

JUDICIAL PRECEDENT AS LAW (1)

DON'T UNDERSTAND 背

The doctrine of binding precedent, or stare decisis (treating like cases alike), lies at the heart of the English legal system. In essence, the doctrine refers to the fact that within the hierarchical structure of the English courts, a decision of a higher court will be binding on a court below.

Judicial precedent involves the following principles:

Judicial precedent is the source of law where past decisions create law for judges to refer back to for guidance in future cases.

First, stare decisis, which means to stand by the Decided, whereby lower courts are bound to apply the legal principles set down by superior courts in earlier cases and appellate courts follow their own previous decisions. For example, the High Court must follow decisions of the Court of Appeal, which must follow decisions of the Supreme Court. The Court of Appeal must also follow its own previous decisions. If the facts are similar to the previous is it bound to follow or

Secondly, the binding part of a previous decision is the ratio decidendi (reason for the decision) {relevant to the case} and it must be followed by judges in later cases. Anything said obiter dicta or (dictum - singular) (statements made by the way) {not relevant to the case} in the original case is merely persuasive because it was not strictly relevant to the matter in issue and does not have to be followed. For example:

§ In Donoghue v Stevenson 1932, the claimant suffered food poisoning after drinking from an opaque bottle of ginger beer which contained a dead, decomposing snail. The House of Lords held that a manufacturer owed a duty of care to the consumer that products are safe because the circumstances prevented the consumer from discovering any defects. This is the ratio and Lord Atkin's "Neighbourhood Test" {1. foreseeability of injury, 2. proximity of relationship} was obiter.

Thirdly, where there is no existing precedent, the court will "declare" the law and the case will become an original precedent, eg:

§ [Airedale NHS Trust v Bland](#), where the courts were asked to decide if food and treatment could be lawfully withdrawn from a patient in a persistent vegetative state, and thus allowed to die. The court allowed food & treatment to be withdrawn and stated that this was lawful. However the court also stated that euthanasia or mercy killing is unlawful.

§ DPP v Shaw (1962) - where Shaw created a "ladies" directory and there was no law at that time in force, the court held creating a new law that he conspired with the 'solicitors' to corrupt public morals. Knüller v DPP (1973) - Knüller created gays directory and the courts followed Shaw and found Knüller guilty.

ABOVE DONE NOTES

The Court Hierarchy

Stare decisis requires a consideration of the effect of precedent in individual courts.

1. THE EUROPEAN COURT OF HUMAN RIGHTS (ECHR) - Strasbourg

Under the Human Rights Act 1998, which came into force in the UK on 2nd October 2000. English courts must now have regard to decisions of the European Court of Human Rights.

2. Privy Council (appeal from commonwealth countries) - the PC does not bind the UK courts but is merely persuasive.

3. HOUSE OF LORDS (now known as Supreme Court)

The Supreme Court stands at the summit of the English court structure and its decisions are binding on all courts below it in the hierarchy on similar facts. The House of Lords was not bound by its own previous decisions until the case of [London Street Tramways v London County Council \(1898\)](#) when it bound itself in the interests of certainty. Then the [Practice Statement \(1966\)](#), issued by the Lord Chancellor, Lord Gardiner, stated that although the House of Lords would treat its decisions as normally binding it would depart from these when it appeared right to do so. This discretion must be exercised sparingly.

In the criminal division, in addition to the Young exceptions, precedent is not followed as rigidly because a person's liberty may be at stake. In *R v Taylor*, the Court of Appeal held that if 'the law has either been misapplied or misunderstood' then it must reconsider the earlier decision.

R v Taylor [1950] CA

D went through 4 bigamous ceremonies whilst married to his lawful wife Alice, whom he had not seen for more than twenty years.

Held: Lord Goddard stated that the CA would normally consider itself bound by earlier decisions (without mentioning *Young v Bristol Aeroplane Co* (1944)).

"...but this court has to deal with the liberty of the subject and if, on re-consideration, in the opinion of a full court the law has been either misapplied or misunderstood and a man has been sentenced for an offence, it will be the duty of the court to consider whether he has been properly convicted."

This rule was followed in *R v Gould* [1968] and *R v Newsome* [1970].

1925 Married Alice

1927 'Married' a second woman

1942 'Married' a third woman

1944 Acquitted of 1942 event because 1927 not a lawful marriage

1945 Acquitted of 1927 no evidence Alice was alive, not seen more than 7 years

1946 'Married' Lilian

1948 'Married' Olive

1950 Pleaded guilty to bigamy in 1946 and 1948. He thought he could not use the defence that he had not heard of Alice for over 20 years, because *R v Treanor* said the defence only applied to a single subsequent marriage, viz 1927 or 1942. Not guilty.

5. DIVISIONAL COURTS - Queen's Bench Division; Family Division and Chancery Division.

A Divisional Court is bound by the Supreme Court and the Court of Appeal and normally follows a previous decision of another Divisional Court but has similar exceptions to the Court of Appeal (*Police Authority for Huddersfield v Watson*).

6. CROWN COURTS - Jury Court (criminal court)

Decisions made on points of law by judges sitting at the Crown Court are not binding, though they are of persuasive authority.

7. COUNTY COURTS AND MAGISTRATES' COURTS

The decisions of these courts are not binding.

ADVANTAGES OF JUDICIAL PRECEDENT

- (a) Certainty to law — thus, lawyers and their clients are able to predict what the outcome of a particular legal question is likely to be in the light of previous judicial decisions;
- (b) Following the ratio decidendi of a previous decision law saves the time & money of the judiciary, lawyers and their clients since cases do not have to be re-argued.
- (c) It provides an opportunity for judges to develop the common law in particular areas without waiting for Parliament to enact legislation.

DISADVANTAGES OF JUDICIAL PRECEDENT

- (a) Old cases could still be used and could be binding on future courts until the overruling mechanism is used in the Supreme Court via Practice Statement 1966 and this is only possible if the case goes up to the Supreme Court.
- (b) mechanism of distinguishing cases on their facts is used to reduce the application of precedent although it could have been discussed out of court by lawyer to his client that precedent would apply;
- (c) law may become classified on the basis of an unjust precedent, with the consequence that previous injustices are perpetuated - an example of this is the long delay in the recognition of the possibility of rape within marriage, which has only once recognised in R v R.

Methods of Avoiding Precedent

1. Distinguishing (finding differences in the material facts) for use by any court, including trial judges;

2. Reversing, for use by appellate courts; and
3. Disapproving, where inferior judges criticise a precedent in the hope that it will be reconsidered by a higher court or superior judges;
4. Overruling - as discussed above. Practice Statement 1966 as per Lord Gardiner in the HOL - the Supreme Court can overrule its own previous decision when it appears "right to do so" and this right must be exercised sparingly.