

JUDICIAL PRECEDENT

INTRODUCTION

Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of *stare decisis* ie, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.

RATIO DECIDENDI AND OBITER DICTUM

The decision or judgement of a judge may fall into two parts: the *ratio decidendi* (reason for the decision) and *obiter dictum* (something said by the way).

RATIO DECIDENDI - The *ratio decidendi* of a case is the principle of law on which a decision is based. When a judge delivers judgement in a case he outlines the facts which he finds have been proved on the evidence. Then he applies the law to those facts and arrives at a decision, for which he gives the reason (*ratio decidendi*).

OBITER DICTUM - The judge may go on to speculate about what his decision would or might have been if the facts of the case had been different. This is an *obiter dictum*.

The binding part of a judicial decision is the *ratio decidendi*. An *obiter dictum* is not binding in later cases because it was not strictly relevant to the matter in issue in the original case. However, an *obiter dictum* may be of persuasive (as opposed to binding) authority in later cases.

A difficulty arises in that, although the judge will give reasons for his decision, he will not always say what the *ratio decidendi* is, and it is then up to a later judge to "elicit" the *ratio* of the case. There may, however, be disagreement over what the *ratio* is and there may be more than one *ratio*.

THE COURT HIERARCHY

THE EUROPEAN COURT OF JUSTICE

Under s3(1) of the European Communities Act 1972, decisions of the ECJ are binding, in matters of Community law, on all courts up to and including the House of Lords.

THE HOUSE OF LORDS

This is the highest court in the land unless a matter of EC law is involved.

The House of Lords was bound by its own previous decisions until 1966 when Lord Gardiner LC announced a change of practice. The Practice Statement [1966] 1 WLR 1234 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 power has been used sparingly.

A decision of the House of Lords binds all lower courts.

COURT OF APPEAL (CIVIL DIVISION)

The Court of Appeal is bound by decisions of the House of Lords even if it considers them to be wrong.

In *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, the Court of Appeal held that it was bound by its own previous decisions subject to the following three exceptions:

- * Where its own previous decisions conflict, the Court of Appeal must decide which to follow and which to reject.
- * The Court of Appeal must refuse to follow a decision of its own which cannot stand with a decision of the House of Lords even though its decision has not been expressly overruled by the House of Lords.
- * The Court of Appeal need not follow a decision of its own if satisfied that it was given *per incuriam* (literally, by carelessness or mistake).

Decisions of the Court of Appeal itself are binding on the High Court and the county courts.

COURT OF APPEAL (CRIMINAL DIVISION)

In principle there is no difference in the application of *stare decisis* in the civil and criminal divisions of the Court of Appeal. In practice, however, in addition to the Young exceptions, because a person's liberty may be at stake, precedent is not followed as rigidly in the criminal division.

In *R v Taylor* [1950] 2 KB 368 the Court of Appeal held that in 'questions involving the liberty of the subject' if a full court considered that 'the law has either been misapplied or misunderstood' then it must reconsider the earlier decision. This rule was followed in *R v Gould* [1968] 1 All ER 849 and *R v Newsome* [1970] 2 QB 711.

THE HIGH COURT

The High Court is bound by the Court of Appeal and the House of Lords but is not bound by other High Court decisions. However, they are of strong persuasive authority in the High Court and are usually followed.

Decisions of individual High Court judges are binding on the county courts.

A Divisional Court is bound by the House of Lords and the Court of Appeal and normally follows a previous decision of another Divisional Court but may depart from it if it believes that the previous decision

was wrong: *R v Greater Manchester Coroner, ex parte Tal* [1985] QB 67.

CROWN COURTS

Decisions made on points of law by judges sitting at the Crown Court are not binding, though they are of persuasive authority. Therefore, there is no obligation on other Crown Court judges to follow them.

COUNTY COURTS AND MAGISTRATES' COURTS

The decisions of these courts are not binding. They are rarely important in law and are not usually reported in the law reports.

AVOIDING PRECEDENTS

DISTINGUISHING

A binding precedent is a decided case which a court must follow. But a previous case is only binding in a later case if the legal principle involved is the same and the facts are similar. Distinguishing a case on its facts, or on the point of law involved, is a device used by judges usually in order to avoid the consequences of an earlier inconvenient decision which is, in strict practice, binding on them.

What is reasonably distinguishable depends on the particular cases and the particular court - some judges being more inclined to 'distinguish' disliked authorities than others. In *Jones v Secretary of State for Social Services* [1972] AC 944, Lord Reid stated:

"It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing, they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty ..."

At the other extreme, Buckley LJ in *Olympia Oil v Produce Brokers* [1914] 3 KB 1262 stated:

"I am unable to adduce any reason to show why that decision which I am about to pronounce is right ... but I am bound by authority which, of course, it is my duty to follow ..."

OVERRULING

A higher court can overrule a decision made in an earlier case by a lower court eg, the Court of Appeal can overrule an earlier High Court decision.

Overruling can occur if the previous court did not correctly apply the law, or because the later court considers that the rule of law contained in the previous *ratio decidendi* is no longer desirable. An example of the former is the overruling of *Anderton v Ryan* [1985] 2 All ER 335 by the House of Lords in *R v Shivpuri* [1986] 2 All ER 334 concerning the Criminal Attempts Act 1981, and an example of the latter is the House of Lords' decision in *Miliangos v George Frank Ltd* [1975] 3 All ER 801

which overruled previous authority that judgements could not be given in foreign currency.

REVERSING

Reversing is the overturning on appeal by a higher court, of the decision of the court below that hearing the appeal. The appeal court will then substitute its own decision.

PER INCURIAM

A decision which is reached *per incuriam* is one reached by carelessness or mistake, and can be avoided. In *Morelle v Wakeling* [1955] 2 QB 379 Lord Evershed MR stated that "the only case in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned".

In *Secretary of State for Trade and Industry v Desai* (1991) The Times 5 December, Scott LJ said that to come within the category of *per incuriam* it must be shown not only that the decision involved some manifest slip or error but also that to leave the decision standing would be likely, inter alia, to produce serious inconvenience in the administration of justice or significant injustice to citizens.

However, this rule does not permit the Court of Appeal to ignore decisions of the House of Lords. In *Cassell v Broome* [1972] AC 1027 Lord Denning MR held the House of Lords' decision in *Rookes v Barnard* [1964] AC 1129 to be *per incuriam* on the basis that it ignored previous House of Lords' decisions. He was rebuked sternly by the House of Lords who considered that the Court of Appeal 'really only meant' that it 'did not agree' with the earlier decision:

"Even if this is not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords." (Lord Hailsham)

PERSUASIVE PRECEDENTS

A persuasive precedent is one which is not absolutely binding on a court but which may be applied. The following are some examples:

- * Decisions of English courts lower in the hierarchy. For example, the House of Lords may follow a Court of Appeal decision, and the Court of appeal may follow a High Court decision, although not strictly bound to do so.
- * Decisions of the Judicial Committee of the Privy Council.
- * Decisions of the courts in Scotland, Ireland, the Commonwealth (especially Australia, Canada and New Zealand), and the USA. These are usually cited where there is a shortage or total lack of English authority on a point.
- * *Obiter dicta* of English judges.

OTHER PERSUASIVE AUTHORITIES

Where there is no direct authority in the form of decided cases, persuasive authority may be found in legal writings in textbooks and periodicals. In modern times many authors have been cited frequently in court, both by counsel and by judges in judgements, eg Smith and Hogan, *Criminal Law*.

ADVANTAGES AND DISADVANTAGES OF PRECEDENT

ADVANTAGES

- * There is certainty in the law. By looking at existing precedents it is possible to forecast what a decision will be and plan accordingly.
- * There is uniformity in the law. Similar cases will be treated in the same way. This is important to give the system a sense of justice and to make the system acceptable to the public.
- * Judicial precedent is flexible. There are a number of ways to avoid precedents and this enables the system to change and to adapt to new situations.
- * Judicial precedent is practical in nature. It is based on real facts, unlike legislation.
- * Judicial precedent is detailed. There is a wealth of cases to which to refer.

DISADVANTAGES

- * Difficulties can arise in deciding what the *ratio decidendi* is, particularly if there are a number of reasons.
- * There may be a considerable wait for a case to come to court for a point to be decided.
- * Cases can easily be distinguished on their facts to avoid following an inconvenient precedent.
- * There is far too much case law and it is too complex.