

Judicial precedent in the english legal system assignment



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The doctrine of judicial precedent is based on the principle of stare decisis which means 'to stand by what has been decided'. It is a common law principle whereby judges are bound to follow previous decisions in cases where the material facts are sufficiently similar and the earlier decision was made in a court above the current one in the court hierarchy. This doctrine of precedent is extremely strong in English law as it ensures fairness and consistency and it highlights the importance of case law in our legal system.

Black's Law Dictionary defines "precedent" as a "rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases." For this system to operate successfully, in both criminal and civil courts, three things are required ??? a settled court structure, a ratio decidendi and accurate records of the decisions made by superior courts. A settled court structure is required as judges need to know which decisions they are bound to follow. The English Court hierarchy was largely established by the Judicature Acts 1873-75.

The House of Lords was made the final appeal court in 1876 under the Appellate Jurisdiction Act, in 2009 the Supreme Court became the final appeal court. There are two court systems, criminal and civil, and they both contain various appeal routes in a vertical court structure. As the UK is a member of the EU, the European Court of Justice and the European Court of Human Rights bind all English Courts in respect to matters within their jurisdiction. For criminal cases the Supreme Court, formally the House of Lords, is the most superior court in the hierarchy.

It binds all courts lower than itself and generally follows its own past decisions. The next court below in the hierarchy is the Court of Appeal (Criminal Division), they are bound by the past decisions of the Supreme Court/House of Lords and its own past decisions. Both Supreme Court and Court of Appeal have a way of avoiding following their own binding precedent which I will discuss later. Below the Court of Appeal is the Queen's Bench Divisional Court, they are bound by both Supreme Court and Court of Appeal.

They are bound by their own past decisions however they can take a flexible approach in order to protect the liberty of the individual in question. The last two courts in the hierarchy are the Crown Court and Magistrates Court.

These courts are bound by the Supreme Court, Court of Appeal and Queen's Bench Divisional Court however they are not bound by their own decisions and they do not bind any other court. The civil court hierarchy is different; the Supreme Court is still the superior court, followed by the Court of Appeal (Civil Division).

The next court down the hierarchy is the Divisional Courts of The High Court, which are bound by the Supreme Court and Court of Appeal, also bound by their own decisions. The next court is the High Court, they are bound by the decisions of all three superior courts and the decisions of the High Court bind the two inferior courts which are the County Court and Magistrates Court.

The inferior courts are bound by all superior courts but they are not bound by their own past decisions. The ratio decidendi, 'the reason for deciding' is the legal principle which the decision of the court is based upon.

It is the ratio decidendi which forms the binding precedent which must be followed in future cases of similar fact, the same court and all courts below it. An example of a ratio decidendi is in the case of R v Howe (1987) where the House of Lords held that the plea of duress was no defence against the charge of murder; this judgement became binding precedent which must be followed by the Supreme Court and all courts below it. It is also important to mention the obiter dictum which forms the remainder of the judgement. An obiter dictum means 'other things said' and these statements do not bind however they can form highly persuasive precedent.

An example of an obiter dicta statement is also found in the case of R v Howe (1987) where the judge stated that if the charge had been attempted murder rather than murder, then duress would still not have been available as a defence. This statement was obiter dicta because it did not directly relate to the facts of this particular case. This persuasive precedent was followed in the case of R v Gotts (1992) where a defendant charged with attempted murder tried to use the defence of duress in the Court of Appeal. The ratio decidendi of R v Gotts (1992) then formed its own binding precedent.

Other persuasive precedents include decisions of the Scottish courts and those made in the courts of other Commonwealth countries such as Australia and Canada. This may be because a case with these particular facts has not been heard in the English Courts before but may have been heard in another country. This was the case in R v R (1991) where the Court of Appeal and House of Lords followed previous decisions made by the Scottish courts that

a man could be found guilty of raping his wife. Another persuasive precedent are dissenting judgements which come from the appeal courts.

In the Supreme Court and Court of Appeal the cases are heard by more than one judge and sometimes a decision is reached by only a majority of these judges. The judges in the minority will also give a judgement for why they came to their decisions and this is called a dissenting judgement. A dissenting judgement was followed by Lord Denning in the case of *Candler v Crane Christmas* (1951). The final requirement to ensure effective operation of judicial precedent is that there needs to be accurate records of the decisions of the superior courts. These can be found in Law Reports.

It is crucial that accurate records are available so that it is possible for the binding and persuasive precedents to be found. One example of a law report is the All England Law Report, law reports are also found in the media, The Times publishes law reports weekly. The reports contain all relevant information relating to the case ??? names of litigants, cases used, solicitors, barristers, a summary of the facts and the judgement itself. There are a number of advantages and disadvantages to judicial precedent and how it operates in the courts in England and Wales, most advantages have corresponding disadvantages.

One advantage is the certainty it provides, as the courts follow past decisions. Due to this certainty people are more aware of what the law is and have a better idea of how it may be applied in their case. In the House of Lords Practice Statement 1966 it points out how important certainty within the law is. Another advantage is consistency and fairness in the law so it can

be seen that similar cases are decided in a similar way. In order for law to be credible it must be consistent. For example, the ratio of *R v Howe* that duress is no defence to the charge of murder must be followed in cases of similar material fact.

There is a wealth of detail contained in the reported cases. The principles set out in the cases are a response to real life situations and things that may have occurred and this can guide future litigants. Over time the law will become more precise as it will gradually be built up by all the variations of facts that come before the courts. Judicial precedent is also flexible and there is room for the law to change as the Supreme Court can use the Practice Statement to overrule cases. An example of flexibility is in *R v R*, after the judgement was made, Parliament amended the Sexual Offences Act 1956, stating that marital rape is a crime.

The doctrine of precedent also allows for new or 'original' precedents to be created. This will occur when there are no previous decisions on the case before the court or there is no legislative provision. Therefore an original precedent makes legal provisions for a matter for which there was previously no law. An example of this, where the matter had not come before the court before and Parliament had no guidance to offer, is found in *Gillick v West Norfolk and Wisbech Area Health Authority* (1985). In this case the House of Lords had to decide whether girls under the age of 16 could be prescribed contraceptives without parental consent.

The Lords decided that girls could be prescribed contraceptives in this circumstance, provided they could understand the issues involved. Judicial

precedent can also be seen as a useful timesaver. Where a principle has already been established, cases with similar material facts are unlikely to have to go through a lengthy litigation process. A major disadvantage of judicial precedent is how rigid it is. An unjust precedent can lead to further injustices, as once the Supreme Court sets an unjust precedent it won't be overruled until a case with similar facts goes on to the Supreme Court on appeal.

The chances are that this may not happen for many years. Also, the law may become outdated and require modernisation. An example of this is where judges since the 1960's had felt that the law stating a builder did not owe a duty of care to persons they had sold a house to was unfair. Lord Denning made obiter comments regarding this to the effect that a duty should be owed. However the law was not changed until 1978 in *Batty v Metropolitan Property Realisations Ltd* where it was held that a duty of care was owed.

Sometimes the law will only be changed if an individual had the courage, the persistence and the money to appeal their case. It can be very difficult for anyone to conduct thorough research into the law; hundreds of judgements are made every year so it can be hard to discover the precise law on a matter. In order to find this out a person may have to search through many volumes of law reports, the complete official law reports are estimated to run to almost half a million pages. The judgements are often complex and therefore it can be difficult to determine what the ratio decidendi of a case actually is.

In the Court of Appeal and Supreme Court there is more than one judgement to consider and a common ratio must be decided by the judges in future cases. A judge may also give more than one ratio, for example in *Rickards v Lothian* (1913) where Lord Moulton gave two ratios for not holding the defendant liable. Judgements themselves are often long with no clear distinction between comments made and the reasons for the decision. In *Dodd's Case* (1973) the judges in the Court of Appeal were unable to find the ratio in a decision of the House of Lords.

Also, the use of distinguishing to avoid past decisions have lead to some areas of law becoming very complex. It can also be argued that judges are overstepping their constitutional role by actually making the law rather than just applying it. Judicial precedent maybe seen as undemocratic as it is the role of Parliament to create law, the judiciary are there to enforce it. In the same way it can also be seen as undemocratic as judges are not elected and therefore should not be making law. Another disadvantage is that there is no opportunity for the judge to research or consult experts on the likely outcomes or effects of their decisions.

Therefore judges are confined to making their decisions based on the arguments presented in the course of the case. Despite the doctrine of judicial precedent being a major factor in the English legal system, there are a number of ways by which a judge may avoid following a precedent.

Distinguishing is a method which can be used by a judge to avoid following a precedent. If a judge finds that the material facts of a current case are sufficiently different from those of a previous precedent and can draw a distinction between them, then he is not bound by the previous decision.
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Two cases that demonstrate this process are *Balfour v Balfour* (1919) and *Merritt v Merritt* (1971). In both cases a wife was making a claim against her husband for breach of contract. The judgement in *Balfour* was that the claim could not succeed as it had been a domestic arrangement rather than a legal one and therefore was not legally binding. In *Merritt* the court held that there was a legal contract between husband and wife and the agreement had been made in writing and took place after they had separated.

This distinguished the case from *Balfour*, the agreement in *Merritt* was not just a domestic arrangement, and it was a legally enforceable contract. This provided sufficient differences between the cases that the judge in *Merritt* did not have to follow the judgement made in *Balfour*. Another mechanism which can be used by judges to avoid following precedent is overruling where a court in a later case states that the legal ruling decided in an earlier case is wrong. Overruling is where a higher court does not follow a precedent set in a previous case, either by a lower court or by itself.

This may occur when a higher court overrules a decisions made in an earlier case by a lower court. An example of a superior court overruling a previous precedent set by a lower court is *Hedley Byrnes v Heller and Partners* (1964) which was a claim for damages arising from negligent and misleading advice. The House of Lords overruled the decisions of the majority in the Court of Appeal in *Candler v Crane Christmas* (1951) and held that there can be liability for making a negligent mis-statement. However, too frequently overruling casts doubts on the certainty of the law and leads to inconsistencies.

For lawyers to be able to give good advice the law must remain relatively “safe to predict” and this not the case if senior judges use every available opportunity to reverse the decisions of their predecessors. Some alarm was caused in the 1986 case of *R v Shivpuri* (1986) which was the first use of the Practice Statement in a criminal case. The House of Lords overruled their own previous decision made in *Anderton v Ryan* which had only been made twelve months earlier as they believed that the law (Criminal Attempts Act 1981) has been incorrectly applied.

On the other hand, the House of Lords have often been reluctant to overrule even bad previous decisions. This was illustrated in *Jones v Secretary of State*, where the decision in *R v Dowling* was allowed to stand even though four of the seven Law Lords thought it was wrong. The need for certainty is still highlighted in the decision of the House of Lords since 1966. Both of these practises can be useful in allowing flexibility within the law but can also lead to uncertainties and inconsistencies which undermine the reliability of the system.

However, where these two parallel ideas of certainty and flexibility is concerned, there will never be one definite solution to satisfy all.

Disapproving can also be used by judges to avoid following precedent; this is where a judge states in his judgement that he believes the decision in an earlier case is wrong. This may occur where the present case is on a related point of law but the point of law is not sufficiently similar for the earlier decision to be overruled. It can also occur where the judge in a lower court in the hierarchy than the court which made the original decision.

In this situation the lower court cannot overrule the superior court however they can disapprove of the decision by expressing their view that it was wrong. An example of this is found in the case of *R v Hasan* (2005), this case was about the availability of the defence of duress by threats, to a criminal offence. The main point of the case was whether a defendant could use the defence of duress if he should have realised that he was putting himself in a position where he might be pressurised into committing an offence.

Reversing is similar to overruling however it occurs where a higher court does not follow precedent set by a lower court in the same case. Reversing is where the same case has gone to appeal and the appeal court reaches the opposite decisions to that of the lower court. An example of reversing is found in *Fitzpatrick v Sterling House Association Ltd* (2000). In this case the Court of Appeal refused to allow the homosexual partner of a deceased tenant to take over the tenancy due to regulations laid out in the Rent Act 1977.

On appeal the House of Lords reversed the decision of the Court of Appeal. The Practice Statement 1966 was issued by the House of Lords, declaring their intention not to be bound by their own previous decisions. The Practice Statement allowed the House of Lords to change the law if they believe that the decision made in an earlier case is wrong. It gave them to the flexibility to refuse to follow an earlier judgement when ' it appears right to do so'. This was shown in the case *Herrington v British Railways Board* (1972) which involved the law on duty of care owed to a child trespasser.

In the case of *Addie v Dumbreck* (1929), the judgement was that an occupier of land would only hold a duty of care for injuries to child trespassers if they were caused deliberately. In *Herrington* the Lords held that social and physical conditions had changes since 1929 and therefore the law should also change. The judgement in *Herrington* was that land owners did owe a duty to prevent injury or death to child trespassers. The Court of Appeal can also refuse to follow its own previous decisions under three exceptions that were brought up in the case of *Young v Bristol Aeroplane* (1944) These exceptions are as follows; If a previous decision conflicts with a later House of Lords (Supreme Court) decision, it must follow the decision of the House of Lords; if there are two conflicting previous decisions then the Court of Appeal must choose between them. ??? If its previous decision was made per incuriam e. g. mistakenly or without care ??? If the House of Lords (Supreme Court) has overruled a previous decision of the Court of Appeal There is an additional reason for the Court of Appeal to depart from following its own past decisions and that is where it has been disapproved by the Privy Council.

Privy Council opinion has only persuasive value, it is not binding. An example of this is where Morgan Smith killed a former flatmate during a fight. His defences were that he did not intend to kill or cause grievous bodily harm; that he was suffering from diminished responsibility; and that he was provoked. The focus of the appeal was on the objective part of the test for provocation and whether the reasonable person could be given certain characteristics of the accused, in this case the characteristic of having a

severe depressive illness. The Court declined to follow the opinion in *Luc Thiet Thuan v R* (1996).

It is also important to mention in the effect of the Human Rights Act 1998 on judicial precedent. If the precedent was set before the Human Rights Act came into force, the precedent may be contrary to it. As with judicial precedent itself, there are also a number of advantages and disadvantages to the avoidance of precedent by the courts. One advantage is that it allows potential for growth and means that case law is not completely rigid. The different mechanisms for avoiding precedent allow judges to develop and modernise the law when it is necessary.

An example of this is the case of *Hall v Simons* (2000) where the House of Lords modernised the law and held that barristers could be held accountable for negligently presenting a case in court. In this case the court refused to follow the decision made in the case of *Rondel v Worsley* (1967) as it was deemed that the commercial world had changed significantly since 1967. Sometimes precedents can be developed to a point in which they are seen to be unfair, avoiding precedent allow these unfair laws to be replaced with more appropriate ones.

In the case of *R v R and G* (2003) which involved two very young defendants convicted of arson, the House of Lords used the Practice Statement to avoid following the precedent set in the case of *Caldwell* (1981). The question facing the House of Lords was whether the defendants had foreseen the risk; they held it was unfair to judge the actions of an 11 and 12 year old by the standard of a reasonable person. The House of Lords brought about a change

in the law meaning that if the question of recklessness should come up, a subjective test is used which requires the defendant to have foreseen the risk.

A disadvantage of avoiding precedent is that the law changes as a result, creating laws retrospectively. This can be seen as being unjust, as the precedent that is set applies to events that have already happened. It may be that the defendant in a case committed an act that at the time of commission was actually within the law. This was the case in *R v R* (1991), at the time of the attack, the law stated that a man could not be found guilty of raping his wife. Due to the retrospectively law making, the defendant was found guilty and imprisoned.

When there is a chance that a judge may avoid precedent it can remove the certainty within the law and make the outcome of some cases uncertain. This is unwelcome as justice requires that cases and defendants are treated in the same way. It also causes problems for legal professionals, who will not be able to advise with certainty on the likely outcome of a case. In criminal law certainty is particularly needed because the liberty of the defendant is at stake. In the case of *Howe* (1987), the House of Lords held that duress was no defence for murder, whether the defendant is the principle or an accessory.

This case overruled the earlier House of Lords decisions in *DPP v Lynch* (1975), where it was held that duress was available as defence when charged with being an accessory to murder. Also, avoiding judicial precedent does not conform with the idea of separation of power. Only Parliament

should create new law and it is the role of the judiciary to apply it. However when judges avoid following precedent they inevitably create new law. 1.

Black's Law Dictionary, p. 1059 (5th ed. 1979).