, graduate studies at Harvard. I clerked for Justice Sopinka at the Supreme Court of Canada. I practiced law for a couple of years with Stikeman Elliot before starting to teach at the University of Ottawa.

**Professor Forcese**

Great. We’re going to talk about how and why to read a case. Why don’t we start by describing what a case is, why you would want to read it?

**Professor Chandler**

Let’s start with what is a case. Cases can be described in different ways. Essentially they are the written reasons for the particular judge’s decision for a case. In essence, what they are telling you is that they are stories that contain a moral. You get the who, what, where, when and sometimes the why. But you also get a rule or a moral that comes along. You also see how the rule is an applied in a particular situation. Namely, those facts. The cases are important and they’re something you start out with at the outset of law school. They are the lifeblood of the common law method. The common law system, which you might have heard about, builds up legal rules through the use of cases. Through looking at precedent cases, turning to apply them to new situations. Over centuries judges in the common law system have turned to these precedents to find rules to apply. They reject rules that don’t apply in that particular situation.

The legislature is another source of law in our system. Not just courts and their precedents, but sometimes statute. If the legislature doesn’t like what judges are doing, they can write a statute basically saying to judges and courts that this is the law now. But the story is not over because those statutes have to be interpreted and applied. The judges will get another try when they start to use the common law method again to build up the cases to show how that new statute should be applied. You can see there an interesting dance between the legislature and the judges over time refining and elaborating rules or even overturning them. You will learn about this when you study not just the common law method, but also courses that are statute-based.

Still on the subject of what is a case, let me tell you about what are the advantages of having cases. One of the advantages to having written recorded reasons is they serve as a record for future use. Judges can go back into them to find precedents and apply them. There’s another layer of utility that these cases have. They force a judge to provide a clear, defensible explanation for the decisions. Rather than just declaring who wins, the judge has to sit down and explain in a persuasive manner why. This provides some degree of transparency in reasoning. It also to some extent, constrains some decision making. It also provides a written record that the parties if they don’t like the outcome, can use for an appeal.

These written judgements provide some consistency and predictability by furnishing a clear record for subsequent judges and lawyers. But it only goes so far. I think you’re going to find when you start to read cases and study cases that many legal rules are incredibly vague. For example, when you’re studying negligence law you’ll learn the rules of negligence…that there’s a duty to take reasonable steps to avoid causing foreseeable harm to others. This is kind of a strange rule. What’s reasonable? What’s foreseeable?

It seems that a rule that you must behave reasonably doesn’t offer much by way of consistency, predictability, constraints on arbitrariness. The reason I’m telling you this is to show you a key tension at the heart of the law in general. Namely that between predictability and specificity on one hand and between flexibility and efficiency on the other. We think about it, if we had to be completely predicable, completely specific about rules you’d be in law school forever. Reading like mad. All the rules we’ve articulated to govern every possible situation. We need more general rules.

For the situations with more differences, a bit of flexibility is needed so that a just outcome can be achieved. The times also change. But all this flexibility and adaptability puts at risk the countervailing desire we have for ensuring consistency. That there’s no unfair inconsistency between like cases. You’re going to see this tension over and over again. As you learn to extract the general underlying rules from specific cases and specific fact situations. And figure out what level of generality to articulate them.

You’re also going to learn this as you learn to work with those rules how to apply them. To take those general rules and to argue about how they should be applied to new fact patters. This tension between flexibility and efficiency on the one hand and predictability on the other will be something that you’ll and have to navigate and learn to take rules out of cases.

That’s a little about what is a case. How about where are these cases. The history of written judgements is a very interesting one in the common law tradition. How did these cases end up getting recorded and spread around so that judges and lawyers could use them, follow them, apply them? The kinds of written judgements that we see now and that you’re going to be reading very shortly…we see them recorded in their current form or reported as they say. They started to be recorded in this way in England in the 16th century. This typically, at that time involved private parties starting a bit of a commercial enterprise by court, sitting there and transcribing the oral or spoken reasons of the judges. In some of the older cases you read, you will see, you will detect that it’s a record of a spoken judgement. Sometimes in the old English system, there will be various judgements rendered and they’re called speeches. This reflects that tradition. Courts then later took to issuing their own reports. Today, much of this has now moved to electronic form. Although you will see reference to a multitude of commercial reporters. These are services that record and publish judgements. You will see reference to lots of commercial, as well as, court-issued reporters.

**Professor Forcese**

Great. How does one deal with the case? How do you go about reading a case?

**Professor Chandler**

Let me separate your question into 2. First, what are the basic mechanics of understanding a case? What is the structure? How is it written? How do we know what part is where and understand it? There’s also I think another question which is implicit in how to read a case, and that’s also why. What are you trying to get out of the case? That’s going to affect how you read a case.

Let me start with the basic mechanics. Most published cases now follow a standard organization. You’ll have basic information near the top. The name of the case. Jones v Smith for example. Often but not always, the name of the case will be the names of the opposing parties in the dispute. And you’ll see there’s a variety of other cases and name types. On the top you’ll see the year, the court, the name of the judge, the reporter, where you find this case. Often there can be locations that it’s reported. After that sometimes, there will be a short abstract. It’s called the head note. And sometimes a set of key words. The key words and head note are not part of the judgement and you shouldn’t treat them as the law. It’s a synopsis that helps you find out what the case is all about. They should not be quoted as law. They’re not law. They’re just an aid.

Sometimes the judgment will go on to list the sources of the legal rules that the court will later use. A list of statutes and cases that are mentioned in the judgement to come. Then after all this we launch really into the heart of the matter. Sometimes there will be one judgement. In court where there is more than one judge hearing a dispute you might have a variety of judgements. But with any judgement, there’s some variation but typically you’ll get a history of the case. What happened in earlier proceedings. For example, if this is an appeal. What happened at the trial level? Then you get into a list of the facts. The who, what, where, when, why that I mentioned.

Then it’s a summary of the legal rules that the judge plans to apply. After all of that, there’s a decision. This typically involves a discussion of remedies. What resolution is the court going to order. Is there going to be a rule a party must cease and desist from some activity? Does someone go to jail? The outcome is typically explained at the end as well.

First year law students are very keen to learn how to prepare a case brief. In essence, it’s a short summary of a case that you will prepare after reading a case. Your professors will usually recommend certain set elements of a structure for the case brief. The objective is to summarize the case into an organized and easily understood format that can quickly be reviewed later – a set of structured notes that helps you to ensure you understand the case.

I always tell my students that it’s very important to not get hung up on the form. The important thing to note is there is no “one way” to do this. What you need to include in the case brief depends on what the purpose of the brief is. By all means, follow the directions that you’re given as you start out on learning how to do this. But keep an eye out for what you find useful for the given purpose in mind for the case brief.

Why do we read cases? I’ve already hinted at the outset; the common law system relies on it. That’s where we find an important source of law in the common law system. In essence, to know the law in a common law system is to know how to extract the rules from a whole set of cases. How to put them together. To explain the structure or rule. Extracting them for all the very specific cases in which it’s applied to understand the underlying rule. And then to use the law is to know how to take these underlying rules to figure out how they should apply in new situations. All this being said, I don’t want to leave you with the impression that this is a thoroughly objective, determinative or even fully logical process. As you start to go out doing this, by reading cases and extracting rules, you’ll see that the process of extracting the rules and applying rules is highly creative. The rules themselves are often messy compromises between incompatible objectives. This may sound a bit frustrating but really this is why you’re in law school. There is often much room for good lawyers about what the legal rules are and how they should actually apply. That’s what I think you will start to find quite fun as you learn to dig through the cases to understand them and find the rules.

**Professor Forcese**

Wonderful. Can I ask a bit about the components of a case and the terminology? You’ve mentioned that there could be at the beginning of every case a name. Are there some guides on how to decide on whether it’s a civil case or a criminal case that you could discern from the name?

**Professor Chandler**

Certainly. Criminal cases will typically say *R v Jones* (for example). The “R” is a short form for Regina or Rex. The Queen or the King depending upon the time of the case. The reason for calling the case that is that in our system of criminal law the dispute is understood as one between the crown and the individual. And that’s why the antagonistic parties in a criminal case are Queen v the accused person.

In civil law, you, not always but very often, will have two private parties that are disputing and you will see their names.

**Professor Forcese**

And what about instances where you have several judges such as in an appellate court. What do we mean by the concept of majority vs minority opinion?

**Professor Chandler**

When you’re at provincial appeal court, cases are often heard by 3 judges. At the Supreme Court by 5, 7 or 9 judges. You can see these are odd numbers for good reason. You want to make sure that there is a majority and a minority if there’s a dispute. Sometimes, if judges on a panel disagree, there will be a several judgments. A number of judges will sign up to a particular judgment. The ideal is to have one judgement that attracts a clear majority and this will then be understood as the articulation of the law to use going forward.

Sometimes it can get a bit messy if you have a case at the Supreme Court that has 2-2-1. Which is then the majority? Or as sometimes happens you will get judgement which different numbers of judges agree on different points and you have to get out your graph paper to figure out what the law is on any one given point.

**Professor Forcese**

You can have a majority and the minority would be a dissent in the sense that they are opposed to the outcome being voiced by the majority. You can have concurring options, which would be…

**Professor Chandler**

A concurring opinion is where two judgements are rendered to explain why you get to the same outcome. The judges agree in the outcome but they disagree on how to get there.

**Professor Forcese**

The reasoning might be quite different even though the outcome is the same. And so you’re left wondering what the actual precedent is for that particular area of the law.

**Professor Chandler**

If you don’t have a majority, say 3 judges on one and 2 on a concurring, you can’t determine which is going to be the guiding rule that emerges from the case.

**Professor Forcese**

Do you have advice for students on how to read a case?

**Professor Chandler**

I would say it’s often advisable to skim through a case quickly from beginning to end to get a sense of where different bits of information are placed. And then return again to the beginning, with a sense of the overall structure in mind. It can save you time in the end. One thing you’ll also find; I certainly remember from law school when I started to read cases is that at the outset it was incredibly slow because I wasn’t quite sure how to determine what were the most important parts of the case. I think this is something that you learn with experience. Not to get too despondent if you’re finding the reading slow at the outset. This is a skill that you develop and strengthen over time.

**Professor Forcese**

I’ll ask you while I have you about the area of specialty that you work on at the law school on the area of medicine and law.

**Professor Chandler**

This is something I’m very excited about and committed to. We have here at the law school a growing group of really interesting faculty members looking at different aspects of health, bio sciences and the law. Whole range of different topics from the constitution, human rights aspects of access to law, public health law, the private law aspect of medical malpractice, the regulation of health professions and more bio-ethics and so forth. My particular area of focus for my teaching is in the area, the legal issues that emerge from the advances in the sciences of the mind. This might be the cognitive neural sciences, the behavioral genetics, and it’s very interesting to see how these are being incorporated into legal doctrine. Into how to address criminal offending and so forth.

I also do a lot of work into select areas of medical practice, the ethics and law of them such as organ donation, transplantation and regeneration. One of the topics there for example is how we decide when and whether we should restrict scientific inquiry for example. These are interest philosophical and legal questions that effect health and well-being and scientific freedom for example.

**Professor Forcese**

Wonderful. Thanks very much Jennifer.

**Professor Chandler**

Sure. It’s a pleasure