Judicial Precedent Revision

Stare Decisis

- Stare decisis means: ‘stand by what has been decided’.

- Points of law that have been decided in previous similar cases must be followed. This makes the system CONSISTENT, FAIR and PREDICTABLE.

- Another aspect to stare decisis is that higher courts take priority over lower courts. That is, decisions in higher courts are BINDING in lower courts (i.e. the judges have no choice but to obey – they are under an obligation to follow the higher court’s lead).

- Stare decisis, therefore, allows past decisions to influence future similar cases and ensures higher courts bind lower courts.

Ratio decidendi

- At the end of each legal case the Judge gives a summary of the facts of the case; followed by a review of the arguments (defence and prosecution) and an explanation of the principles of law he/she is using to come to a decision.

- Only the legal principles used to come to a decision are referred to as the ratio – decidendi’ which means ‘the reason for deciding’. This is very important because it creates a precedent for judges to follow in the future. For example, in Donoghue v Stevenson the principle that the manufacturer owes a duty of care to the consumer is the legal principle.

Obiter dicta

- Sometimes the Judge will speculate on what his/her decision would have been if the facts of the case had been different; this hypothetical situation is referred to as the ‘obiter dicta’ (i.e. other things said) and the legal reasoning put forward may be used in future cases (however, it is NOT a binding precedent as is the ratio- decidendi).

- A major problem of looking at a past judgment is to divide the ratio decidendi from the obiter dicta, as the judgment is usually in a continuous form, without any headings stating what is meant to be part of the ratio decidendi and what is not.

Original, Binding and Persuasive Precedent

Original precedent

If a point of law in a case has never been decided before, then whatever the judge decides will form a new precedent for future cases to follow, i.e. it is the original precedent.

- As there are no past cases for the judge to base a decision on, he/she is likely to look at cases which are closest in principle and he/she may decide to use similar rules.

- This way of arriving at a judgement is referred to as reasoning by analogy (i.e. comparing similar cases).
This idea of creating new law by analogy can be seen in Hunter and Others v Canary Wharf Ltd and London Docklands development Corporation (1995) and more famously in Donoghue v Stevenson.

**Binding Precedent**

- This is a precedent from an earlier case which must be followed even if the judge in the later case does not agree with the legal principle.
- A binding precedent is only created when the material facts of the second case are sufficiently similar to the original case and;
- The decision was made by a court which is senior to (or in some cases the same level as) the court hearing the latter case.

**Persuasive Precedent**

- A persuasive precedent is a case that the court may use, but which it does NOT have to follow. The court may be persuaded to follow its legal rulings, but it is not under any obligation to do so. Persuasive precedent may come from a number of sources:
  
  1. Courts lower in the hierarchy. Such an example can be seen in R v R (1991) where the House of Lords (HL) agreed with and followed the same reasoning as the Court of Appeal in deciding a man could be guilty of raping his wife.

  2. Statements made obiter dicta (especially where the statement was made in the HL). This is clearly seen in the law of duress as a defence to a criminal charge, where the HL in R v Howe (1987) ruled that duress could not be a defence for murder. Also in the judgement (the Obiter statement) the judges stated that duress could not be used as a defence to someone charged with attempted murder. When, later, in R v Gotts (1992) a defendant charged with attempted murder tried to argue that he could use the defence of duress, the obiter statement from Howe (1987) was followed as persuasive precedent in the Court of Appeal.

  3. Decisions of the Judicial Committee of the Privy Council. This court is NOT part of the court hierarchy in England and so its decisions are NOT binding. However, since many of its judges are also members of the HL, their judgements are treated with respect and may often be followed. An example of this can be seen in the law of remoteness of damages in the law of tort and the decision made by the Privy Council in the case of the Wagon Mound (1) (1961). In later cases, English courts followed the decision in this case.

  4. A dissenting judgement. Where a case has been decided by the majority of judges (e.g. 2-1 in the Court of Appeal), the judge who disagreed would have explained his reasons for doing so. If the case then goes to appeal to the House of Lords (HL), or if there is a later case on the same point which goes to the HL, it is possible that the HL may prefer the dissenting judgement and decide the case in the same way. The dissenting judgement has persuaded them to follow it.
5. Decisions of other courts in other countries. This is especially so where the other country uses the same principles of common law as in the English system. This applies to Commonwealth countries such as Canada, New Zealand and Australia.

Hierarchy of Courts

One of the fundamental rules of ‘stare decisis’ is that in England and Wales the higher court take priority over lower courts. The court system has a hierarchy. It has a structure of power from top to bottom; every court is bound to follow any decision by a court above it.

The higher court has more senior and powerful judges sitting in it who can give orders and exert more influence.

The Hierarchy Of Courts Table

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Key Facts and Rules regarding the Hierarchy of Courts Principle

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<td>Divisional</td>
<td>Itself, High Court and all Other lower courts</td>
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European Court of Justice (ECJ)

- Since 1973, the ECJ (in Luxembourg) is now the highest court in the UK where European law is involved.

- A decision made by this court is 'binding’ on all other courts in England and Wales. However, there are still laws which are unaffected by European Union Law and for these the ‘House of Lords’ is the supreme law.

- An important feature of the ECJ is that it can overrule its own past decisions if it feels necessary. This flexible approach to past precedents is seen in other legal systems in Europe, and is a contrast to the more rigid approach of our national courts.

House of Lords

- The most senior national court is the House of Lords and its decisions bind all other courts in the English legal system.

- The House of Lords is NOT bound by its own past decisions, although it will generally follow them. However, this has not always been the case; from 1898 to 1966 the House of Lords regarded itself as being completely bound by its own past decisions unless the decision had been made in ‘per incuriam’ (in error).

- But this was not seen to be satisfactory, as the law could not alter to meet changing social conditions and opinions. Since 1966, the Practice Statement has allowed the House of Lords to change the law if it believes the earlier case was wrongly decided. It has the ‘flexibility’ to refuse to follow and earlier case when ‘it appears right to do so’.

Practice Statement 1966

- Since 1898 the House of Lords was bound to follow its own previous decisions.

- However in 1898 London Street Tramways v London County Council.

- The lords held that certainty in the law was more important than the possibility of individual hardship being caused by having to follow a past decision. Thus from 1898 the Lords regarded itself as bound by it’s own previous decisions unless they were made ‘per incuriam’, in error, which is where the Lords have ignored a statute.

- In 1966 the Lord Chancellor felt that by binding the House of Lords it removed flexibility and created injustice therefore to avoid that, the Practice Statement was introduced.

- Since 1966 this Practice Statement has allowed the House of Lords to change the law if it believes that an earlier case was wrongly decided. It has the flexibility to refuse to follow an
earlier case when it appears right to do so this phrase however is very vague and gives little
guidance as to when the House of Lords might overrule a previous decision.

- The first major use of the Practice statement did not occur until 1972 in Herrington V British
Railways Board (1972), which involved the law on the duty of care owed to a child
trespasser.

- The earlier case of Addie V Dumbreck (1929) had decided that an occupier of land would
only owe a duty of care for injuries to a child trespasser if those injuries had been caused
deliberately or recklessly. In Herrington the lords held that social and physical; conditions
had changed since 1929, and the law should also change.

- From the mid 70s onwards the House of Lords showed a little more willingness to make use
of the Practice Statement.

- The Miliangos case was also appealed to the HL, where the HL used the Practice Statement
to overrule its own decisions in Havana Railways case regarding paying damages in sterling
only-which was changed beacuse of Milliangos.

- In the criminal law where the liberty and reputation of the subject is at stake the Lords has
also been willing to over-rule itself. In one case only a year after the previous decision. –
Shivpuri (1986) over-ruled Anderton v Ryan (1985)

- A more recent criminal case was when House of Lords changed the ruling on recklesness in R
v G and Another (2003)

- Another major case was Pepper V Hart (1993) where the previous ban on the use of Hansard
in statutory interpretation was overruled.

- The House of Lords recognised that they might sometimes make errors and the most
important thing was to put the law right. Where the Practice Statement is used to overrule a
previous decision, that past case is then effectively ignored.

- The law is now that which is set out in the new case.

Court of Appeal

- The Court of Appeal has two divisions : ‘Civil’ and ‘Criminal’. Both divisions are bound to
follow the decisions of the European Court of Justice and the House of Lords.

- In addition, they must usually follow past decisions of their own; although there are some
limited exceptions to this rule:

1. Where two previous decisions of the Court of Appeal conflicted the Court of Appeal could
choose which decision to follow. The other would then be overruled.

2. Where there was a later decision of the House of Lords which conflicted with the Court of
Appeal decision, the Court of Appeal would follow the House of Lords decision.
3. Where a Court of Appeal decision had been made per incuriam (in error), that is, without taking into account a relevant case or statute, then the decision made in error can be overruled.

The CA challenge to its own decisions

- Lord Denning argued, in the case of Gallie v Lee (1969), that the Court of Appeal needed more FLEXIBILITY to depart from its own previous decisions ‘when it is right to do so’ – (as is the case with the House of Lords since the introduction of the 1966 Practice Statement).

- Lord Denning argued that Young’s case exceptions are “a self-imposed limitation and we who imposed it can also remove it” (i.e. the case was decided in the Court of Appeal and could therefore be changed in the same way).

- He saw no reason why the Court of Appeal could not make those changes on occasion to bring about justice, rather than causing delay and expense by sending cases on further to the House of Lords.

- Lord Denning’s challenge can be seen in the case of Davis v Johnson (1979) where the Court of Appeal refused to follow its own previous decision in a matrimonial dispute.

- The case then went to the HL and although the HL agreed with the CA interpretation in the matrimonial dispute, they ‘unequivocally and unanimously reaffirmed’ the rule in Young – clearly stating that the CA are restricted to their current exceptions.

The CoA challenging to the HL decisions

The doctrine of Stare decisis imposes a binding precedent on the CA, in that it must follow the decisions of the HL. On occasion, however, it has gone against this doctrine as the following cases show.

1. Broome v Cassell (1971)

- The CA, under Lord Denning, did not follow a previous decision of the HL concerning aspects of payment of damages. The Court claimed that the decision of the HL was per incuriam (made carelessly). When the case went to the HL on further appeal, the HL reprimanded the CA by stating it was not open to the CA to ignore the HL decisions.

2. Miliangos

- Further challenges (again under Lord Denning) were made in the cases of Schorsch Meier v Henning (1975) and Miliangos v George Frank (Textiles) Ltd (1976). Both these cases concerned the previous HL decision in the Havana Railways case, which held that damages could only be awarded in sterling. Lord Denning felt that the economic climate had changed – that sterling was no longer a strong and stable currency. Damages were awarded in other currencies in both cases before the CA.

- Only the Miliangos case was appealed to the HL, where it was pointed out (again) that the CA had no right to ignore or overrule the decisions of the HL. However, the HL then used the Practice Statement to overrule its own decisions in Havana Railways case – agreeing with
Lord Denning that it should be altered, but stating that it was not for the Court of Appeal to do so.

**Following, Overruling, Reversing and Distinguishing**

**Summary of Legal Terms**

The following are a brief summary of legal terms

**Distinguishing**

A method of avoiding a previous decision because facts in the present case are different

**Overruling**

A decision which states that the legal rule (precedent set) in an earlier case is wrong.

**Reversing**

Where a higher court in the same case overturns the decision of the lower court

**Distinguishing**

1. This is a method which can be used by a judge to avoid following a past decision which he/she would otherwise have to follow. It means that the judge finds that the material facts of the case he/she is deciding are sufficiently different for him/her to draw a distinction between the present case and the previous precedent. The judge is NOT then bound by the previous case.

2. Two cases demonstrating this process are Balfour v Balfour (1919) and Merritt v Merritt (1971). Both cases involved a wife making a claim against her husband for breach of contract. In Balfour it was decided that the claim could not succeed because there was no intention to create legal relations; there was merely a domestic arrangement between husband and wife and so there was no legally binding contract.

3. The second case, Merritt, was successful because the court held that the facts of the case were sufficiently different, in that although the parties were husband and wife, the agreement was made after they had separated. Furthermore, the agreement was in writing. This distinguished the case from Balfour; the agreement in Merritt was not just a domestic arrangement but meant as a legally enforceable contract.

**Overruling**

1. This is where a court in a later case state that the legal rule (i.e. precedent set) decided in an earlier case is wrong. Overruling may occur when a higher court overrules a decision made in an earlier case by a lower court. For example, the House of Lords overruling a decision of the Court of Appeal. It can also occur where the European Court of Justice overrules a past decision it has made; or when the House of Lords uses a device known as the Practice statement 1966 to overrule a past decision of its own.
2. An example of this was seen in the Pepper v Hart (1993) when the House of Lords ruled that Hansard (the record of what is said in Parliament) could be consulted when trying to decide what certain words in an Act of Parliament meant. This decision overruled the earlier decision in Davis v Johnson (1979) when the House of Lords had held that it could not consult Hansard.

3. Overruling is RETROSPECTIVE – overruling of a 1930 case today would mean that the 1930 ruling was never effective and this can create problems. For example, in Contract Law it would be possible to argue that the contract was null and void (legal when created but not legal now). In Criminal Law, could create offences which would make conduct which was legal when it happened illegal.

**Reversing**

1. This is where a court higher up in the hierarchy overturns the decision of a lower court on appeal in the same case. For example, the Court of Appeal may disagree with the legal ruling of the High Court and come to a different view of the law; in this situation they reverse the decision made by the High Court.

2. An example of this was seen in R v Kingston (1984) when the House of Lords reversed the Court of Appeal’s decision of quashing defendant’s conviction of violent assault.

**Advantages and Disadvantages of Judicial Precedent**

**Advantages**

- Certainty - It creates certainty in the law and means solicitors and barristers can advise their clients on the probable outcome of their case.
- Fairness - Similar cases are treated in a similar way, this is in the interests of justice and fairness.
- Time Saving - It saves court time as for most situations there is already an existing solution.
- Law Development - it allows the law to develop alongside society R v R (1991) - this case overturned a centuries old legal principle that a man could not rape his wife.

**Disadvantages**

- Rigidity - The system is too rigid and does not allow the law to develop enough.
- Injustice - The strict rules of judicial precedent can create injustice in individual cases
- Slow Development - The law is slow to develop under the system of judicial precedent. The law cannot be changed until a case on a particular point of law comes before one of the higher appellate courts.
- Confusion - Hundreds of cases are reported each year, making it hard to find the relevant precedent which should be followed.
• Complexity - The law is too complex with thousands of fine distinctions.

Role of Judges

1. The role of judges in creating law is fundamental to the English Legal System. Parliament is the supreme lawmaker in the legal system, but judges have to interpret the law and they also create new points of law which are followed in later cases already heard and decided upon by judges.

2. There are two jobs to be done when deciding a case:

   • The material facts of the case must be identified and analysed.
   • The law must be applied to those facts.

3. The application of law to a set of MATERIAL FACTS is the task of the judge, and this is what creates case law. Once this has occurred, any case which has similar material facts will be treated in the same way by later courts. This produces FAIRNESS for the defendant since they are treated in the same way as previous defendants and it also provides some PREDICTABILITY for later potential offenders. They will know what to expect.

4. Once the judge or judges have decided the line they are going to take, they prepare a written document which outlines their thinking and gives their decision. All views are put into the document, so if a judge does not agree with the findings, his or her reservations can be put down. This is known as a DISSENTING VIEW. Even dissenting views are useful. Judges in later cases may consult all relevant views when interpreting a case