

FACTS AND ISSUE

FACT

1. Something that actually exists; an aspect of reality - it is a fact that all people are mortal;
2. An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation;

“A fact is any act or condition of things, assumed (for the moment) as happening or existing.”

FACT in ISSUE

1. A fact that the plaintiff alleges and that the defendant controverts;
2. A fact to be determined by a fact-trier (judge); **PROBANDUM**.- Also written fact-in-issue.- Also termed principle fact.

“A fact-in-issue is a fact as to the correctness of which the tribunal, under the law of the case, must be persuaded; the term ‘probandum’ (thing to be proved) will here be used as the convenient single word.”

ISSUE

1. A point in dispute between two or more parties.

“In civil procedure, an issue is a single, certain and material point arising out of the allegations and contentions of the parties; it is matter affirmed on one side, and denied on the other, and when a fact is alleged in the complaint and denied in the answer, the matter is then put in issue between the parties.”

FACTS MEAN and INCLUDE:

- (1) Anything, state of things, or relation of things, capable of being perceived by the senses; refers to external facts which can be perceived by the 5 senses.
- (2) Any mental condition of which any person is conscious; refers internal facts which are the subjects of consciousness.

FACTS are either PHYSICAL or PSYCHOLOGICAL

Illustrations:

- (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
- (b) That a man heard or saw something is a fact.
- (c) That a man said certain words is a fact.
- (d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.
- (e) That a man has a certain reputation is a fact.

‘MATTER OF FACT’ is anything which is the subject of testimony.
‘MATTER OF LAW’ is the general law of the land, of which the courts will take judicial cognizance.

Methodology for Legal Analysis - FIRAC

“Thinking like a Lawyer” and “Applying statutory law to a fact pattern”

A. Sections of an FIRAC (an acronym for a five step analytical process)

F – State the Facts of the case

Case refers to an actual, potential, or hypothetical dispute which raises a question of whether one or more laws were violated. A lawsuit is an example of a case.

The beginnings of material or key facts may be unearthed by the question – “what extra facts might be relevant to the final outcome of this problem/dispute”? The sources of key facts could be events, dates, people, documents and statutes. It may be based on the queries – W5H - What? When? Where? Why? Who? How?

The “**facts**” of the case describe what happened to cause the dispute. The facts may describe behavior, **who or what** engaged in that behavior, the reasons for the behavior, **when and where** the behavior occurred, **why** or the circumstances at the time the behavior occurred, **who or what** was affected, **how** they were affected, and so on.

In a case there will be events, issues, a cast of characters, but the key to every case is its facts – cases are built on facts. All law suits arise as a result of disputes involving facts. The legal system revolves around resolving disputes through the application of rules of law to the facts of a case. Therefore, the two major components of the dispute resolution process are the applicable law and the facts of the dispute.

Some facts are more important than others, and the most important facts are the key facts—those facts upon which the outcome of the case depends. Key facts are those facts necessary to prove or disprove a claim. A key fact is so essential that if it were changed, the outcome of the case would be different - key facts are an element of a legal issue.

A material or key fact may be described as a fact which is of vital importance to a line of deductive reasoning in order to solve a problem or to give helpful advice on a range of options in response to a particular issue or social problem. Pinpoint the determinative facts of the case, i.e. those that make a difference in the outcome. Your goal here is to be able to tell the story of the case without missing any pertinent information but also not including too many extraneous facts either.

There are three categories of facts:

- Clearly material or key facts: “Dorji pulled the trigger of the gun”; “the net profit of the firm decreased by 40%”;

- Clearly immaterial or irrelevant facts: “Dema has freckles”; “Pema once traveled to Phuentsholing”;
- Background facts – facts which may be material once additional rules, principles, facts and issues are identified: “Dema has freckles”; “Pema once traveled to Phuentsholing”.

I – State the Issue (law question)

Lawsuits are brought because one person believes another has violated some law. Thus, the primary “**issues**” a court has to answer is whether a named defendant is guilty of or liable for violating a specific law. “Did Sonam Tshering violate sections 11, 50 and 51 of the Tobacco Control Act, 2008”? And “Is Dorji liable for negligence”? Are examples of “**law issues**” as opposed to “**element issue**” a question about the meaning of a particular word or phrase used in a law?

The issue sets up the problem. What happens in the remaining steps depends upon the law issue identified in this step. Change the issue and everything that follows also changes. Among other things, this means that when the facts give rise to multiple law issues it is necessary to do a separate FIRAC analysis for each issue.

“Issue spotting” may seem easy but don’t be misled. There are so many variables at work that a law issue may remain hidden in plain sight. The facts may be screaming that a law has been violated but you will be oblivious to the outcry if you are ignorant of the law. You may know everything about a law except for the key piece of information needed to make the connection in that particular fact situation before you. You may misread the facts or fail to pick up on a nuance. Time pressure may cause you to overlook something that would have been apparent if you had not been in a rush. A haphazard approach may miss things that a systematic approach would find.

Not noticing a law issue, for whatever reason, have consequences. To not ask a question is to forfeit the answer and all the associated benefits. Overlooking a law issue in a real case can mean a damage award that might have been, a defense that never was, or an upset client.

The “I” step is only about recognizing the question. Figuring out the answer is the purpose of the remaining steps. Even if you are absolutely, positively certain you know what the answer is, restrain the urge to jump to the “C” step. Your initial reaction could be wrong. You may have overlooked a critical fact. Your understanding of the law may be incorrect. Bias or emotion may have influenced your perception. Doing a complete FIRAC analysis is the only way to catch such errors.

An issue is a single, certain and material point arising out of the allegations and contentions of the parties; it is matter affirmed on one side, and denied on the other, and when a fact is alleged in the complaint and denied in the answer, the matter is then put in issue between the parties. In the issue section of an FIRAC it is important to state exactly what the question of law is. It is a statement of the general legal question answered by or illustrated in the case. To find the issue, ask who wants what

and then ask why did that party succeed or fail in getting it. Once this done, the “why” should be turned into a question?

R – State the Rule of law that applies

The “rule” is the text of the law that was identified in “I” step or the legal principle. What is needed is a quotation of the rule, preferably from a primary source or the restatement of the legal principle. The name of the rule is not sufficient. Neither is a paraphrased statement. In the application step, words of the rule will be compared to the facts. The words of the rule also provide information needed for the conclusion step. If the rule is not expressed accurately here, the rest of the analysis will be flawed.

The rule section of an FIRAC is the statement of rules/legal principles/precedence pertinent in deciding the issue stated. It is a legal summary of all the rules used in the analysis.

A – State the application - analyze the situation by applying the rule to the Facts

The application section of an FIRAC applies the rules developed in the rule section to the specific facts of the issue at hand. It is important in this section to apply the rules to the facts of the case and explain or argue why a particular rule applies or does not apply in the case presented (develop arguments on both sides of the issue being dealt with). The application section is the most important section of an FIRAC because it develops the answer to the issue at hand.

An “application” is, in essence, a comparison of two sets of words: the words of the rule that describe the conduct it prohibits/requires/permits and the words (facts) that describe the conduct that occurred. The task is to ascertain whether two sets of words describe the same conduct. The words of a rule describe certain conduct. Those words have been chosen with care to create a precise and unique description of that conduct and to distinguish it from conduct not covered by the rule. The result is a list of separate and identifiable things which have been combined together in sentence form. One word or phrase of the rule may describe a specific behavior. A different word or phrase may describe who must have engaged in that behavior; or a state of mind that must have been present while engaging in the behavior; or circumstances that must have been present when the behavior occurred; or who or what must have been affected by the behavior. Other words may describe other things. Each of these things is one element of the rule.

The best way to do an application is to compare each element, one at a time, to the facts. Each element describes one part of the conduct covered by the rule. By proceeding methodically through all the elements, each and every part of the conduct is compared to the facts. Nothing essential is overlooked and nothing extraneous is considered.

Begin by converting each element into an element issue. An element issue is a question that asks whether an element is satisfied. It may be stated in general terms,

such as “was there smuggling”? It is preferable, however, to phrase an element issue as a question that states the relevant facts and asks whether they come within the meaning of the element. “Was the act of being caught at a fixed checkpoint with tobacco product without paying tax amount to smuggling”? Is a better statement of an element issue than “was there smuggling”?

An element is “satisfied” or “met” if the thing described by the element (who, what, circumstance, etc.) is also described by the facts. If all the elements are satisfied, the rule and the facts describe the same conduct. But it’s all or nothing. Close doesn’t count. There must be a perfect match. If one or more of the elements are not satisfied, the rule and the facts describe different conduct. There may be some other rule that encompasses the conduct – but not the one you are analyzing.

Doing an application is like playing a matching game. The following illustrates the concept:

Consider the following pairs of words. Does the word in the “element” column mean the same thing as, or include, the word directly opposite it in the “fact” column?

Element	Fact	Answer
Spouse	Wife	Yes or No
Forty percent	Two-fifths	Yes or No
Statue	Tobacco Control Act	Yes or No
Pig	Greedy	Yes or No

Just like a matching game can be tricky, so can an application. Grammar and punctuation can effect how a word or phrase should be interpreted. A word may have multiple meanings. If you think an element means one thing but the legal definition is different, you will be searching the facts for the wrong thing. It is all too easy to misread, overlook, or ignore relevant facts, consider irrelevant ones, or assume the existence of facts that are not stated.

C – Reach a Conclusion

Every rule, in addition to describing certain conduct, also states a conclusion to be reached when that conduct occurs. It may help to think of the rule as an “if-then” statement: if the conduct described by the rule occurred, then the conclusion stated in the rule should be reached. The comparison conducted in the application step provides the information needed to determine whether the “if” condition has been met. If all the elements were satisfied, the conduct occurred. If one or more of the elements were not satisfied, the conduct did not occur.

The conclusion section of an FIRAC directly answers the question presented in the issue section of the FIRAC. This section restates the issue and provides the final answer.

Example:

“Except as authorized by law, every person who possesses tobacco products is guilty and shall be punishable with misdemeanor if the source of supply is revealed. If the accused fails to disclose the source of supply, he or she shall be liable for the offence of smuggling in addition to the offence of misdemeanor”

The first half of the rule describes the conduct it prohibits. Those are the words that were compared to the facts in the application step. If it was determined that the facts and the rule described the same conduct (i.e. all the elements are satisfied), the second half states the conclusion to be reached – guilty.

What if the facts and the rule described different conduct (i.e., one or more elements were not satisfied)? The conclusion stated in the rule is not reached – not guilty.

Checklist

- Ensure all issues are rebutted and dealt with clearly and precisely;
- Were all issues corroborated with evidence;
- Is the analysis as thorough as possible?

Variations:

MIRAT - (Material Facts, Issues, Rules, Application, Tentative Conclusion)

IDAR – (Issues, Doctrine, Application, Result)

CREAC – (Conclusion, Rules, Explanation, Analysis, Counterarguments, Conclusion)

TREACC – (Topic, Rule, Explanation, Analysis, Counterarguments, Conclusion)

CRuPAC – (Conclusion, Rule, Proof, Analysis, Conclusion)

ILAC – (Issue, Law, Application, Conclusion)

Illustration of the Application of FIRAC

“Gelong Sonam Tshering a monk of Semtokha Sherdra bought chewing tobacco worth Nu.120/- from Jaigoan entered into Phuentsholing without paying tax and boarded a bus to Thimphu. The Police at Chhuzom fixed checkpoint having received information searched the luggage of the suspect, recovered the tobacco and arrested Gelong Sonam Tshering who claims ignorance of the law. Subsequently, the suspect is charged for smuggling in accordance with the provisions of the Tobacco Control Act”

Use the FIRAC model for a legal analysis of the matter:

Facts – present or absent

- Would it have been a material if Gelong Sonam Tshering was wearing or not wearing monk’s robes?
- Is it relevant that Sonam Tshering is a monk from Semtokha Sherdra?
- Is it important to know whether the Police had probable cause to search Gelong Sonam Tshering’s luggage?

Issues:

- Is the defendant liable for smuggling?

Rules: What legal rules potentially apply to the issues and where did the rule come from?

“Except as authorized by law, every person who possesses tobacco products *is guilty and shall be punishable with misdemeanor if the source of supply is revealed. If the accused fails to disclose the source of supply, he or she shall be liable for the offence of smuggling in addition to the offence of misdemeanor*”

The first half of the rule describes the conduct it prohibits. Those are the words that were compared to the facts in the application step. If it was determined that the facts and the rule described the same conduct (i.e. all the elements are satisfied), the second half states the conclusion to be reached – guilty.

What if the facts and the rule described different conduct (i.e., one or more elements were not satisfied)? The conclusion stated in the rule is not reached – not guilty.

- Supremacy of the Parliament to make laws (Article 10 section 1 of the Constitution);
- Ignorance of law is no excuse?
- Intent behind the relevant provisions of the Tobacco Control Act;
- Probable cause for search – border check point and internal fixed check point?

Application (arguments Pro and Con)

- What are the arguments that support the fact and issue that the defendant engaged in smuggling?
 - The tobacco was found in the possession of the defendant;
 - The defendant did not pay tax as required under the relevant regulation of the Tobacco Control Act;
 - Claims ignorance of law which is not tenable.
- What are the arguments that the defendant did not engage in smuggling?
 - The quantity of tobacco in the possession of the defendant was within the permissible limit;
 - But the defendant did not pay the requisite tax at the entry point as required.

Conclusion: which group of arguments is most persuasive in directly answering the question presented in the issue section?

Relevant Provisions of the Tobacco Control Act 2010:

§ 11 of the Tobacco Control Act 2010 provide that:

“No person in the country shall: a) cultivate or harvest tobacco, b) manufacture, and supply or distribute tobacco and tobacco products; or c) sell and buy tobacco and tobacco products.”

§ 51 of the Tobacco Control Act 2010 provide that:

“Any person who contravenes the provision of section 11(c) shall be punishable with misdemeanor if the source of supply is revealed. If the accused fails to disclose the

source of supply, he or she shall be liable for the offence of smuggling in addition to the offence of misdemeanor”

The authoritative text Dzongkha version alludes to requirement of identifying and actual custody of the source of the contraband.

§ 52 of the Tobacco Control Act 2010 provide that:

“Any person found smuggling tobacco or tobacco products shall be guilty of an offence of smuggling and shall be punishable with minimum sentence of felony of fourth degree”

Case Components

- Facts
- Procedural history
- Issues
- Rules
- Analysis
- Decision (conclusion)

Primary Sources of Law

- Constitution
- Statutes
- Case Law
- Administrative Regulations

Writing Skills

- Edit: grammatical errors; voice problems; consistence and effectiveness.
- Quotes of 50 or more words are blocked with no quotation marks;
- Quotes of 49 words or less are set in quotation marks;
- Periods and commas are placed inside quotation marks;
- All other punctuation marks are placed outside quotation marks if part of the quote;
- Three dots (periods) precede and end quotations if portions prior and later are not quoted;
- Use [sic] to indicate a significant error in the original quote;
- When used [sic] is placed directly following the mistake;
- Always keep detailed note of all research done – when reading the case highlight important pieces of information and mark important facts with a circled “F”, the holding with a circled “H” etc.;
- Ellipsis is used to indicate the omission of a word or words. Never begin a sentence with an ellipsis, use brackets on the first letter of the opening word to indicate the change from lower to upper case;
- Remember legal writing is intended to inform and/or convince the parties and not entertain. Use concrete terms such as 6’2” rather than tall or 84 MPH rather than driving fast; and
- Avoid unnecessary words.

Skills and Abilities of Good Judging

1. The judge should try to take the perspective of all the parties before the court prior to reaching a decision;
2. The judge should try to remain open to the newness of each case, even if it resembles previous ones. While also subjecting new understandings to scrutiny through comparison with past experiences, (good judging requires an openness to responding to cases and to parties as individuals);
3. The judge should not disguise how he or she actually reached the decision, and should explain the decision not only through post hoc justification but also with references to the intuitions and reasons for selecting one principled justification over the other possible ones;
4. The judge should confront the difficulty of rejecting the arguments of a party by trying to develop reasons that would persuade that party or explains the result in terms that party would concede are fair;
5. Avoid redundancy, repetition – use terms and sentences from the submissions made by the parties in the Court findings. Use "... submission ..."; "The submission ..."; "... submission". Etc.

ASSIGNMENT

Facts

Dorji a monk was granted 10 decimal of land by kasho near the Dzong. Dorji is allegedly supposed to have gifted the said property to Sangay an orphan who has since built a house on the said plot. However, there is no agreement executed between the parties or any evidence to suggest that Sangay paid for the property.

Dorji after a prolonged illness passed away last month. Dema looked after Dorji while he was sick and upon his demise also performed his last rites. At the time of his death the property upon which Sangay has built a house, is found registered in the Chhazhag Sathram in the name of Dorji's legal heir niece Dema who has now become aware of the existence of the property.

Rule of Law

Section 61 of the Land Act provides as follows: "The ownership of land shall be conferred to its owner upon registration of such land in the Thram in his name in accordance with the provisions of this Act."

Chapter 5 [Sections 159 – 164] provides for procedures on land conveyance (transaction of private registered land) application for transfer of ownership to the Local Authority.

Section 140 of the Land Act provides as follows: "From the day a land transaction deed has been lawfully executed and processed by the Local Authority, neither of the party shall engage in any other transaction on the same piece of land till the change of ownership in the Thram is complete. Any subsequent transactions under such circumstances shall be null and void. In case of multiple transactions, the legally binding agreement executed with the first buyer shall be deemed valid."

Precedence: Where conveyance deed has been executed and the parties have executed the terms of the deed except the transfer of ownership – then the party giving the property cannot make it an excuse to rescind the agreement based on the doctrine of estopple.

Assignment

Dema on the basis of registration of the property in the Chhazhag Sathram claims ownership of the property, and alleges that Sangay has no right to the property. Sangay claims that ownership was not contested previously and hence, on the basis of uninterrupted and continuous possession claims right to the property.

The assignment is to determine whether Dema has rightful claim to the ownership of the property. In regard to the assignment, identify the key facts.

There are four recommended steps to follow when determining the key facts of a case:

Step 1: Identify each cause of action possibly raised by the facts.

- Ownership;
- Adverse and continuous possession - Sangay built house on the disputed plot;
- Legal ownership of the disputed plot;

Step 2: Determine the elements of each cause of action identified in step 1.

- Dorji's ownership based on kasho;
- Gift to Sangay – whether deed executed? Whether steps initiated to transfer ownership to Sangay?
- How was the land registered in Dema's name in the Chhazhag Sathram?

Step 3: List all the facts possibly related to the elements of the causes of action identified in step 2.

- Land granted to Dorji by kasho – ownership;
- House built on the land by Sangay – alleged gift from Dorji. Why ownership was not transferred to Sangay? Why did Dema not contest ownership of the property previously?
- Why and how was the land registered in Dema's name in the Thram?

Step 4: Determine which of the facts apply to establish or satisfy the elements of each cause of action—the key facts.

- Dorji's ownership based on kasho;
- Property gifted to Sangay – house built on the property by Sangay, but ownership not transferred and not contested by Dema previously;
- Thram registered in Dema's name – legal ownership;