THE RE-KILLING (PERHAPS) OF THE DONOGHUE GASTROPOD – AND SOME SUGGESTIONS TO TINKER WITH THE FIRST-YEAR LEGAL EDUCATION CURRICULUM

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Abstract

The doctrine of *stare decisis* is a feature of our common law system. If students cannot identify the *ratio decidendi* ('*ratio*') which is a definitive ingredient of *stare decisis*, they may have problems in understanding how precedent is created and applied in legal problem solving. Even if they do understand how a precedent is created by the courts, this knowledge will not necessarily assist them in applying it in legal problem solving.

This paper proposes that these difficulties can be mitigated in three ways. The first, by students' being taught the fundamental ingredients only of *stare decisis* at the start of the teaching semester. The second way, by explaining that where the identification of the *ratio* of a case is in dispute, that the appropriate template to use is the major premise of the syllogism template or in the 'Rule, namely the 'R', in the I-R-A-C acronym. The third way is that a more advanced lesson on the nuances of *ratio* extraction, be deferred until the middle of the teaching semester.

I Introduction

This paper discusses the challenges faced by first-year law students in understanding the complications inherent in recognising and *applying,* precedent in legal problem-solving. The emphasis on applying precedent, is to draw attention to the nuance in this paper, namely that its focus is not on the purely doctrinal aspects of *stare decisis,* but rather on the practical aspects of applying precedent in legal problem-solving. Murphy J said in a celebrated speech:[2]

> I move to the doctrine of precedent, and that's a favourite doctrine of mine. I have managed to apply it at least once every year since I've been on the bench. The doctrine of precedent is one that whenever faced with a decision, you always follow what the last person did who was faced with the same decision. It is a doctrine eminently suitable for a nation overwhelmingly populated by sheep.

Murphy J's comments were tongue in cheek. To the contrary, Kirby J explained that:

> The doctrine of precedent has been referred to as 'the hallmark of the common law'.[3] It has been called 'the cornerstone of a common law judicial system' that is 'woven into the essential fabric of each common law country's constitutional ethos'[4] Its significance in day-to-day legal practice may have declined with the rise in the quantity and pervasiveness of statute law. *However, it*

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2 L K Murphy, 'The Responsibility of Judges', Opening Address for the First National Conference of Labor Lawyers, 29 June 1979 in G Evans (ed) *Law, Politics and the Labor Movement* (Melbourne: Legal Service Bulletin, 1980) 5.

3 The Hon. Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 93.

4 B.V. Harris, 'Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle' (2002) 118 *Law Quarterly Review* 408, 412.

> *still lies at the heart of the Australian legal system* and the way Australian lawyers approach the resolution of many legal problems.[5]

Kirby J's proposition that the doctrine of precedent remains at 'the heart of the Australian legal system and the way Australian lawyers approach the resolution of many legal problems,'[6] underlies the fact that the study of the doctrine of precedent necessarily remains *de rigueur* in foundational legal units.[7] The next logical step in our journey here therefore would be to direct our attention to the way in which the process for the search for the *ratio* of a case is conducted. Not all the perspectives or methods discussed below will be held uniformly or adopted by Australian first-year law lecturers. An insight into these perspectives has been obtained both by an examination of numerous standard Australian first year texts, as well as anecdotally, that is to say, from informal discussion and sharing experiences. This hopefully will result at least in a relatively utilitarian approach. In that light, one convenient starting point is to discuss the extent to which those authors have presented the practical aspects of the search for precedent, and explore the extent to which the process of the search for precedent itself divulges, at a more subliminal level, the conceptual difficulties associated with the doctrine.

Lecturers in the common law tradition know that the *ratio* of a case is its binding part. A popular if not relatively ubiquitous exercise to help first-year law students to recognise the *ratio* in a case, is to draw their attention to a selected case and direct them to identify its *ratio*; this usually happens early in their semester.

Without covering the field, a survey of at least some of the more eminent texts reveals that this is an arguably ubiquitous approach. For instance, in *Laying Down the Law*,[8] a popular first year text, the authors give an extract from *Cohen v Sellar*[9] and direct the reader (amongst other things) to extract the passages 'which could be argued to be *rationes decidendi* or *obiter dicta.*[10] *Connecting with Law*[11] contains broadly similar exercises, including an interesting variation based on a fictional case of someone claiming an indemnity under an insurance policy.[12] *The New Lawyer*[13] likewise contains such an exercise, where the reader is directed to consider, appropriately enough given the title of this paper, *Donoghue v Stevenson*[14] ('*Donoghue*') and to answer several questions including the following: 'focusing on Lord Atkin's decision, what was the *ratio decidendi?* '[15]

Donoghue has proven to be a popular vehicle historically, for the *ratio* extraction exercise, and also a convenient case to explore the various nuances and complications associated with that

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5 Michael Kirby, 'Precedent: Report on Australia' (Paper presented to the International Academy of Comparative Law Conference, Utrecht, the Netherlands, 17 July 2006). <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_17jul06.pdf>.

6 Ibid.

7 A cursory examination through, say, three major Australian texts arguably bears this out. See generally Catriona Cook et al, *Laying Down the Law*, (LexisNexis Butterworths, 9th ed 2014) Chapter Six. Also see generally, Michelle Sanson and Thalia Anthony, *Connecting With Law,* (Oxford University Press, 3rd ed, 2014) Chapter 10, and Nickolas James and Rachael Field, *The New Lawyer* (John Wiley and Sons, 2013) 222.

8 Cook et al, above n 7.

9 *Cohen v Sellar* [1926] 1 KB 536

10 Cook et al, above n 7, 145.

11 Sanson and Anthony, above n 7.

12 Ibid 419.

13 James and Field, above n 7, 222.

14 *Donoghue v Stevenson* [1932] AC 562.

15 James and Field, above n 7, 236.

process.[16] The selection of *Donoghue* is likely driven by the fact that it is the type of case which encourages a discussion of *rationes* at varying levels of generality, ranging at a comparatively low level of generality to being a case of a supply of a bottle of ginger beer in an opaque container to an ultimate consumer who was not a purchaser – to a comparatively high level of generality, as being a case involving *any* product manufactured for consumption when there is no opportunity for intermediate inspection (these points being made by the authors of *Laying Down the Law*[17]).

This poses useful challenges for our first-year law student to overcome, and to become more familiar with the nuances of the identification of *ratio*. Separately, *Donoghue* was a seminal case in the development of the modern tort of negligence and its eminence adds strength to its choice as a handy case with which first-year law students are to become familiar. These challenges in identifying the *ratio* of *Donoghue*, are usefully explained by the authors of *Laying Down the Law* as follows:

> At the lowest level of abstraction the decision would be binding on later courts only in cases with precisely the same facts. On that basis, it would not be binding in a later case where the drink was Coca Cola. But in terms of the legal rule, why should there be a distinction between ginger beer and Coca Cola? What is an appropriate level of generality at which the *ratio* should be stated? That question is not easy to answer. *The actual statements of law in the case under consideration will not necessarily be decisive.* Sometimes the court will make a number of different statements at different levels of generality. In such cases the *ratio* is worked out over time.[18]

Professor Richard Krever's following explanation similarly discusses the difficulties brought about by the fact that the *ratio* of a case cannot be decisively determined by an analysis of the judicial pronouncements in it, and additionally, Professor Krever introduces the idea that the very exercise of doing so might actually be sterile:

> The *ratio decidendi* is the actual rule of law stated in the holding of a decision, a rule that will be binding on future courts. An *obiter dictum* on the other hand is a judicial pronouncement on the law that is not integral to the holding itself. While it may be considered by a later court an *obiter dictum* will not establish a rule of law that must be followed by any court. *Although this distinction is for the most part merely a legal myth, it is carefully retained by lawyers who utilise it to formulate legal argument*.[19]

The authors of *Laying Down the Law* make the very same point, albeit less pungently than Professor Krever, saying that the court will only give its 'full consideration' on the point of whether a statement is a ruling on a point of law (*ratio*) rather than a statement of a rule of law (*obiter*) when that matter is in contention, requiring the court to make a ruling with the benefit of the argument of counsel.[20] The orthodox *ratio* identification exercise, contained in the Australian texts referred to earlier, does serve the crucial purpose of teaching students how to identify the parts of the case which contain the actual basis for the decision, and which parts are

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16 I vividly recall that *Donoghue* was the case selected for the *ratio* identification exercise that I was directed to undertake in the first year of my own undergraduate law studies in 1980!

17 Cook et al, above n 7, 141; very similarly, see the treatment at Sanson and Anthony, above n 7, 285.

18 Cook et al, above n 7, 141 (emphasis added). Similarly see Sanson and Anthony, above n 7, 417: The court in the case itself would merely have stated its decision based on the case at hand, but the scope and generality of the *ratio* is worked out in the ensuing cases where the ratio is sought to be applied.

19 Richard Krever, *Mastering Law Studies and Law Exam Techniques* (LexisNexis, Australia, 2014) 15 (emphasis added).

20 Cook et al, above n 7, 139.

remarks made in passing; these are of course just the respective *ratio* and *obiter* dicta expressed in everyday language.

The exercise by its nature however, necessarily confines the identification of the respective rationes and *obiter* dicta within the microcosm of the case being analysed. So, notwithstanding the successful completion of this exercise, the law student is still confronted with the complication that the actual statements of law in the case under consideration, will not necessarily be decisive[21] once they are required to determine the broader application of those statements.

The study of *stare decisis* thus becomes potentially a pedagogical blind alley for our first-year law student, who has to grapple with the respective ideas on the one hand, that the *ratio* of the case which they have identified through this exercise, is the ground for its decision; and on the other hand, that that statement might not be regarded as a decisive statement of the law, and that the scope of the *ratio* of the case is worked out over time. All this is being presented to law students at a time they would not yet have a solid understanding of jurisprudence.

A law lecturer who is confronted by the need to explain these difficulties might be tempted to direct their students towards more sophisticated explanations of *stare decisis*. Professor Russell Hinchy attempts to provide such an explanation in his text *The Australian Legal System: History, Institutions and Method*[22] where he discusses various theories of precedent, including Professor Neil McCormack's hypothesis that:

> The theory of precedent and his (Professor McCormack's) subsequent model of *ratio decidendi* must form part of a coherent system of 'a complex interplay between considerations of principle, consequentialist arguments, and disputable points of interpretation of established legal rules'.[23]

Professor Hinchy said also:

> Not everyone of course is in agreement as to the meaning and use of the concept of *ratio decidendi*. For example, in the opinion of Julius Stone, the concept of *ratio decidendi* is 'illusory' and 'indeterminate'.[24]

Professor Hinchy's observations concerning the 'complexity' of the interplay between considerations of principle and disputable points of interpretation, by those very descriptions, provide support for at least one premise of this paper, namely that the mastery of the doctrine would at best pose significant difficulties for our Australian novice law student. Without arriving at a final view as to whether a workable definition of *ratio decidendi* can eventually be achieved, its description as being illusory and indeterminate at least underpins our suggestion that a novice law student might find the doctrine difficult to master.

Professor Hinchy's book is a fairly advanced work directed to a more senior law student, and likely to be of more interest to someone with an interest in jurisprudence than a first year law student. It will be useful then, to explore the views of other commentators, particularly those writing for foundational law students. *Learning Legal Rules*[25] is such a work in which its authors posit the question: 'So, how do I spot the ratio' and suggest, amongst other things, that 'this is a matter of skill and interpretation built on experience' akin to asking a number of movie goers

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21 Cook et al, above n 7, 141.

22 Russell Hinchy, *The Australian Legal System: History, Institutions and Method,* (Lawbook Co, 2nd ed, 2015).

23 Hinchy, above n 22, 238, in part citing Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1995) 156.

24 Hinchy, above n 22 citing J. Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications Pty Ltd, 1964) 267 – 74.

25 James A. Holland & Julian Webb, *Learning Legal Rules: A Student's Guide to Legal Method and Reasoning,* (Oxford University Press 7th ed 2010).

or readers of a book, to ask what the book or film was all about.[26] The authors refer to various articles and books 'eg MacCormick (1987); Montrose (1957); and Goodhart (1957)'[27]and make the following telling observations:

> However, our experience is that at the outset of legal studies, such in-depth analysis tends to produce confusion rather than comfort.[28]

The authors in the same paragraph further posit, in the same vein:

> We are in some agreement with Twining and Miers that the intricacies of the debate (how do I spot the ratio) can (at least with regard to students beginning their legal studies) be a *'long and rather sterile'* one.[29]

The author agrees entirely with the authors of *Holland and Webb*. Professor John Farrar's *Legal Reasoning*[30] is another foundational legal studies text which contains useful comments concerning his views on the presentation of the study of *ratio* for first year law students. Professor Farrar prefaces his discussion of *ratio decidendi* by explaining its historical evolution. That passage at its conclusion, implicitly concedes the absence of an authoritative definition of *ratio*:

> Some jurists have thought that in the absence of an *authoritative* definition, (the emphasis is reproduced) perhaps the solution is to establish a technique of identifying a *ratio* in any particular case rather on the basis of 'I may not be able to define an elephant but I know one when I see one'.[31]

Professor Farrar notes in this regard as follows:

> It (the concept of *ratio decidendi*) is more easily intelligible in terms of a technique or process of abstraction and generalization which assumes its importance in later cases.[32]

Tellingly, Professor Farrar did not offer a more sophisticated conceptual explanation of *ratio* whose treatment of *ratio* differed from Professor Hinchy's, who included in his analysis a discussion of various sophisticated theories of precedent. The difference in treatment can likely be explained by the fact that Professor Hinchy was writing for a more sophisticated reader, whilst Professor Farrar's likely audience was a first year law student. Professor Farrar's treatment, contrary to Professor Hinchy's, was to rationalise the concept of *ratio* by describing it as a technique, rather than focus on its jurisprudential underpinnings, and to explain that its importance would then be determined by its treatment in subsequent cases.

Keeping in mind that Professor Farrar's book was written with the first-year law student in mind, and that our own intended audience comprises first-year law lecturers, this paper agrees with Professor Farrar's approach. Farrar's treatment of *ratio* at least attempts to explain its evolution in a case, including the process by which its parameters are determined by subsequent cases, in a manner likely to be intelligible to a first-year law student, and without drawing excessively on the doctrine's theoretical and jurisprudential underpinnings.

In Part III below, this paper offers suggestions to 'tinker with' the curriculum and digresses briefly to suggest that teaching *ratio* should be offered as a two-tiered exercise, with two discrete learning outcomes; the first being to identify the *ratio* in any particular case, and the second is to

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26 Ibid 185.
27 Ibid 186, the passage itself does not contain the citation to those works and is reproduced verbatim.
28 Ibid.
29 Ibid (emphasis added). The reference to *Twining and Miers* is reproduced from the source, verbatim. The authors there do not in that passage or earlier, furnish a more formal citation.
30 John H Farrar, *Legal Reasoning,* (Lawbook Co 2010).
31 Ibid 107.
32 Ibid 110.

teach students how judges in a common law system actually 'conduct the process of abstraction and generalisation'[33] and thus ultimately delineate the parameters of *ratio*. These suggestions are arguably congruent with Professor Farrar's conceptualisation of *ratio*.

Another point of potential complication, at least to a first-year law student, is that a well-considered judgement on point should 'stand in authority somewhere between a *ratio decidendi* and an *obiter dictum*.[34] As the authors of *Laying Down the Law* point out, 'authoritative *obiter*' describes judicial pronouncements which because of the tribunal's eminence and the fact there is no binding case on point, should be accorded great respect.[35]

Professor Farrar, in discussing the parameters respectively of *ratio decidendi* and *obiter dictum*, in a reprise of his comments concerning the indeterminancy of *ratio*, said:

> Clearly the whole conception of *obiter dictum*, involving the negation of *ratio decidendi*, is affected by the fuzziness of *ratio*.[36]

In exploring the significance of *ratio decidendi* versus *obiter dictum*, the authors of *Laying Down the Law* explored the relative authoritativeness (to use as neutral an expression as possible) of each approach. Professor Farrar approached the question differently, by exploring the idea that conceptualising *obiter dictum* is affected by the 'fuzziness' of *ratio*. The authors thus approached the question from dissimilar pedagogical viewpoints, but each argument nevertheless underpins a central proposition in this paper, namely that the idea of identifying the *ratio decidendi* of a case – and concomitantly, any *obiter dictum*, since the concept of *obiter dictum* involves the negation of *ratio decidendi*[37]- is difficult for a novice law student to master.

> Finally, the doctrine of *stare decisis* includes the core idea that each court is bound by decisions of courts higher in its hierarchy, and that a decision of a court in a different hierarchy may yet be persuasive but not necessarily binding.[38] These propositions are simple to state in the abstract, but the complexity of the Australian court hierarchy makes it difficult to explain their practical application to a first-year law student.[39]

Notwithstanding that the doctrine of precedent underpins our common law system and that the binding nature of *ratio decidendi* is central to it, its peripatetic nature and the imprecision in identifying *ratio* together, mean that the exercise of *ratio* identification may in truth be a somewhat inauthentic exercise, at least for a first-year law student.

The challenge for legal educators is to find a system that will lead law students to an understanding, not just of identifying the principle (loosely speaking – the avoidance of the expression *ratio* is deliberate) of a case, including the delineation of its parameters, but also the manner in which it is applied. This is not a one off exercise, as this skill is developed throughout legal studies and beyond. This paper suggests that the vehicle of the major premise of an Aristotelian syllogism, or the rule in I-R-A-C (the 'R' in the acronym), be adopted as the vehicle for such a method, and this paper now discusses how that might be achieved.

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33 Ibid, to reproduce Professor Farrar's own language.

34 *Nowicka v Superannuation Complaints Tribunal* [2008] FCA 939, [21]. *Hedley Byrne & Co Ltd. Heller & Partners Ltd.* [1964] AC 465 was a particularly celebrated instance of this approach, with the most significant portions of the case, where the law of negligent misrepresentation was discussed, being, strictly, *obiter dicta*.

35 See, eg, Cook et al, above n 7, 148.

36 Farrar, above n 30, 112.

37 Farrar, above n 30.

38 Cook et al, above n 7, 135.

39 One commentator said: 'Australia's Legal System is quite complicated and difficult to explain': Koli Pro Akpet, 'The Australian Legal System: The Legal Profession and the Judiciary' (2011) *Ankara Bar Review* 71.

II An Entrée into Syllogistic Reasoning

This section introduces the idea that the major premise of an Aristotelian[40] syllogism is the figurative vessel within which students should arguably explore the evolution of an applicable legal rule, including the question of whether that rule can be characterised as *ratio decidendi* or *obiter dictum*, or something else. A 'syllogism' is a statement of logical relationship which has three parts, namely: the major premise, usually a broad statement of general applicability; the minor premise, usually a narrower statement of particular applicability related in some way to the major premise; and the conclusion, which is the logical consequence of the major and minor premises.[41]

I-R-A-C, which is an acronym for 'issue-rule-application-conclusion', is commonly taught in Australian law schools usually in first-year,[42] and in England.[43] In America, the adoption of the I-R-A-C format was said to have been developed for the strategic purpose of assisting disadvantaged students to sit their Bar exams.[44] An often quoted concept in American legal pedagogy is that the syllogistic major premise corresponds with the Rule (the 'R' in the I-R-A-C acronym).[45]

Whilst the 'Application' (the 'A' in the I-R-A-C acronym) can be complicated to create, we focus here on the development of the R ('Rule') such that, for the purposes of this paper, as far as the Application is concerned, the reader does not need to go beyond an appreciation of the fact the 'Application' is the place in the I-R-A-C vessel where one applies the rule of law. The essence of syllogistic legal problem-solving is that the need for syllogistic analysis comes about solely when an issue exists. Professor James Gardner, in his seminal text in which he used the template of syllogistic logic to explain effective advocacy, said:

> [T]he choices available to an advocate are quite constrained, and the number of syllogisms suitable for use in any given case is limited. Unlike a philosopher, a legal advocate does not deal with open-ended questions … the need to make a legal argument never arises in a vacuum; it arises only in the context of a specific case in which specific parties seek specific judicial relief…[46]

The idea that the application of syllogistic logic only arises in context, is implicit also in Professor James Boland's explanation that induction is the process of synthesising a legal rule

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40 The reference to Aristotle is a nod to the fact that his theory of the syllogism is regarded as having a major influence on Western thought: see, eg, Standford University, Centre for the Study of Language and Information, *Aristotle's Logic* (17 February 2017) <https://plato.stanford.edu/entries/aristotle-logic/>

41 James A Gardner, *Legal Argument: The Structure and Language of Effective Advocacy* (LexisNexis US, 2007) 4.

42 See, eg, Cook et al, above n 7, 550.

43 See, eg, Chris Turner, Jo Boylan-Kemp and Jacqueline Martin, *Unlocking Legal Learning* (Taylor and Francis UK, 2012) 143.

44 See, eg, P Gabel, 'HIRAC – Heading, Issue, Rule, Application, Conclusion' in Kathy Laster, *Law as Culture* (Federation Press, 2nd ed, Sydney NSW, 2001) 194; Bradley Clary and Pamela Lysaght, *Successful Legal Analysis and Writing: The Fundamentals* (West/Thomson Reuters 3rd ed, US, 2010) 84.

45 See, eg, Clary and Lysaght, above n 44, 82. This is the central idea in James M Boland, 'Legal Writing Programs and Professionalism: Legal Writing Professors can join the Academic Club' (2006) 18(3) *St Thomas Law Rev* 711. For an Australian perspective, see Chapters One and Two in K Yin and A Desierto *Legal problem-solving and syllogistic analysis: a guide for foundation law students*, (LexisNexis NSW, 2016).

46 Gardner, above n 41, 11. See also Yin and Desierto, above n 45, 12.

based on the issue presented.[47] The existence of the issue thus dictates the rule's evolution. Professor Anita Schnee's following explanation of the process of the creation of a legal rule, is particularly useful for our discussion:

> The inductive enquiry encompasses rule *development and choice*, and the principles and policies that contribute to development of law. [48]

Also:

> Induction is needed where there is no rule or when there is *a choice between rules.*[49]

Consistent with the idea explored by Professor Gardner above,[50] the need then, to deal with a legal question, arises only when there is legal argument at all – the tautology is deliberate. In the specific case of identifying *ratio,* it is thus only where some controversy (issue) arises over the identification of the *ratio*, that the question of its identification becomes relevant at all. The first proposition is axiomatic when juxtaposed with the second, and the juxtaposition again, is deliberate as it reflects the essence of syllogistic reasoning, and more broadly, of our common law adversarial system itself.

This means that where there is a significant contest as to the choice of rule, such as when one needs to justify the ultimate selection of one proposition as being the *ratio decidendi* of a case from various alternative propositions, then this contest takes place within the major premise of the syllogism (or the Rule within the I-R-A-C vessel). Depending on the sophistication of the controversy, one *might* in the process need to go into some detail as to the reasons for adopting a specific rule.[51] Professor James Boland said:

> New law students can only absorb the basic tenets of the syllogism.[52]

Boland also suggested that instruction in syllogistic reasoning should be provided to them as it would give students an adequate foundation on which they can build so as to eventually achieve a higher level of logical thinking and argument.[53]

This paper agrees with Professor Boland and therefore suggests that first-year law students should be given instruction in basic syllogistic reasoning. This would provide them with both an adequate doctrinal foundation for the development of more sophisticated analysis, as well as the legal skill required to construct sophisticated legal arguments subsequently. After all this, this paper suggests that a fairly utilitarian approach be adopted, both to the teaching of syllogistic logic, as well as to the doctrine of *stare decisis* discussed below in the next section.

III Tinkering with the Curriculum

Given the lack of uniformity of views as to its scope (and taken to its limits, that *ratio* is an 'illusory' concept, if Professor Stone's view was to find support),[54] this paper suggests that, rather than try to give an authoritative definition of *ratio* to first-year law students, yet accepting that a fundamental appreciation of the doctrine is required – that law students should arguably focus on two discrete outcomes: first, to identify the *ratio* of any particular case,[55] and second,

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47 Boland, above n 45, 723 (emphasis added).
48 Anita Schnee, 'Legal Reasoning: "Obviously"' (1997) 3 *Legal Writing: The Journal of the Legal Writing Institute* 105, 106 (emphasis added).
49 Ibid 117 (emphasis added).
50 Gardner, above n 41.
51 Clary and Lysaght, above n 44, 87.
52 Boland, above n 45, 721.
53 Ibid.
54 Hinchy, above n 24.
55 This is a nod to Professor Farrar, who made this point at above n 31.

to understand the technique or process of abstraction and generalisation which assumes the importance of *ratio* in later cases.[56]

Recapping on a point in Part II above, that identification of *ratio* in a case only arises in the context of some controversy between the parties where *ratio*'s identification is in question, this paper recounts the idea explored by the authors of *Laying Down the Law,* that the distinction between *ratio* and *obiter dictum* comes to the forefront of detailed analysis, requiring 'full consideration' when identification or characterisation of a legal proposition as being *ratio* or *obiter dictum*, is the subject of legal argument.[57] The corollary of this proposition is that, unless the characterisation of a legal proposition as being *ratio* or *obiter* as the case may be, is actually an issue in contention between the parties, then it would be unlikely that the court would even embark on a discussion of whether that legal proposition was *ratio* or *obiter dictum*. Professor Krever noted in this regard that:

> There are not many cases (relatively speaking) where the judge explicitly states that part of the reasons for judgement is *obiter*.[58]

By parity of reasoning, neither is the law student generally required to do so, nor concomitantly is he or she required to characterise any particular part of a judgment as *ratio* or *obiter* as the case may be. There probably is limited empirical evidence only to support Professor Krever's observation, but it is suggested that most law lecturers with some years of lecturing experience would have read a significant number of cases over time and would agree with him.

Consistent with the essence of syllogistic legal problem solving introduced earlier, namely that the need for analysis only arises when an issue arises,[59] that distinction becomes really significant only when there is a contest as to whether a proposition in case law should, in truth, be characterised as *ratio* or *obiter dictum*. For example, only such a contest might arise in the context of a legal problem where one of several protagonists would be arguing as part of its case that the 'rule' should not be binding, as it is 'merely *obiter dictum*' with their opponent arguing to the contrary.

When such a contest does arise, then consistent with formulaic syllogistic reasoning, the major premise (or 'Rule' in the I-R-A-C acronym) is the place in the syllogism vessel to explore these arguments, as the resolution of this contest would be relevant to the 'choice of the rule'.[60] The logical extension of this point is that unless the characterisation of a principle as being *ratio* or *obiter* actually has some impact on the validity of some legal contest, it adds an unnecessary complication for the first-year student to have to identify them respectively as *ratio* (or *obiter* dicta), nor to appreciate the finer jurisprudential points associated with the evolution of *ratio* in abstract.

That abruptly brings us to two of the suggestions advanced in this paper. The first is that first-year law students be provided with instruction early in the semester on the fundamentals only of the doctrine of *stare decisis*, and covering only the difference between *ratio* and *obiter* within the microcosm of the *ratio* identification exercise described above.[61] The second is that early in the semester, law students be given fundamental instruction on syllogistic reasoning. Such instruction would necessarily incorporate the idea that any contest concerning the identification of the appropriate legal principle in the dispute, including the question of whether that principle was in truth *ratio decidendi* or *obiter dictum*, be performed within the

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56 This is, again, consistent with the argument advanced by Professor Farrar above n 32.
57 Cook et al, above n 20.
58 Krever, above n 19, 64.
59 Gardner, above n 46; Boland, above n 47.
60 Schnee, above n 49.
61 Cook et al, above n 7; Sanson and Anthony, above n 7; James and Field, above n 13.

major premise of the syllogism vessel, or the Rule in the I-R-A-C vessel, this being at the core of syllogistic logic itself.

For a practical demonstration of how this method might be applied in legal problem solving, this paper identifies an authentic example in first year legal studies where a point in contention was the identification of the *ratio* of a case. There is an appropriate illustration in *Learning Legal Rules*[62] which analyses the case of *Grant v Australian Knitting Mills*[63]in which the scope of the *ratio* of *Donoghue*[64] was in issue. The facts in *Grant* were that the plaintiff bought underwear which was contaminated by sulphites. This defect was hidden and could not have been detected by reasonable inspection. The plaintiff contracted dermatitis from the underwear and one question[65] was whether the *Donoghue* principle was limited to the supply of food and drink. *Australian Knitting Mills* argued that the principle in *Donoghue* was indeed restricted in this way, saying that Lord Atkin's famous principle in Donoghue, that a manufacturer owes a duty of care to the ultimate consumer when their product is supplied in the form it was intended for the ultimate consumer, and with no reasonable prospect of intermediate inspection, was at its widest, limited in its application to the supply of food and drink. On this point, the authors of *Learning Legal Rules* summarised the findings of the Privy Council in *Donoghue* as follows:

> The Privy Council stated that their understanding of *Donoghue v Stevenson* was that the principle in that case could be applied only where a defect is hidden and unknown to a consumer; in Grant the chemical in the underpants represented a latent (and therefore hidden) defect equivalent to the snail in the opaque bottle.[66]

The next step in teaching the method of using the major premise (or Rule) as the vessel to present the argument concerning the parameters of *ratio*, is to create a problem question where law students are compelled to confront the question of the scope of Lord Atkin's *ratio* in *Donoghue.* To demonstrate this method, consider the below hypothetical facts of an exercise:

> HYPOTHETICAL LAW SCHOOL QUESTION FACTS
>
> Victor has bought a car called a Zoomer. Due to the position of its fuel tank, Zoomers are prone to catch fire even if involved in a minor collision.[67] Sure enough, following a minor collision, *Victor's* Zoomer caught fire, thereby causing him to suffer significant injury. Assume that for all practical purposes the positioning of the car's fuel tank resulted from a manufacturing defect, and that it was not something that could have been detected by any reasonable inspection.

Assume that law students are directed to address whether the *ratio* of *Donoghue* is wide enough to apply to these facts, and that they need to only consider Lord Atkin's judgment in *Donoghue*. After also reading *Grant,* law students' answers may look like the below:

> HYPOTHETICAL LAW STUDENT ANSWER
>
> Lord Atkin held in *Donoghue v Stevenson* that a manufacturer of goods owes a duty of reasonable care independent of contract to avoid acts or omissions likely to injure its neighbours. 'Neighbours' are those who are so closely and directly affected by one's act that they ought reasonably to have them in contemplation as being so affected when directing their mind to their own acts or omissions.

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62 Holland & Webb, above n 25, 183.
63 *Grant v Australian Knitting Mills* [1936] AC 85.
64 *Donoghue v Stevenson* [1932] AC 562.
65 Amongst others – including the argument that the plaintiff ought to have washed the garments before wearing them.
66 Holland & Webb, above n 25, 184.
67 These facts are loosely reminiscent of the famous Ford Pinto case. <https://en.wikipedia.org/wiki/Ford_Pinto>.

> So, if the manufacturer intends their goods to reach the consumer in the same form in which they left their factory, without immediate inspection knowing that without taking reasonable care in their manufacture a consumer could be injured, the manufacturer owes the consumer a duty to take reasonable care in their manufacture of their goods. This was the case when Mrs. Donoghue drank the contents of a sealed, opaque bottle of ginger beer which contained the remnants of a dead snail that caused her to suffer gastro enteritis.
>
> The Privy Council in *Grant v Australian Knitting Mills* considered the question of the scope of the *ratio* of *Donoghue v Stevenson*. The plaintiff in the former case bought underwear that was contaminated with sulphites. This was considered to be a hidden defect that could not have been detected by reasonable inspection. It was argued that the contamination was analogous to the snail in the opaque bottle in *Donoghue*. The Privy Council held that the principle in *Donoghue* was not restricted to the supply of food or drink and could be extended to the plaintiff's underwear.

Consistent with syllogistic analysis, this Rule shows the development of the applicable legal principle clearly, and that it is not simply a cut and pasted version of the law. The Rule has been synthesised to confront the 'issue' presented[68] namely the specific situation of Victor's Zoomer. The law student's answer recognises the relevant facts in case law which might align, at least arguably, with the facts of their case and identified the Rule to address those facts.

In this case, the question's hypothetical facts arguably align with the facts of the case law: that Victor bought an item manufactured by another which contained some defect which he could not have detected reasonably. These facts align with the facts of Mrs. Donoghue's opaque ginger beer bottle in *Donoghue* and the undetectable sulphite contamination in *Grant.*

The author's entire argument concerning the evolution of the applicable legal principle, is contained in the major premise (or rule). This is consistent with the formulaic syllogistic template. In so doing, they have confronted the arguments which arise in their question, namely whether the *ratio* in *Donoghue* should apply to the situation of a car whose petrol tank was concealed – but have not gone beyond. This dispute would not require them to provide a narrative on the scope of the *ratio* of *Donoghue* in the abstract*,* nor of *Grant.*

This approach emphasises a primary characteristic of syllogistic problem-solving, namely that the evolution of the relevant rule only takes place in context rather than in abstract. Having been provided with the relevant doctrinal knowledge of the case law, and of the fundamental nature of *stare decisis,* law students should then arguably be capable of producing such an answer, and the author's own experience suggests this is achievable.

In discussing the minor premise, assuming for the sake of argument that the major premise (Rule) is more or less complete, and this admittedly requires the reader to suspend disbelief given that the facts are covered by more recent case law and legislation, then drafting the minor premise or Application is a comparatively straightforward exercise. The more obvious direction of the analysis, given the arguments in *Grant* that the principle in *Donoghue* should at least extend to a case of contaminated apparel, would be one that leads to the conclusion that the principles of *Donoghue* should likewise apply to the present case such that the manufacturer is liable. For the sake of the exercise, to demonstrate that a properly articulated Rule might enable the law student to give a contrary answer within a range of supportable responses, below is a sample response which might be less obvious:

> HYPOTHETICAL ALTERNATIVE LAW STUDENT ANSWER
>
> Although the Privy Council in *Grant* accepted that the principles in *Donoghue* should extend to the manufacturer of contaminated apparel, *Grant* was a case of an item for use on the human body. It could thus be argued that a car is somewhat different from an item for human physical

68 Boland, above n 47.

> consumption, such as Mrs. Donoghue's ginger beer, or an item of clothing such as the plaintiff's underwear in *Grant.* Ultimately, a more convincing argument is that the principles in *Donoghue* ought not to apply to the present facts, so that the manufacturer of Victor's Zoomer does not owe him a tortious duty of care.

This alternative argument is not necessarily likely to succeed at a real trial (the author's view is that it would not), but it demonstrates that having articulated the major premise or Rule coherently, the law student demonstrates the necessarily analytical tools to develop a cogent and legitimate argument. This displays the use of the syllogistic form to synthesise a rule where there is a contest between two protagonists concerning the parameters of *ratio.* Our second suggestion above (that early in the semester, students be instructed on syllogistic reasoning), is not restricted to situations of contest between differing views on the scope of *ratio*. Rather, instructing law students on syllogistic logic arguably gives them an adequate foundation on which to build so as to eventually achieve a higher level of logical thinking and argument.[69]

This Part concludes by illustrating the broader use of the syllogistic major premise (or Rule) as the template, to synthesise a rule to resolve the question of which of two competing rules should apply to any given situation. The illustration below is selected from an area of law that is familiar to first year law students, namely, the principles relating to part performance of a contract.

> HYPOTHETICAL FACTS OF A LAW SCHOOL PROBLEM ON CONTRACT PART PERFORMANCE
>
> Evan owns a house. Evan enters into an oral agreement with Norman to rent his house to Norman for the monthly rent of $500.00. Norman actually pays rent for a few months but does not move in, intending to do so at a more convenient time. Evan wants to sell his house and needs to grant vacant possession of it, and wants to take the position that his oral agreement with Norman is not enforceable. Disregarding any custom or practice of real estate that might affect the matter, the question is whether Norman can seek specific performance of the oral lease agreement.

The legal issue between the parties is whether Norman satisfies the requirements of part performance to be entitled to an order for specific performance of his oral agreement with Evan, which concerns a lease. A lease is a disposition of an interest in land, and the parties' oral agreement would be unenforceable as there is no record of it in writing to satisfy the *Statute of Frauds*.[70] The particular question that arises is whether Norman's payment of rent satisfies the test of 'referability' which is one of the legal requirements of part performance. Norman would like to move in one day, and would also likely want to argue that he has satisfied the requirements of part performance, because he would not have paid rent to Evan unless he thought he had an enforceable agreement to rent Evan's house. On the other hand, Evan wants to be in a position to grant vacant possession so he can sell the house, so he would likely argue that Norman's payment of rent of itself, does not amount to part performance.

Assuming that the law has been set out more or less accurately, the hypothetical answer below clearly shows how the rule (major premise) has been synthesised from the applicable legal principles:

> Rule: It was held in *McBride v Sandland*[71] that an act must be unequivocally and in its own nature referable to a contract in the general nature of the agreement sought to be enforced in order to satisfy the test of part performance. McBride was an Australian case.

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69 See Boland, above n 53.

70 In the author's home jurisdiction of Western Australia, this is the *Statute of Frauds* (1677) s 4, which applies here by virtue the *Law Reform Statute of Frauds Act* 1962 (WA), There are equivalent or similar provisions throughout Australia. See, eg, *The Conveyancing Act* 1919 (NSW) s 54A.

71 *McBride v Sandland* (1918) 25 CLR 69.

> On the other hand, it was stated in *Steadman v Steadman*[72] that it need only be proved that it was more probable than not that the acts relied on, were done in reliance on the fact of a contract for the test of part performance to be satisfied. Steadman is an English case. The Steadman test has not explicitly been disapproved in Australia, but the strong balance of Australian authority is to prefer the test that, to constitute part performance, the acts in question must be unequivocally and in their own nature, referable to a contract of the general nature of the alleged oral agreement: see for example *Lighting By Design (Aust) Pty. Ltd. v Cannington Nominees Pty. Ltd*.[73] Adopting this test, the payment of money alone has not been considered to be such an act, but payment of money if combined with other acts may allow a court to find that part performance is satisfied – *Ciaverelli v Pollimeni*.[74]

This hypothetical answer can arguably be produced by a law student armed with a limited inventory of legal-technical skills. An answer like this requires limited understanding of the doctrine of *stare decisis*, and syllogistic logic would have been essential but also adequate. Together, they underline the reasons why the author advanced the two ideas earlier of giving law students fundamental instruction on the doctrine of *stare decisis*, and that law students also be taught the fundamentals of syllogistic reasoning, early in the semester.

The third suggestion offered in this paper is that a more advanced yet still limited lesson on the doctrine of *stare decisis,* be delivered later in the semester. The fact that Australian law students are studying law in the common law tradition, necessitates their having a more detailed understanding of *stare decisis* than is contained in the preliminary *ratio* versus *obiter* exercise.[75] On the other hand, Professor Krever's pungent remark is pertinent here, that the distinction between *ratio* and *obiter dictum* might yet be for the most part, a 'legal myth'[76] such as to negate the suggestion of the usefulness of such an exercise. The author thus suggests a utilitarian approach, with instruction occurring in say the sixth or seventh week of a 13 week semester.[77]

A useful exercise is contained in the English text *Unlocking Legal Learning*[78] whose author posits a number of fictional cases to be considered sequentially. In the first case,[79] the plaintiff's dog dies from eating yew leaves from the neighbour's tree; in the second case,[80] the plaintiff's pet rabbit dies as a result of being accidentally shot by the neighbour, the bullet passing through a hole in the fence. Amongst other things, law student readers of this text are directed to explore what the judge in the second case *Bunny*, considered to be the *ratio* of the earlier case *Berry*, and also what they regard to be the *ratio* of *Bunny*. The exercise thus usefully helps students to replicate the mental processes of a judicial consideration of *ratio*, and acquaint them with knowledge of how *ratio* might be 'worked out over time'.[81] This approach may give an adequate grounding for law students to develop and refine during their legal studies. Further refinements on the theory or evolution of *ratio*, such as covered in Professor Hinchy's work,[82] are more appropriately covered in units such as jurisprudence, or else lessons that can be learnt in more advanced units, rather than being the subject of dedicated instruction in first-year law.

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72 *Steadman v Steadman* [1976] AC 536.
73 *Lighting By Design (Aust) Pty. Ltd. v Cannington Nominees Pty. Ltd.* (2008) 35 WAR 520.
74 *Ciaverelli v Pollimeni* [2008] NSWC 234.
75 Cook et al, above n 8; Sanson and Anthony, above n 11; James and Field, above n 15.
76 Krever, above n 19.
77 I deliver this lesson in week seven of the semester.
78 Turner et al, above n 43.
79 Ibid 109 '*Berry v Branch'*.
80 Ibid 112 '*Bunny v Browning'*.
81 Cook et al, above n 18.
82 Hinchy, above nn 23 and 24.

Conclusion

The fault-line between *ratio* and *obiter* dicta is either indistinct, or is for the most part insignificant, but a fundamental understanding of *stare decisis* is necessary as a bare minimum, for law students in the common law tradition. The gastropod in this paper's title might be recognised as a nod to the dead snail in Mrs. Donoghue's famous ginger beer bottle, and as an allusion to the fact that *Donoghue v Stevenson* has historically often been the case of choice for the ubiquitous *ratio* identification exercise in first-year law. Whilst this exercise remains essential, the author suggests that its parameters and limitations be recognised.