Lecture # 5
Doctrine of Precedent

By: Salik Aziz Vaince
[0313-7575311]

➢ Introduction

- Judicial precedent refers to the source of law where past decisions of the judges create law for future judges to follow.
- This source of law is also known as case law.
- It is a major source of law, both historically and today.
- Judicial precedents are an important source of law they have enjoyed high authority at all times and in all countries. In broadest sense a precedent means a previous decision. A judicial precedent is a legal source of law and speaks with authority.
- English system of precedent is based on the Latin maxim stare decisis et non quieta movere (usually shortened to stare decisis) which loosely translated ‘stand by what has been decided and do not unsettle the established’.
- This supports the idea of fairness and provides certainty in the law.
- In common law legal systems, a precedent or authority is a principle or rule established in a previous legal case that is either binding on or persuasive for a court or other tribunal when deciding subsequent cases with similar issues or facts.
- The general principle in common law legal systems is that similar cases should be decided so as to give similar and predictable outcomes, and the principle of precedent is the mechanism by which that goal is attained.
- Common law precedent is a third kind of law, on equal footing with statutory (statutes and codes enacted by legislative bodies), and regulatory law (regulations promulgated by executive branch agencies).
- Case law is the set of existing rulings which have made new interpretations of law and, therefore, can be cited as precedent. In most countries, including most European countries, the term is applied to any set of rulings on law which is guided by previous rulings, for example, previous decisions of a government agency - that is, precedential case law can arise from either a judicial ruling or a ruling of adjudication within an executive branch agency. Trials and hearings that do not result in written decisions of a court of record do not create precedent for future court decisions.

➢ Meaning

- Precedent means, “Authorities or decision of superior courts to be followed”.

➢ Definition:

- “A decided case that furnishes a basis for determine later case involving similar facts or issues is called a precedent”.

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Black’s Law Dictionary defines: “A decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising or a similar question of law”.

- Austin defines: “Precedent is a judicial law”.
- Salmond defines: “Precedents are judicial decisions by the courts followed in subsequent a like cases”.
- Osborn defines: “Precedent is a Judgement of a court of law cited as an authority for deciding a similar set of facts”.

**Precedent as source of law**

Judicial precedents are an important **source of law**. They have enjoyed high **authority** at all times and in all countries. Particularly very important in England as English law is based in precedents.

The one reason why precedent occupies so high place in the English system is that English judges have occupied a very high position in the country. They have been experts in their line and consequently their decisions have enjoyed high reputation.

The **bench** has always given law to the **Bar** in England.

However, there are some writers who are of the view that judicial precedent is **not a source of law**.

- **According to Stobbe**: “Practice is in itself not a source of law; a court can **depart** from its formal practice and no court is bound to the practice of another. Departure from the practice here observed is not only permitted but required if there are better reasons for another treatment of the question of law”.
- **Keeton** rejects this view and holds that a judicial precedent is a **source of law**. To quote him: “A judicial precedent is a judicial decision to which authority has in some measure been attached. It must be noted at once, however, the partly because of the **high status** which judges occupy in political and social organization and partly because of the importance of the **issues** which they decide, judicial decisions have at all times enjoyed high authority as indication of law”.

English people have always looked to their judiciary in any matter, and court always fulfilled their expectations so that’s why they accept **judge made law** without question.

- **Blackstone writes**: “For it is an established rule to abide by former precedents, where the same points come again in **litigation**; as well as to keep the **scale of justice** even and steady and not liable to waver with every new judge’s opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a **permanent rule**, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiment”.

To these I may add that the labour of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.

As we personally in our daily life want the consistency as regarding the timetable or schedule.

**Nature of precedent**

- A judicial decision **can make a law** but cannot **alter** it.
- Where there is a settled rule of law, it is the duty of the judges to **follow** the same.
They cannot substitute their opinions for the established rule of law.

**Authority of precedent**

- The reason why a precedent is recognised is that a judicial decision is presumed to be correct.
- That which is delivered in Judgement must be taken for established truth.
- The practice of following precedents creates confidence in the minds of the litigants.
- Law becomes certain and known and that in itself is a great advantage.
- Decisions are given by judges who are experts in the study of law.

**Circumstances which weaken the binding force of precedent**

- The operation of precedent is based on the legal presumption that judicial decisions are correct.
- A matter once decided is decided once for all.
- What has been delivered in a Judgement must be taken to be an established truth.
- However, there are circumstances which weaken the binding force of a precedent. Those are exceptions to the rule of the binding force of precedent.

  i. **Abrogated decision**
     - A decision will no more be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court.
     - Reversal occurs when the same decision is taken on appeal and is reversed by the appellate court.
     - Overruling occurs when the higher court declares in another case that the case was wrongly decided and so it is not to be followed.

  ii. **Affirmation or Reversal on a different ground**
     - It sometimes happens that a decision is affirmed or reversed on appeal on a different point.
     - Such conduct on the part of the appellate court shows that the appellate court did not agree with the grounds mentioned.
     - The true view is that a decision either affirmed or reversed on another point is deprived of any absolute binding force which it might otherwise have had.

  iii. **Ignorance of statute**
     - A precedent is not binding if it was rendered in ignorance of a statute.
     - Such a mistake also vitiates the decision. Even a lower court can refuse to follow a precedent on this ground.

  iv. **Inconsistency with earlier decisions of higher court**
     - A precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher court.
     - For example, if the court of appeal decides a case in ignorance of a decision of the House of Lords which went the other way, the decision of the court of Appeal is per incuriam and is not binding either on it or on lower courts.
     - On contrary, it is the decision of the House of Lords that is binding.

  v. **Inconsistency between earlier decisions of the same rank**
- A court is not bound by its own previous decisions that are in conflict with one another.
- The court of Appeal and other courts are free to choose between conflicting decisions, even though this might amount to preferring an earlier decision to a later decision, preferring an unreported decision to a reported decision and preferring a decision of a court of coordinate jurisdiction to its own decision.
- Where authorities of equal standing are in conflict, a lower court has the same freedom to pick and choose between them.
- The lower court may refuse to follow the later decision on the ground that it was arrived at per incuriam, or it may follow such decision on the ground that it is the latest decision.

vi. Precedents sub silentio or not fully argued
- When a particular point involved in a decision is not taken notice of and is not argued by a counsel, the court may decide in favour of one party, whereas if all the points had been put forth, the decision may have been in favour of the other party.
- Hence such a rule is not an authority on the point which had not been argued and this point is said to pass sub silentio.

vii. Decisions of equally divided courts
- Where an appellate court is equally divided, the practice is to dismiss the appeal.
- The rule adopted in the House of Lords is that the decision appealed from becomes the decision of the House of Lords.
- This problem is not a serious one today as it is the usual practice of most appellate courts to sit with an uneven number of judges like three or five.

viii. Erroneous decisions
- Decision may also on mistake by being founded on wrong principles or by conflicting with fundamental principles of common law.
- Courts may overrule erroneous decisions which involve injustice to the citizen or which concern an area of law which is important for the citizen that the courts should establish what the correct law is.
- The rule that courts are bound by decisions of higher courts and in some cases by their own decisions, even though wrong, must stand as authority until overruled by higher authority.
- On this principle, an erroneous decision of the House of Lords can only be corrected by statute.
- However, in London Transport Executive v. Betts, Lord Denning expressed the view that the House of Lords could disregard a prior decision of its own which conflicted with fundamental principles of common law.
- Scruttons Ltd. V. Midland Sillicones Ltd.
- Elder, Dempster and Company v. Paterson Zochonis and company

➢ Circumstances Which increase the authority of a precedent
- The number of judges constituting the bench and their eminence is a very important factor in increasing the authority of a precedent.
To some extent, the **eminence of the lawyers** who argued the case enhances the authority of a precedent.

- A **unanimous decision** carries more weight.
- **Affirmation, approval or following** by other courts, especially by a higher **tribunal**, adds to the strength of a precedent.
- If an **Act is passed** embodying the law in a precedent, the precedent gains an added authority.
- To a limited extent, the **lapse of time** adds to the authority of a decision. Likewise, if a precedent is not followed for a long time, its authority starts deteriorating.

### Do judges make law?

There are two contrary views on this point. The first view is that judges only declare the **existing law**. The second view is that they **make law**.

#### Declaratory theory:

The declaratory theory is concerned with the first view.

- According to this theory, judges are no more than the **discoverers of law**.
- They discover the law on a particular point and declare it.
- The judge is only declaring what the law is meaning thereby judges do not create law, they only declare what it has always been.

**Justice Coke** said that judicial decisions are not a source of law but the best proof of **what the law is**.

**Lord Esher** says in *Willis v. Baddeley*: “there is in fact no such thing as **judge-made law**, for the judges do not make the law though they frequently have to apply the **existing law** to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.

In *Hernett v. Fisher*, Scrutton, L.J. said: “This court sits to **administer the law**, not to make **new law** if there are cases not provided for”.

#### Judges as Law-makers:

The other view is that judges make laws, when a new point is decided; the judge is creating new law.

**Lord Bacon** said that the point which the judges decide in case of **first impression** is a “distinct contribution to the existing law”.

Critics point out that certain limitations on the **legislative powers** of the judges. A judge cannot **overrule a statute**.

- Where a statute has clearly laid down the law, the judge has to enforce it. He has to leave it to the **legislator** to deal with any unpleasant consequences not foreseen when the law was made.
- The legislative power of the judge is restricted to the **facts of the case** before him.
- Any ruling which he may lay down will be law only in so far as it is necessary for the decision of the case.
- Any principle laid down by a judge which do not form the ground of his decision and which are not applicable to the case under consideration are only **obiter dicta**. Such dicta have **no binding authority**.

In *Quinn v. Leathem*, **Lord Halsbury** observed: “A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that law is not always logical at all”.

The judge is confined to the facts of the case while enunciating legal principles. Within those limits alone it can be said that judges make law.

**Conclusion:** it is submitted that both the above views regarding the function of judges contain only a partial truth. Whether judges make or declare law depends on the nature of the particular legal system. In common law countries, the role of the judges has been greatly creative. In countries where the law has been codified, the role of the judges has been comparatively less creative. However the difference between the two is not very great. The creative role of the judges in England has been so dominant that the English law sometimes referred to as judge-made law, but this does not mean that judges in England have made the law in the same sense in which legislature make it.

**Binding Authority of Judicial Precedent or Stare Decisis**

- Stare decisis (Anglo-Latin) a legal principle by which judges are obliged to respect the precedents established by prior decisions. The words originate from the phrasing of the principle in the Latin maxim Stare decisis et non quieta movere: "to stand by decisions and not disturb the undisturbed."
- In a legal context, this is understood to mean that courts should generally abide by precedents and not disturb settled matters.
- This doctrine requires a Court to follow rules established by a superior court.
- The doctrine that holdings have binding precedence value is not valid within most civil law jurisdictions as it is generally understood that this principle interferes with the right of judges to interpret law and the right of the legislature to make law.
- Most such systems, however, recognize the concept of jurisprudence constante, which argues that even though judges are independent, they should judge in a predictable and non-chaotic manner. Therefore, judges' right to interpret law does not preclude the adoption of a small number of selected binding case laws.
- There was no doctrine of stare decisis as there was no reporting of the decisions of the courts.
- It was in the 17th century that the decisions of the Exchequer courts came to be reported in England and were given a binding force.
- In 1833, the famous decision of Chief Justice Park in Mirehouse v. Rennel reiterated the urgent need for recognizing the binding force of precedents.
- Then came the Supreme Court of Judicature Acts of 1873 and 1875 and the theory of stare decisis was firmly established.
- Today it is a characteristic feature of the legal systems of England.

**Decision reached per incuriam**

- A decision given per incuriam is a case in which a statute or rule having statutory effect is not brought to the attention of the court.
- Per incuriam means that a court failed to take into account all the relevant and vital statutes or case authorities and that this had a major effect on the decision.
- Per incuriam does not simply mean the earlier court got things wrong. It only means there was a significant oversight, not only must there have been a failure to take account of relevant authorities;
that fault must also have been such a major defect that it seriously affected the reasoning in the case and would have affected the outcome.

- Decisions said to be reached per incuriam were actually reached per ignorantium, but it is uncomplimentary to say that the court is ignorant of the law.
- In the hierarchy of courts a lower court is bound to follow the decision of a higher court even though it might believe that the decision is reached per incuriam. It is not for a lower court, to question or say that a decision of a higher court was reached per incuriam. That is the privilege the higher court if after reconsidering its former decision, it is satisfied that the previous decision, had been reached per incuriam.
- Lord Halsbury mentioned a case decided by the House of Lords in ignorance of a statute as one which would not be binding on the house.
- Lord Greene gave a Judgement in the Court of Appeal in Lancaster Motor Co. (London) Ltd. V. Bremith in which a previous Judgement of the court was ignored because it contravened the terms of a rule of the Supreme Court. Lord Greene characterized that Judgement as one “delivered without argument and delivered without reference to the crucial words of the rule and without any citation of authority”.
- It has since been doubted whether a decision on the interpretation of a statute given without reference to a well-recognized general rule of statutory construction can be said to have been given per incuriam.
- The most important development under this head has been the clear recognition of the fact that a decision given in ignorance of a case which would have been binding on the court is given per incuriam.
- Morrelle Ltd. V. Wakeling

➢ Ratio Decidendi

- Ratio Decidendi is a Latin phrase meaning “the reason for the decision.” Ratio Decidendi refers to the legal, moral, political and social principles on which a court’s decision rests. It is the rationale (logic) for reaching the decision of a case. This is the legal reason or principal which lies behind the decision and it is this ratio which will provide the precedent for judges to follow in future cases.
- According to Salmond: “A precedent is a judicial decision which contains in itself a principle”.
- The underlying principle which thus forms its authoritative element is often termed the ratio decendi.
- Sir Rupert Cross defined: “any rule expressly or impliedly treated by the judge as a necessary step in reaching his conclusion”.
- As Precedent can only be used in future cases if legal reasoning of past decisions is known, therefore at the end of a case there will be a Judgement, a speech of judge and reasons for that decision.
- For example in a Judgement the judge will give, summary of facts of case, review on arguments of advocates, relevant law he is using to come to the decision.

➢ Discovering the ratio decidendi of a case

- The ratio decidendi of a case is the principle of law: A court in a later case and not the judge in the original case determine the ratio decidendi of a case.
- Discovering the ratio decidendi
- Of a case is often difficult. Judges will hardly ever state explicitly the ratio in the judgment but will bury it among a mass of dicta.
- Old cases are easier because the reporter did not always include mere obiter dicta.
- The report may not accurately encapsulate the ratio in the head note to the law report.
- The reporter may have misinterpreted the decision and attempted to state the ratio too widely or too narrowly.

- **Words not necessary for the decision must be obiter.**
  - However, a judge may give two or more reasons for his decision in which event they are both or all rationes decidendi and not mere obiter dicta.
  - **Lord Simonds:** "here is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also."
  - **Examples:** *Donoghue v Stevenson [1932] HL*
  - What was considered material was the claimant had been injured through consuming ginger beer manufactured by the defendant and bottled in glass through which the contents could not be seen and which contained a dead snail.
  - It was not material that the friend in the cafe had bought the ginger beer or that it the friend and the cafe owner poured it into the tumbler. Particularly immaterial was the fact that there was no contractual relationship between the complainant and the defendant, and in this way, the court laid down a wider ratio.
  - The court made it clear that the ratio was not to be limited to cases involving snails in ginger-beer bottles. Lord Atkin laid down the rule in these words:
  - A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.
  - In subsequent cases, courts have extended the ratio of Donoghue v Stevenson to motorcars, lifts, hair dye, industrial chemicals, and irritant chemicals in underpants. The courts have extended category of persons potentially liable to include repairers, erectors and assemblers.

- **Three or even five separate judgments may be given.**
  - Judges in an appeal can find for the same party for different reasons. In this event, the ratio decidendi is that agreed by the majority. If there is no majority in favour of any one ratio the case loses much of its value as a precedent, and may not be considered binding, even if it is a decision of the House of Lords.

  - **Denning, task is ‘formidable’.**
  - Denning described the task of distinguishing between ratio decidendi and obiter dicta as 'formidable' and said that, occasionally, it is more difficult to distinguish them in a single speech than in multiple opinions.

- **What 'I agree' means**
In an appeal case, if a judge says 'I agree' that means he agrees with the decision and proposed order but not necessarily that he agrees with the reasoning of his judicial colleagues.

**Obiter Dicta**

- *Latin* term which means, *by the way*. Words of an opinion entirely unnecessary for the decision of the case.
- The statements of law which go beyond the requirements of the particular case and which lay down a rule that is irrelevant or unnecessary for the purpose in hand are called *obiter dicta*.
- The remainder of the Judgement and not directly upon the question before the court or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or Argument.
- These comments do not form part of the *ration* (reasoning) and are therefore not part of the precedent. For instance, sometimes a judge will speculate on what his decision would have been if the material facts had been different.
- Sometimes, part of the Obiter Dicta may be put forward in future cases and although it will not form a binding precedent it may help to ‘persuade’ a later judge towards a particular view in the law.
- It is sometimes difficult to distinguish between ratio and any headings as the judgment is usually in continuous form without any headings specifying what is ratio and what is not.
- As in *lower courts* may be there is one judge but in appeal cases heard by more than one judge (uneven number). That’s doesn’t mean that there will be many judgments but one judge will give judgment and others can say I agree. In *complicated* cases more than one judge can write their own *reasoning* that how they arrived at their Judgement that means more than one ratio this can cause problem for future judges in following the decision.
- These dicta have the force of *persuasive precedent* only. The judges are not bound to follow them.
- Obiter dicta help in the growth of law.
- These sometimes help the cause of the reform of law.
- The judges are expected to know the law and their *observations carry weight*.
- The *defects* in the legal system can be pointed out in the obiter dicta.
- The judges are not bound to make their observations on a particular point unless that is strictly relevant to the point in issue but if they feel that they must speak out their own minds on a particular point, the public should be grateful to them for their labour of love.

**Law reports**

- Law reports mean ‘law newspaper’. In England there are several major series of law reports bound as annual volumes. In addition *case law* is also available on electronic data base.

**Law Reports example:**

- *Best v Samuel Fox & Co. Ltd 1952 2 All ER 394*
  - *Best* (Claimant) - 2 (Volume 2)
  - *Samuel Fox & Co.* (defendant) - All (All)
  - 1952 (year of report) - ER (England Law Reports)
  - Thus it means the report is published at page 394 of Volume 2 of All England Reports for 1952.
### Citation

<table>
<thead>
<tr>
<th>In courts of Criminal Jurisdiction</th>
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<tbody>
<tr>
<td><strong>Prosecutor</strong></td>
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<tr>
<td>R &quot;The Crown&quot;</td>
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<tr>
<td>R &quot;The Crown&quot;</td>
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<tr>
<td>Smith</td>
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### Civil Actions

<table>
<thead>
<tr>
<th>Claimant</th>
<th><strong>Pronounced &quot;And&quot;</strong></th>
<th>Defendant</th>
<th>Details</th>
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<tbody>
<tr>
<td>R</td>
<td>v</td>
<td>Z</td>
<td>Divorce or child involved, parties remain anonymous</td>
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<tr>
<td>Smith</td>
<td>v</td>
<td>Jones</td>
<td>Typical</td>
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<td>Re: Tempest</td>
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<td>&quot;In the matter of&quot;</td>
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<thead>
<tr>
<th>The Wagon Mound</th>
<th>A shipping case is always known by the name of the defendant ship.</th>
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<tbody>
<tr>
<td>Barrow Haematite Steel Co</td>
<td>Some cases are cited with reference to subject matter (a steel maker company case).</td>
</tr>
<tr>
<td>Pinnel’s case</td>
<td>Some older cases are referred by a ‘<strong>single name</strong>’ (Regarding the payment of full amount due).</td>
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- **R= Regina or Rex, The Crown (Criminal)**
- Dates following cases are sometimes in round brackets (2003) or square brackets [2003]; square brackets indicate that the case decided in a year different from the event. E.g. R (Factortame Ltd and others) v Secretary of State for Transport, Local Government and the Regions (No 8) [2002] was heard in 2002 but the events occurred over 15 years earlier. The "(No 8)" indicates that the matter had been to the House of Lords on 8 occasions.

- **Contents of a law report:**
  - Following are the contents of law reports:
    1. Names of the parties
    2. Court
    3. Name(s) of the Judge(s)
    4. Date of hearing
5. Law Points  
6. Cases cited  
7. Litigation history  
8. Facts  
9. Counsels names  
10. Verbatim (word for word) text of the judgment  
11. Court order etc.

<table>
<thead>
<tr>
<th>Letters in case name</th>
<th>Case heard in</th>
<th>Notes</th>
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<tbody>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>HL</td>
<td>House of Lords</td>
<td>Appellate Committee of</td>
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<td>PC</td>
<td>Privy Council</td>
<td>Judicial Committee of</td>
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<tr>
<td>CA</td>
<td>Court of Appeal</td>
<td>Criminal or Civil Division</td>
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<tr>
<td>QBD</td>
<td>Queen's Bench Division of the High Court</td>
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<td>ChDiv</td>
<td>Chancery Division of the High Court</td>
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<td>Fam</td>
<td>Family Division of the High Court</td>
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<tr>
<td>DC</td>
<td>Divisional Court of the High Court</td>
<td>So we know it is an appeal</td>
</tr>
<tr>
<td>Crown Ct</td>
<td>A Crown Court judgment</td>
<td>Usually when a High Court judge is sitting</td>
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Effectiveness depends on the availability of full and accurate reports

The effectiveness of a doctrine of precedent based on *stare decisis* depends in large measure on the availability of full and accurate reports of decided cases. There has never been in England any official or systematic attempt at compiling law reports. The law reporting that exists today has simply evolved by private enterprise through three periods of development.

Precedent

Means the process of following earlier cases, also the report of the case itself is called a *precedent*.

Year Books (about 1275 to 1535)

The Yearbooks are anonymous reports, compiled annually, and written by hand in French. Some were later printed but most remained in manuscript. The Yearbooks are rarely cited in court now, as they are of no practical use in modern times. They are, however, useful in the study of the medieval common law.

Private (or named) reports (1535 to 1665)

Individuals, for commercial publication Compiled the private reports. Most of the private reports are referred to by the name of the reporter. They are cited by recognised abbreviations. Thus, the reports compiled by Sir Edward Coke between 1572 and 1616 are known as Coke's Reports, abbreviated to Co Rep. Holt CJ (1704) exemplifies the judicial frustration with bad private reporting:
"See the inconveniences of these scrambling reports; they will make us appear to posterity for a parcel of blockheads".

| Modern reports (1865 to the present) | The private reports were often criticised. They were expensive to buy. Some of them were never printed and had to be cited in manuscript form. There was too much overlapping in that the same case might be reported in two or more series. Their usefulness to the legal profession was reduced by the inordinate length of time taken to report some important decisions. They were, for the most part, unreliable. |
| Incorporation of Law Reporting for England and Wales. | Because of dissatisfaction with the private reports, a council was established comprising representatives of the four Inns of Court and the Law Society with the Attorney-General and Solicitor-General as ex officio members. The council's reports called The Law Reports, were first published in 1865 and eventually absorbed the private reports. In 1870 the Council was incorporated as a company and became known as the Incorporated Council of Law Reporting for England and Wales. In the High Court and Court of Appeal if the Incorporated Council of Law Reporting for England and Wales has published a Law Report that counsel which to quote, then they must use that report and only if the Council has not reported it may they use another source. |
| All England Law Reports (All ER) | Published since 1936 by Butterworths. |
| Specialist series of law reports | Tal Cases (TC or Tax Cas) published by the Inland Revenue and Reports of Patent, Design and Trademark Cases (RPC) published by the Patent Office. Lloyds Law Reports (Lloyd's Rep). |
| Stanley v International Harvester co. of Great Britain Ltd (1983) CA | Sir John Donaldson MR complained about the indiscriminate citing of computer-recorded cases, which contains no new law. |
| [ ]–v- ( ) | Since 1891, the year of publication of a volume of The Law Reports has appeared in square brackets and is part of the reference to that volume without which a case cannot be traced. Round brackets indicate the year of the hearing. |
| Smith Bernal | Internet reporting of cases. All courts. Case Track. |
| House of Lords website | House of Lords judgments available on the internet on http://www.parliament.uk/ |
What things are examined before applying precedent on a case?

Following points judges consider before applying precedent:

1. A decision must be based on a 'proposition or question of law'.
2. A decision must not be based on question of fact.
3. It must have ratio decidendi.
4. The material facts of the case must match with the material facts of the precedent.

- Proposition or question of law; is understood in the following three senses:
  - First Sense: A question of which answer is already prescribed in some rule of law. For example punishment for murdering a human being is prescribed in Criminal Justice Act 2003, thus opinion of a judge is ruled out.
  - Second sense appears when the language of statute is dubbed with uncertainty and various interpretations may be drawn from it; thus interpretation of the language becomes the question of law.

- Proposition or Question of fact

Before dealing with 'question of fact', it is important to first understand the term 'fact'---'fact' includes the following:

- anything, state of things or relation of things capable of being perceived by senses; and
- any mental condition of which any person is conscious.

- Question of fact is understood in the following two senses:
  - First Sense: Question of fact means a question other than a question of law. The phrase 'other than' refers to the two senses of question of law mentioned above.
  - Second Sense: Where due to contractual breach a question arises before the court as to what should be granted to the plaintiff either damages or specific performance? The question of fact becomes 'question of judicial discretion' as no rule of law applies and court is at discretion to adopt a stance best suited to the circumstances of the case.

Different Types of Precedent

- Original Precedent or Declaratory Precedent

If a point of law has never been decided before, then whatever the judge decides will form a new precedent for later cases to follow.

- Donoghue v Stephenson (1932) is a foundational case for English tort law by the House of Lords. It created the modern concept of negligence, by setting out general principles whereby one person would owe another person a duty of care.

Also known as the "snail in the bottle" case, the facts involved Mrs. Donoghue drinking a bottle of ginger beer in a cafe in Paisley, Renfrewshire. A snail was in the bottle. She fell ill, and she sued the
ginger beer manufacturer, Mr. Stevenson. The House of Lords held that the manufacturer owed a duty of care to her, which was breached, because it was reasonably foreseeable that failure to ensure the product’s safety would lead to harm of consumers.

- **Snail in a bottle case – negligence.** As there are no past cases for the judge to base his decision on, he is likely to look at cases that are closest in principal and he may decide to use similar reasoning. This way of arriving at a judgment is known as ‘reasoning by analogy’.
- The idea of creating new law by analogy can be seen in

  - **Facts:** Canary Wharf Ltd. undertook to construct a large tower interfered with the reception signals. The claimants alleged that the structure had interrupted their TV reception, and claimed private nuisance - for loss of enjoyment - and remuneration for their wasted license fee, for the time their signal had been impaired.
  - **Issue:** Does blocking a television signal constitute a nuisance in law?
  - **Decision:** Action dismissed.
  - **Reasons:** The court held that for an action in private nuisance to lie in respect of interference of the plaintiff’s enjoyment of his land it will generally arise from something emanating from the defendant's land (such as noise, smell, etc.). Occasionally actions on the defendant’s land themselves are so offensive that they constitute a nuisance, however this is not the case here.
  - **Ratio:** Electrical interference of a television signal does not constitute a nuisance in law.
  - In general a nuisance will arise from something emanating from the defendant's land.

**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 reasoning.
- A **binding precedent** is only created when the facts of the second case are sufficiently similar to the original case and the decisions was made by a court which is senior too, or in some cases the same level as, the court hearing the latter case.

**Persuasive Precedent**

- These are not binding on the court; however a judge may consider such a precedent and decide that it is the correct principal to follow.
- On other words, he is persuaded that he should follow it.
- They can come from:
  - **1) Courts lower in the hierarchy**
    - Such an example can be seen in R v R (1991) In this case the law lords followed the same reasoning as the Court of Appeal in deciding that a man could be guilty of raping his wife.
  - **2) Judicial committee of the Privy Council decisions**
    - This court is not the part of the hierarchy so its decisions are not binding but many of its judges are also members of Supreme Court, their judgments are treated with respect and may often be followed.
- An example of this can be seen in the law on remoteness of damages in the law of tort and decision made by Privy Council. **The Wagon Mound (No. 1) (1961)**. In which the leakage of oil from ship damaged the cotton. Later on followed in other decisions.

- This also happened in **Attorney General for Jersey v Holley [2005] 3 WLR 29 Privy Council** (Murder of girlfriend under provocation. The jury is required to apply a uniform, objective standard of the degree of self-control to be expected of an ordinary person of the defendant's sex and age when judging whether his loss of self-control was sufficient to satisfy the defence). When majority of the Privy Council judges (six out of nine) rules that in the defence of provocation, a defendant is to be judged by a standard of a person having ordinary powers of self-control. This was contrary to an earlier Judgement of the HOL. As a result there were conflicting decisions from the HOL & Privy Council.

- Although the decision by the Privy Council is not binding on English courts, in **R v Mohammed (2005)** (Murder of daughter under provocation) the Court of Appeal (COA) followed Holley rather than the decision of the HOL.

- Then in **R v James; R v Karimi (2006)** (regarding the murder of wife under provocation in both cases), a five member COA confirmed that the decision in Holley should be followed by courts in England & wales.

- **R v Howe (1987)** this case made it clear that duress was not available as a defence to any of the parties to an offence of murder. The D had fallen under the evil influence of a man called Murray and, as a result, had assaulted one person (who had then been killed by another), and then actually killed a man. The House of Lords ruled that that the defence of duress was not available to D as either the principal offender in one murder, or as the secondary party to the other murder. In their judgment, the Lords also stated obiter that duress should not be available to someone who had been charged with attempted murder. This was later followed in **R v Gotts (1992)**.

- The Lords ruled that duress could not be a defence for a charge of murder. So the Lords also followed Obiter that duress would not be available as an offence for someone charged with attempted murder.

- But in **1992 R v Gotts** the D, aged 16, seriously injured his mother with a knife. He tried to argue in his defence that he was acting under duress because his father had threatened to shoot him unless he killed his mother, but the defence was rejected by the Court of Appeal, who followed the obiter statement made by the Lords in **R v Howe (1987)** as persuasive precedent, the Court of Appeal used this Obiter statement as a persuasive precedent to rule out a defence of duress in a charge of attempted murder.

- **A dissenting Judgement**
  - That means to **disagree**. A dissenting judge is one who does not agree with the majority of the other judges.
  - A dissenting Judgement arises where a case has been decided not by a **unanimous** decision but by a majority of the judges (for example 3-2 or 2-1). The judge who **disagreed** with the majority will set out their legal reasoning for their decision in a dissenting judgment. In the event of an **appeal**, the higher court for example the HOL may be 'persuaded' by the reasoning of the dissenting judgment and give a ruling which reflects their **preferred reasoning**.
Decisions of courts in other countries
- Especially where the same idea of common law are used, commonwealth countries e.g. Australia, New Zealand and Canada.

Operation of the Doctrine of Precedent
- Every court is bound by a court above it in the hierarchy.
- In general, appellate (appeal) courts are bound by their own private decisions. (But there are exceptions to this rule, especially for the House of Lords since the 1966 Practice Statement.)
- These basic rules are essential if the doctrine of precedent is to operate at all. The other thing, which is essential, is that lower courts know all the legal reasoning behind decisions of the higher courts. They can only do this if those reasons are properly reported. All decisions from the High Court upwards are properly reported through the system of Law Reporting.

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<tr>
<th>Court</th>
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<th>Courts it must follow</th>
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<td>All other courts in ELS</td>
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<td>County court and magistrate court do not create precedent and are bound by all higher courts</td>
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Note that until October 2009 the senior court in the UK legal system was the House of Lords. This court was then abolished and replaced by the Supreme Court. The lower courts have to follow decisions of the Supreme Court and also decisions by the House of Lords which have not been changed by the Supreme Court.

Courts of first instance
- The courts where the original trial of a case held.
- Courts of first instance create precedents very rarely but they must follow the decisions of higher courts.

Appellate courts
- Appellate courts are those courts that hear appeals of lower courts.
- Appellate courts do not hear the original trial.
- Mostly appellate court hears appeals on point of law and decides the law that’s why these courts are important than courts of first instance regarding the creation of precedent.
**Hierarchy of Courts**

- DO NOT confuse the civil and criminal systems. Make sure that you know which courts bind which.

### Civil Courts

- European Court of Justice
- Supreme Court
- Court of Appeal (Civil Div.)
- Divisional Courts
- High Court
- County Court

### Criminal Courts

- European Court of Justice
- Supreme Court
- Court of Appeal (Crim. Div.)
- Queen’s Bench Divisional Court
- Crown Court
- Magistrates’ Court

**Judicial Tools Distinguishing; over ruling, reversing, following**

- Different judicial tools are as follows:

**Distinguishing**

- A case on its facts, or on the point of law involved, therefore does not have to be followed.
- Used by judges to avoid a previous inconvenient decision.
- If a judge decides that the material facts of the case in front of him are sufficiently different from the material facts of the case containing the precedent then he is not bound by the precedent e.g.
  - **Balfour v Balfour (1919)** a husband worked overseas and agreed to send maintenance payments to his wife. At the time of the agreement the couple was happily married. The relationship later soured and the husband stopped making the payments. The wife sought to enforce the agreement.
  - **Held:** The agreement was a purely social and domestic agreement and therefore it was presumed that the parties did not intend to be legally bound.
  - **Merritt v Merritt (1990)** a husband left his wife and went to live with another woman. There was £180 left owing on the house which was jointly owned by the couple. The husband signed an agreement whereby he would pay the wife £40 per month to enable her to meet the mortgage payments and if she paid all the charges in connection with the mortgage until it was paid off he would transfer his
share of the house to her. When the mortgage was fully paid she brought an action for a declaration that the house belonged to her.

**Held:** The agreement was binding. The Court of Appeal distinguished the case of Balfour v Balfour on the grounds that the parties were separated. Where spouses have separated it is generally considered that they do intend to be bound by their agreements. The written agreement signed was further evidence of an intention to be bound.

- Both the 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 so there was no contract. In Merritt the court distinguished the case from Balfour because although the parties were husband and wife, the agreement was made after they had separated. Furthermore, it was in writing, so it was a legally enforceable contract.

- Sometimes ratios are wide – applicable to many further cases.
- Some ratios are narrow – maybe not applicable to any.
- Wide ratios have less material facts to consider than narrow ratios. Wide ratios are more difficult to distinguish.
- Donoghue v Stephenson wide ratio and a rapid, extensive subsequent development of the law of negligence.

➢ **Over-ruling**

- When a court is looking at previous cases, as a rule it won’t interfere with the outcomes of those cases. It's important for the decisions of courts to be final, so that people can be certain about their legal rights. So a court might say that a previous case was wrong, and that it should not be followed anymore, it won’t actually change the result of that previous case. That's overruling.
- Overturn means to invalidate an original court's decision through legal means. Overturning a case occurs through the process of appeal, based on the argument that the original court erred in its interpretation of the law. Most overturned cases are done so as a result of stare decisis, the legal principle in which courts adhere to principles established by precedent in earlier cases.
- This would normally happen when a court higher in the hierarchy over-rules a decision made by a lower court in a previous case.
- In such an eventuality the precedent loses all its force with retrospective (effect on matter that have occurred in past) effect so that transactions entered in to before the date of overruling shall be affected as much as the transaction entered in to after that ruling.
- However both the ECJ and the House of Lords can over-rule their own decisions made in previous cases, or depart from earlier decisions.
- Hedley Byrne & co. Ltd v Heller & Partners Ltd [1964],

  The House of Lords held that there could be liability in English law for negligent misstatements thereby overruled Candler v Crane Christmas & Co. [1951].
Reversing

- Reversing a decision is where a court does in fact change the previous decision. Generally this only happens on appeal from one of the parties to the initial decision. So if you lose a case in the High Court and appeal to the Court of Appeal, you're looking to get the High Court decision reversed. You don't just want the Court of Appeal to say that the first decision was wrong; you want them to make a new decision in your favour.

- In legal terms, a reversal is the decision of a superior court to annul the judgment, sentence or decree of a lower court. Reversals typically result when a superior court, such as a state supreme court, or the Supreme Court of the UK, finds the original court committed an error in interpreting the facts of a case when making its judgment. In order for a judgment, sentence, conviction or decree to be reversed, a lawyer must present a formal appeal to the superior court stating the facts of the case as he sees them and indicating the grounds where he believes the prior court ruling was in error.

- In Re Pinochet (1999), the House of Lords reversed a previous decision of its own for the first time.

Following

- Where a higher court agrees with the decision of the lower court.

Practice Statement 1966

- The Practice Statement [1966] 3 All ER 77 was a statement made in the House of Lords by Lord Gardiner LC on July 26, 1966 on behalf of himself and the Lords of Appeal in ordinary, that they would depart from precedent in the Lords in order to achieve justice.

- Until 1966, the House of Lords in the United Kingdom was bound to follow all of its previous decisions under the principle of stare decisis, even if this created "injustice" and "unduly restrict(s) the proper development of the law" (London Tramways Co. v London County Council [1898] AC 375).

- The Practice Statement 1966 is authority for the House of Lords to depart from their previous decisions. It does not affect the precedential value of cases in lower courts; all other courts that recognize the Supreme Court (formerly the House of Lords) as the [court of last resort] are still bound by Supreme Court decisions. Before this, the only way a binding precedent could be avoided was to create new legislation on the matter. This is the text of the Practice Statement:

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore, to modify their present practice and, while treating formal decisions of this house as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property, and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House". (Lord Gardiner's statement in the House of Lords, July 26, 1966)
House of Lords and Judicial Precedent

- From 1966, this practice statement allowed the HOL to change the law when it believed that an earlier case was wrongly decided.
- It had the flexibility to refuse to follow an earlier case when ‘it appeared right to do so’. It’s much confusing that when HOL might overrule a previous decision.
- In fact HOL was reluctant to use this power, especially in the first few years after 1966.
- The first case in which the practice statement was used is Conway v Rimmer (1968) (Only involved a technical point on discovery of documents. An ex-police officer sued for wrongful prosecution and sought disclosure of some police files. The Home Secretary claimed public interest immunity for all such files. The Home Secretary’s certificate was not conclusive, and it was up to the court to examine the documents and order disclosure if the public interest in the administration of justice outweighed the public interest in confidentiality. The decision in Duncan v Cammell Laird [1942] should not be followed. The House of Lords simply distinguished the Conway case from the Duncan case on the facts, rather than explicitly overruling it.).
- The first major use was in British Railways Board v Herrington [1972] AC 877 House of Lords (a House of Lords decision on occupiers liability and trespassers, this case overruled Addie v Dumbreck (in which decision was 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).

**Facts:** British Railway had negligently omitted to maintain its fences next to an electrified railway, a part of the fence has been breached and people especially children have been using the breach in the fence to get onto the rail. British Railway Board had been informed several times however they did not take action. On one occasion a child six years of age was electrocuted by the railway.

**Judgment:** The court held that trespassers are owed more than a duty to not cause deliberate harm. They are owed the same duty of care as any other entrant so long as they can satisfy the following:
- The occupier has knowledge of the trespasser
- The occupier has knowledge of the danger (non-obvious)
- The Likelihood of danger must be high enough to justify the occupiers' duty to take precautionary measures. This test was later polished by Occupiers Liability Act 1984 s.1 (1) (3).)

- There continued to be great reluctance in the HOL to use the Practice statement, as can be seen by the case of Jones v Secretary of State for Social Services [1972] HL
  - Before a 7 man house. Conjoined appeals by two fitters who injured themselves lifting heavy equipment. Both then suffered heart problems. They were refused disablement benefit by a Commissioner on the grounds that the heart disease was not connected to the accident. Benefit was regulated by s. 7(1) of the National Insurance (Industrial Injuries) Act 1946. C argued that Re Dowling [1967] on the same matter was wrong and should be overruled.
  - **Held:** Quashing the Commissioners' decision but declining to overrule the decision in Dowling, even though four members of the House thought it was wrong.
  - **Lord Reid:** “The old view was that any departure from rigid adherence to precedent would weaken that certainty. I did not and do not accept that view. 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.”

“...the Practice Statement ... which should be applied sparingly and should only rarely be invoked in cases of the construction of statutes or other documents.”

- The same attitude was shown in Kuller v DPP [1973] HL
  - D published a gay contact magazine thereby conspiring to corrupt public morals.
  - **Held:** In Shaw (1962) the House of Lords held that the common law crime of "conspiracy to corrupt public morals" existed despite many commentators believing that it did not exist; effectively the HoL created it.
  - Lord Reid had dissented in Shaw, and still believed it to be wrong, but it did not follow that it should now be reconsidered.
  - Lord Reid stated: “I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act.”

- From the mid-1970s onwards the HOL showed a little more willingness to make use of the Practice Statement. For example in Miliangos v George Frank Ltd [1975] HL
  - The rule in Re United Railways [1961] HL that required damages to be awarded in sterling was no longer desirable and was overruled. Thereby allowing damages to be awarded in the currency of the country specified in the contract. This change was needed because of changes in foreign exchange conditions, and the instability of sterling, since United Railways.

- More recently in Murphy v Brentwood DC [1990] HL
  - D the local authority negligently approved building plans for a house with inadequate foundations C the purchaser of a house which developed serious cracks.
  - **Held:** A seven-man House departed from the decision in Ann's v Merton BC [1977] saying that the Council owed no duty of care to the purchaser.
  - Lord Keith: “There can be no doubt that to depart from the decision would re-establish a degree of certainty in this field of law which it has done a remarkable amount to upset.”
  - This is often referred to as ‘The Retreat from Ann’s’

- Another major case was Pepper (Inspector of Taxes) v Hart [1993] HL
  - D a schoolteacher benefited from reduced fees for his children. The rate of tax payable on these fees was to be found in Parliamentary discussions recorded in Hansard. C was the inspector of taxes.
  - **Held:** Allowing the use of Hansard (The official published report of the proceedings of a parliamentary body) as an extrinsic aid to the interpretation of statutes (subject to certain conditions). Using the Practice Statement the HoL departed from its own decisions in Davis v Johnson [1979] and two other decisions.
In *Horton Vs sadler and another (2006)* the HOL used the practice statement to depart from a previous decision of its own. The case involved a personal injury claim, but the point of law being decided was about the power to allow service out of time under s.33 of the Limitation Act 1980. The HOL departed from their decision in *walkley Vs Precision forgings Ltd (1979)*. The Law Lords departed from Walkley for three reasons:
- It unfairly deprived claimants of a right that Parliament had intended them to have.
- It had driven the court of Appeal to draw distinctions which were correct but were so fine as to reflect no credit on the area of law and
- It went against the clear intention of parliament.
- **Lord Bingham** in his speech considered the issue of departing from a previous decision. He pointed out that the case was not one in which contracts, settlement of property or fiscal arrangements had been entered into, nor did it involve the criminal law where certainty was particularly important. Also, there would not be any detriment to public administration caused by departing from the previous decision.

### The practice statement in Criminal Law

- The Practice statement stressed that criminal law needs to be certain, so it was not surprising that the HOL did not rush to overrule any judgments in criminal cases.
- First time Practice Statement used in a criminal case *R Vs Shivpuri (1986)*
  - D was arrested entering the country, carrying a package which he believed contained either heroin or cannabis, but was in fact harmless ground dried vegetable. D was charged with attempting to avoid import restrictions; smuggling.
  - **Held:** Accepting that previous law had been incorrectly applied, concerning the *Criminal Attempts Act 1981*.
  - And acknowledging widespread criticism - that the previous case had created a distinction that the court now considered to be confusing and incapable of sensible application - of its decision in *Anderton v Ryan [1985]* (barely a year old) (given after the Court of Appeal had decided Shivpuri) HoL applied the Practice Statement to depart from that decision.
  - Dismissing the recentness of the decision to be overruled as a factor weighing in favour of not overruling it,
  - **Lord Bridge** said, “If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better.”
- In other words, the HOL recognised that they might sometimes make errors and the most important thing then was to put the law right. Where 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.
- Another important case *R v G & R [2003] 3 WLR House of Lords*
  - The two appellants, aged 11 and 12, went camping for a night without their parents’ permission. The boys found some old newspapers outside the Co-op which they lit with a lighter and then threw them under a wheelie bin. They then left without putting them out assuming they would naturally burn out. In fact the burning newspapers set light to the wheelie bin and the fire spread to the Co-op shop and caused over £1m of damage.
- **Held**: The defendants’ convictions were quashed. The House of Lords overruled *MPC v Caldwell [1982]* AC 341.

- The appropriate test of recklessness for criminal damage is:
  - "A person acts recklessly within the meaning of section 1 of the *Criminal Damage Act 1971* with respect to - (i) a circumstance when he is aware of a risk that it exists or will exist;
  - (ii) a result when he is aware of a risk that it will occur;
  - and it is, in the circumstances known to him, unreasonable to take the risk."

  - This case showed that the HOL as being more prepared to use the Practice Statement where they thought it ‘right to do so’.

➢ **The Supreme Court**

➢ With the change over from the HOL to the SC in October 2009, the Practice Statement does not strictly apply to the SC, so it is not clear whether this court will use the Practice Statement. However, the Practice Rules of SC state that ‘If an application for permission to appeal asks the SC to depart from one of its own decisions or from one of the HOL this should be stated clearly in the application and full details must be given’. This suggests that the SC will operate a similar system as that under the Practice Statement.

➢ **The court of appeal**

➢ As already stated there are two divisions of this court, the Civil division & the Criminal division, and the rules for precedent are not quit the same in these two divisions.

➢ Both divisions of the court of appeal are bound by the decisions of the European Court of Justice and the Supreme Court.

➢ This is true even though there were attempts in the past, mainly by Lord Denning, to argue that the Court of Appeal should not be bound by the HOL (now the SC).

➢ **The Denning story**

➢ The attack was on two fronts (Lord Denning MR carried on a one-man campaign to secure a change of practice in the Court of Appeal of Appeal).

➢ **MR.** (The Keeper or Master of the Rolls and Records of the Chancery of England, known as the Master of the Rolls, is the third most senior judge in England and Wales after the President of the Supreme Court of the United Kingdom and the Lord Chief Justice, and serves as the presiding officer of the Civil Division of the Court of Appeal and Head of Civil Justice. The position dates from at least 1286, although it is believed that the office probably existed earlier than that.)

➢ **First**: He asserted that the HOL decisions no longer bound the Court of Appeal.

➢ **Secondly**: He claimed that the Court of Appeal was no longer bound to follow its own decisions as a general rule and not just in the exceptional circumstances laid down in *Young v Bristol Aeroplane Co. Ltd [1944]*. This case involved compensation for a workman, under the *Workmen’s Compensation Acts*

  - **Held**: that the Court of Appeal was bound by its own previous decisions the only exceptions to this rule are:

    1. The court is entitled and bound to decide which of two conflicting decisions of its own it will follow;
2. the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords;
3. the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g., where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.
- Decisions of the Court of Appeal itself are binding on courts below, namely the High Court and the county courts.

- **Lord Denning** understood (or misunderstood) the last words of the Practice Statement to mean:
  - "We are only considering the doctrine of precedent in the Lords. We are not considering its use elsewhere."

- **Conway v Rimmer [1967] CA**
  - **Lord Denning** said, "My brethren (lay members) today feel that we are still bound by the observations of the House of Lords in Duncan v Cammell, Laird & Co. Ltd.... I do not agree. The recent statement of Lord Gardiner LC has transformed the doctrine of precedent. This is the very case in which to throw off the fetters."
  - When **Conway v Rimmer** reached the **House of Lords [1968]** they reconsidered **Duncan's case** and overruled it, but it was made clear that Duncan's case had been binding on the Court of Appeal all along.

- **Broome v Cassell & co. Ltd [1971] CA**
  - Court of Appeal refused to follow the decision of the House of Lords in **Rookes v Barnard [1964]**, on the principles for the award of exemplary damages in tort. They based the refusal on the ground that **Rookes v Barnard** was wrong and decided per incuriam, in ignorance of two previous decisions of the House. When **Broome v Cassell & co. Ltd** reached the House of Lords, the Law Lords **castigated** the Court of Appeal for its disloyalty.

- **Lord Hailsham** said: "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 in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable .... The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers."

- **Denning repentant?** Denning, in one of his books, expressed regret for the approach he adopted in **Broome v Cassell & co. Ltd** because the court ordered Commander Broome to pay part of the costs of the hearing in the Court of Appeal.

- **Denning follows up his attack**
  - **Schorch Meier GmbH v Hennin [1975]**
    - He held he could award damages for breach of contract in a foreign currency that was the currency of the contract. This was not the precedent of the lords in **Re United Railways of the Havana & Regla Warehouses Ltd [1961]** that laid down that damages could be awarded only in sterling.
    - The Schorsch Meier case did not go to the Lords
  - **Miliangos v George Frank (Textiles) Ltd [1976] HL**
    - Overruled United Railways and again put **Denning** in his place on **stare decisis.**
Lord Cross: "In the Schorsch Meier case, Lord Denning MR . . . took it on himself to say that the decision in the Havana case that our courts cannot give judgment for payment of a sum of foreign currency—though right in 1961—ought not to be followed in 1974 because the 'reasons for the rule have now ceased to exist'. The Master of the Rolls was not entitled to take such a course. It is not for any inferior court—be it a county court or a division of the Court of Appeal presided over by Lord Denning—to review decisions of this House. Such a review can only be undertaken by this House itself under the declaration of 1966."

The second front of Lord Denning's attack

Was to assert that the Court of Appeal was no longer bound rigidly to follow its own previous decisions.

Gallie v Lee [1969]

"I do not think we are bound by prior decisions of our own, or at any rate, not absolutely bound. We are not fettered as it was once thought. It was a self-imposed limitation: and we who imposed it can also remove it. The House of Lords have done it. So why should not we do likewise?"

Not all his brother judges agreed with him.

Tiverton Estates Ltd v Wearwell Ltd [1975]

Denning repeated the view he had expressed in Gallie v Lee, but added

"I have not been able, however, yet to persuade my brethren—or, at any rate, not all of them—to agree with this view."

Scarman LJ: "The Court of Appeal occupies a central, but . . . an intermediate position in our legal system. To a large extent, the consistency and certainty of the law depend upon it. It sits almost always in divisions of three: more judges can sit to hear a case, but their decision enjoys no greater authority than a court composed of three. If, therefore, throwing aside the restraints of Young v Bristol Aeroplane co. Ltd. one division of the court should refuse to follow another because it believed the other's decision to be wrong, there would be a risk of confusion and doubt arising where there should be consistency and certainty. The appropriate forum for the correction of the Court of Appeal's errors is the House of Lords, where the decision will at least have the merit of being final and binding—subject only to the House's power to review its own decisions. The House of Lords, as the court of last resort, needs this power of review: it does not follow that an intermediate appellate court needs it."

Had Denning learnt his lesson?

He capitulated and accepted the orthodox view in Miliangos v George Frank (Textiles) Ltd [1975]

"I have myself often said that this court is not absolutely bound by its own decisions and may depart from them just as the House of Lords from theirs; but my colleagues have not gone so far. So that I am in duty bound to defer to their view."

Davis v Johnson [1979]

On domestic violence and Matrimonial Proceedings Act 1976. The parties, not married to each other, lived together with their baby daughter in a council flat of which the parties were joint tenants. There was violence by the man. The woman fled with the child to a battered wives' refuge. She applied to the court to reinstall her and have the man excluded from the flat. The Court of Appeal had considered the
same question on two occasions only a few months earlier in \textit{B v B [1978]} and \textit{Cantliff v Jenkins [1978]}. They held that the 1976 Act did not protect a female cohabitee where the parties were joint tenants or joint owners but only where she was the sole tenant or sole owner of the property.

- In \textit{Davis v Johnson}, Denning called together a ‘full’ court of five judges, describing it as ‘a court of all the talents’. The court held by a majority of three that the 1976 Act does protect a female cohabitee even where she is not a tenant at all or only a joint tenant. They declared \textit{B v B} and \textit{Cantliff v Jenkins} wrong did not follow them. They granted an injunction to order the man out and reinstall the woman.

- On the question of stare decisis in the Court of Appeal Denning had this to say; "On principle, it seems to me that, while this court should regard itself as normally bound by a previous decision of the court, nevertheless it should be at liberty to depart from it if it is convinced that the previous decision was wrong. What is the argument to the contrary? It is said that if an error has been made, this court has no option but to continue the error and leave it to be corrected by the House of Lords. The answer is this: the House of Lords may never have an opportunity to correct the error; and thus it may be perpetuated indefinitely, perhaps forever."

- Later in his judgment, Denning was more specific: "To my mind, this court should apply similar guidelines to those adopted by the House of Lords in 1966. Whenever it appears to this court that a previous decision was wrong, we should be at liberty to depart from it if we think it right to do so.... Alternatively, in my opinion, we should extend the exceptions in \textit{Young v Bristol Aeroplane co. Ltd} when it appears to be a proper case to do so."

- Sir George Baker was even more inventive and precise. He said that \textit{Young's case} was binding on the Court of Appeal but he would like to see a further limited exception to it:

  "I would attempt to define the exception thus: 'The court is not bound to follow a previous decision of its own if satisfied that that decision was clearly wrong and cannot stand in the face of the will and intention of Parliament expressed in simple language in a recent statute passed to remedy a serious mischief or abuse, and further adherence to the previous decision must lead to injustice in the particular case and unduly restrict proper development of the law with injustice to others.'"

- On a further appeal, the decision of the majority in the Court of Appeal was upheld and the House of Lords overruled \textit{B v B} and \textit{Cantliff v Jenkins}.

- However, their Lordships rejected most of what the Court of Appeal had said about stare decisis.

- Lord Diplock, said: "The rule as it had been laid down in the \textit{Bristol Aeroplane case} had never been questioned thereafter until, following upon the announcement by Lord Gardiner LC in 1966 that the House of Lords would feel free in exceptional cases to depart from a previous decision of its own, Lord Denning MR conducted what may be described, I hope without offence, as a one-man crusade with the object of freeing the Court of Appeal from the shackles which the doctrine of stare decisis imposed upon its liberty of decision. In my opinion, this House should take this occasion to reaffirm expressly, unequivocally and unanimously that the rule laid down in the \textit{Bristol Aeroplane} case as to stare decisis is still binding on the Court of Appeal."

- Denning has described this decision as his 'most humiliating defeat' and a 'crushing rebuff'

- But after \textit{Davis v Johnson} it is beyond doubt that the true position concerning stare decisis in the Court of Appeal is that,
- First, the Court of Appeal is bound by decisions of the House of Lords even if they are wrong, and,
- Secondly, the Court of Appeal is bound by its own decisions subject only to the exceptions laid down in Young v Bristol Aeroplane co. Ltd [1944].

**Court of Appeal (civil division)**

- **Young v Bristol Aeroplane co. Ltd [1944]**
  - A 'full' Court of Appeal of six members decided that it was normally bound by its previous decisions subject to the following three exceptions:
    1. Where its own previous decisions conflict. The Court of Appeal must decide which to follow and which to reject.
    2. Where to follow a decision of its own which conflicts with a decision of the House of Lords even though its decision has not been expressly overruled by the House of Lords.
    3. Where an earlier decision was given per incuriam (by ‘carelessness’ or mistake’ or ‘manifest slip’ or ‘error’.)
  - A fourth exception: That the Court of Appeal is not bound to follow a decision in an interlocutory (Consisting of dialogue) matter made by two judges in the Court of Appeal Boys v Chaplin [1968].
  - A fifth exception exists: In order to give full effect to Community law if one of their previous decisions is inconsistent with Community law. United Kingdom membership of the European Union has not abrogated the doctrine of stare decisis in the Court of Appeal (Duke v Reliance Systems Ltd [1987] CA).

**Court of Appeal (criminal division)**

- The Criminal Division of the Court of Appeal has existed for 100 years. The average waiting time for conviction appeals is less than a year, and for sentence appeals it is less than 6 months.
- Stare decisis much the same as Civil Division
- In principle, there is no difference in the application of stare decisis as between the civil and criminal divisions of the Court of Appeal; R v Spencer [1985] not overruled on this point by the House of Lords.
- Because someone’s liberty may be at stake, precedent is not followed as rigidly in the criminal division.

**Conflicting decision of Privy Council and the House of Lords**

- R v James and Karimi [2006] CA was decided by an enlarged Court of Appeal which followed a Privy Council precedent rather than an earlier House of Lords precedent. The case related to the reasonable man test in provocation in murder.
- This means that when a decision involving English Law and the majority in the Privy Council so decide a Privy Council decision can be preferred.
- This disturbs the previous understanding of the rules of stare decisis, but is not remarkable in practical terms. Previously it would have been noted that the Privy Council decision was merely persuasive, now it can be followed.

**Judicial Committee of the Privy Council**

- The Judicial committee of the Privy Council hears appeals from some commonwealth countries.
• The judges include the justices of the Supreme Court and also judges who have held high judicial office in countries which still use it as their final court of appeal.

• Normally a panel of five judges sits to hear an appeal. There can, however, be more judges on the panel where the case is particularly important.

• Decisions (technically, 'advice') of the Judicial Committee are not binding on the English courts but they are of **strong persuasive authority**.

• Decisions of the Judicial Committee are binding in the country from which the appeal came and, possibly, in other countries subject to its jurisdiction where the law on the particular point is the same.

• **Lord Lloyd;** "The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other."

• Nine strong PC decisions will be preferred to HOL

• The case of **Jersey v Holley [2005] PC** was heard by the Privy Council and they had to decide an issue relating to provocation in murder. Nine judges sat to decide that the law should be returned to the position before the case called **R v (Morgan James) Smith (2000) HL**. Effectively they were saying **Smith was wrong.**

• The judges that sit in the Privy Council are the very same men and women that make up the House of Lords (but not all the same in both these two cases), so a Privy Council decision is very powerful.

• **James and Karimi, R v [2006] CA**

• Within months of Holley the Court of Appeal was confronted with two conjoined appeals referred to them by the CCRC (Criminal Cases Review Commission) on the very point raised in Holley.

• Their dilemma was which precedent should they follow, the House of Lords or the Privy Council? A court of 5 judges was gathered by the Lord Chief Justice and they decided that when there were such conflicting precedents then the PC could be followed.

• Not to be taken to mean it is the norm: They also ruled that this was not to be taken as a licence to decline to follow a decision of the House of Lords in any other circumstances.

• So, in some rare cases the Privy Council decisions are more than persuasive.

• Consistent with other ruling: This decision was not altogether surprising because the Court of Appeal had followed the Privy Council in **R v Mohammed [2005] CA** a few weeks earlier.

• Court of Appeal were following the intention of the Law Lords, **Lord Phillips in James & Karimi**

• "... It is not this court, but the Lords of Appeal in Ordinary who have altered the established approach to precedent."

• **Lord Asquith in the Court of Appeal said:** "A trial judge should be quick, courteous and right. That is not to say that the Court of Appeal should be slow, rude and wrong, for that would usurp the function of the House of Lords."

• **On whom binding:** Decisions are binding on the High Court and the county courts but they do not bind the House of Lords.

• Each Division does **not bind** the other, but are **persuasive.**
(Courts can sit simultaneously, and in 1990 two Criminal Division courts sitting on the same day reached opposite conclusions on the interpretation of intent for offences deriving from 19th Century legislation.)

**High Court**

- **Not binding on other High Court Judges**: Decisions of individual High Court judges are binding on the county courts but not on other High Court judges.
- **Highly persuasive**: They are of strong persuasive authority in the High Court and are usually followed.
- **Cannot overrule, but can disapprove or not follow**: If a High Court judge feels that he cannot follow a colleague’s decision it is always with reluctance and he will usually state his reasons clearly and fully. He cannot 'overrule' it but is limited to 'disapproving' or 'not following' it.

  - *Froom v Butcher* [1976] CA
    - Some judges held that failure to wear a seat belt was not contributory negligence; others held that it was, but disagreed about the percentage by which the damages should be reduced. The difference of opinion was resolved by the Court of Appeal in 1975 in *Froom v Butcher* [1976],
    - **Held**: failure to wear a seat belt is contributory negligence if use of a belt would have avoided or lessened the injuries sustained in the accident. It was further suggested that, in general, the appropriate reduction is 25 per cent if the injuries would have been prevented altogether by the use of a seat-belt or 15 per cent if they would nevertheless have occurred but would have been less severe.

**Divisional Courts - appellate divisions of the High Court**

- Normally bound by own decisions
- It is also normally bound by its own previous decisions but subject to the same in *Young v Bristol Aeroplane co. Ltd* [1944].

**Crown Court**

- Crown Court can only create precedent when a High Court judge is sitting
- Crown Court judge’s rulings on points of law are persuasive authority (unless made by judges of the High Court sitting in the Crown Court), are not binding precedents. There is no obligation on the part of other Crown Court judges to follow them.
- Since inconsistent Crown Court decisions may produce uncertainty in the criminal law it is desirable that an appellate court resolve any conflict as quickly as possible.

**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.

**Advantages and disadvantages of Precedent**

- **Advantages**
  1. **Convenient timesaving device**: If a problem has already answer and been solved it is natural to reach the same conclusion. Precedent can be considered a useful time-saving device. Where a principle has been established, cases with similar facts are unlikely to go through the lengthy process of litigation.
2. **Greater certainty in the law**: Is perhaps the most important advantage claimed for the doctrine of judicial precedent? Because the courts follow past decisions, people know what the law is and how it is likely to be applied in their case; it allows lawyers to advise clients on the likely outcome of cases; it also allows people to operate their businesses knowing that financial and other arrangements they make are recognised by law. It may also allow persons generally to order their affairs and come to settlements with a certain amount of confidence. The HOL Practice Statement pointed out how important certainty is.

3. **Avoids mistakes**: The existence of a precedent may prevent a judge making a mistake that he might have made if he had been left on his own without any guidance.

4. **Prevents injustice**: The doctrine of precedent may serve the interests of justice. It would be unjust to reach a different decision in a following case.

5. **Ensures impartiality of judge**: The interests of justice also demand impartiality from the judge. This may be assured by the existence of a binding precedent, which he must follow unless it is distinguishable. If he tries to distinguish an indistinguishable case his attempt will be obvious.

6. **Practical character**: Case law is practical in character. It is based on the experience of actual cases brought before the courts rather than on logic or theory.

7. **Offers opportunity to develop the law**: The making of law in decided cases offers opportunities for growth and legal development, which could not be provided by Parliament. The courts can more quickly lay down new principles, or extend old principles, to meet novel circumstances. There has built up over the centuries a wealth of cases illustrative of a vast number of the principles of English law. The cases exemplify the law in the sort of detail that could not be achieved in a long code of the Continental type.

8. **Flexible**: The case-law method is sometimes said to be flexible. There is room for the law to change as the SC can use the Practice Statement to overrule cases. The ability to distinguish cases also gives all courts some freedom to avoid past decisions and develop the law. A judge is not so free where there is a binding precedent. Unless it can be distinguished he must follow it, even though he dislikes it or considers it bad law. His discretion is thereby limited and the alleged flexibility of case law becomes rigidity.

9. **Centralized nature of English Law means it is easier to follow**: Following of precedent is easier in England than in many other countries because England has a centralized legal system with only a small number of courts.

10. **Consistency and fairness in the law**: it is seen as just and fair that similar cases should be decided in a similar way, just as in any sport it is seen as fair that the rules of the game apply equally to each side. The law must be consistent if it is to be credible.

11. **Precision**: As the principles of law are set out in actual cases the law becomes very precise; it is well illustrated and gradually builds up through the different variations of facts in the cases that come before the courts.

### Disadvantages

1. **Can become thoughtless**: The convenience of following precedent should not be allowed to degenerate into a mere mechanical exercise performed without any thought.
2. **Rigidity:** The system is too rigid and does not allow the law to develop enough. The fact that lower courts have to follow decisions of higher courts, together with the fact that the court of appeal has to follow its own past decisions, can make the law too inflexible so that bad decisions made in the past may be perpetuated. There is the added problem that so few cases go to the SC. Change in the law will only take place if parties have the courage, the persistence and the money to appeal their case.

3. **Too many precedents:** The citation of authority in court should be kept within reasonable bounds because it can be costly in terms of time and money.
   - Lord Diplock has warned of the 'danger of so blinding the court with case law that it has difficulty in seeing the wood of legal principle for the trees of paraphrase'.
   - The House of Lords has decided that it will not allow transcripts of unreported judgments of the Court of Appeal, civil division, to be cited before the House except with its leave.

4. **Complexity:** since there are nearly half million reported cases it is not easy to find all the relevant case law even with computerized database. Another problem is in the judgments themselves, which are often very long with no clear distinction between comments and the reasons for the decision. This makes it difficult in some cases in Dodd's Case (1973) the judges in the Court of Appeal said they were unable to find the ratio in a decision of the HOL.

5. **Limits development of the law:** The doctrine of stare decisis is a limiting factor in the development of judge-made law. Practical law is founded on experience but the scope for further experience is restricted if the first case is binding.

6. **Too confusing:** However, the advantage of certainty is lost where there are too many cases or they are too confusing.

7. **Causes injustice:** The overruling of an earlier case may cause injustice to those who have ordered their affairs in reliance on it. Precedent may produce justice in the individual case but injustice in the generality of cases. It would be undesirable to treat a number of claimants unjustly simply because one binding case had laid down an unjust rule.

8. **Mistakes perpetuated:** Judicial mistakes of the past are perpetuated unless bad decisions happen to come before the House of Lords for reconsideration. In any event, flexibility and certainty are incompatible features of judge-made law. A system that was truly flexible could not at the same time be certain because no one can predict when and how legal development will take place.

9. **Illogical distinctions:** the use of distinguishing to avoid past decisions can lead to 'hair splitting' so that some areas of the law have become very complex. The differences between some cases may be very small and appear illogical.

10. **Slowness of growth:** judges are well aware that some areas of the law are unclear or in need of reform, however they cannot make a decision unless there is a case before the courts to be decided. This is one of the criticisms of the need for the COA to follow its own previous decisions, as only about 50 cases go to the SC each year. They may be a long wait for a suitable case to be appealed as far as the SC.
Questions from past papers

Q1. Critically consider whether the doctrine of stare decisis allows the law to adequately develop. Would the law be improved if the Court Of appeal could overrule its previous decisions? [October/November 2004]

Q2. Analyse the value of the doctrine of stare decisis in the English Legal System. Describe methods available to judges to avoid some of the effects of this doctrine. [October/November 2005]

Q3. The doctrine of stare decisis restrains the natural development of the law! To what extent do you agree with this statement? Discuss the judicial tools available to the judiciary to ensure that the law continues to develop. [May/June 2006]

Q4. To what extent would you agree that the principle of stare decisis has handicapped the development of English Law? [May/June 2007]

Q5. The system of precedent merely slows down the proper development of the law’ Discuss this statement. [October/November 2007]

Q6. To what extent does the principle of stare decisis in English law make it difficult to set aside an unjust decision? [May/June 2008]

Q7. ‘The incalculable advantages of the whole system of English law are that is principles are capable of adaption to the new circumstances perpetually arising.
(Sir Hartley Shawcross in R v Joyce (1945))

Giving examples from decided cases, discuss critically the extent to which you would agree or disagree with this view of the doctrine of precedent. [October/November 2009]

Q8. ‘The problem with a system of precedent is that it makes the law stand still; it cannot move with the times’.

How far would you agree with this criticism? [October/November 2010]

Q9. The system of precedent makes it difficult for unjust decisions to be overruled.

How far would you agree with this criticism? [October/November 2011]

Q10. In what ways the decisions of the House of Lords in Herrington v British Railways Board (1972) constitute a significant change to the law of precedent? [October/November 2012]

Q11. The main advantages of precedent are certainty, precision and flexibility.’

Discuss the accuracy of this statement, using case law to illustrate your answer. [May/June 2013]

Q12. ‘Certainty in relation to substantive law is usually to be preferred to correctness since this at least enables the public to order their affairs with confidence’ – Lord Donaldson MR in Rickards v Rickards [1989].

Consider critically this view of judicial precedent. [October/November 2013]

Class Activity

Understand the technical terminology in this area, historical development and concept of precedent.

Appreciate the relevance of the hierarchy of the courts.

Case notes on illustrative cases concerning the position of the Court of Appeal and Supreme Court.

Classroom discussion on the advantage and disadvantage of such a system.