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The Doctrine of Judicial Precedent

5.1 Introduction

In this chapter we begin to deal with case law in depth. In the study and practice of law we seek to analyse legal principles; and the ‘principles’ in English law are derived from pure case law or from case law dealing with statutes.

5.1.1 What is Case Law?

So, what exactly do we mean by ‘case law’? In earlier chapters (see, for instance, (1.5.4), (1.6) and (2.3.1)) we discussed the idea of cases and we examined procedure and law reporting. In this and the next chapter we will discuss case law in much greater depth. Though this is not a book on the ‘English Legal System’, we will begin with an explanation of some basic points on what ‘cases’ are and how they come about.

Criminal law cases, of course, come about because the police make an arrest and charge the accused, the legal arguments of the case being taken up by the Crown Prosecution Service (CPS). Indeed, the CPS may well have been involved at the ‘charging’ stage, advising on the strength of the evidence, etc. The CPS then brings the prosecution on behalf of the Crown. The charge must be clearly defined. Lay people often talk of a person being ‘charged with theft’ (or rape, or murder, etc.), but the CPS has to frame the charge according to strict rules and with reference to established and recognised common law or statutory crimes. Thus, a charge of burglary would have to cite section 9 Theft Act 1968 and set out which part of that section forms the basis of the case. Before the matter comes to trial (in front of magistrates or a judge and jury) there will be other preliminary matters to deal with and perhaps even detailed legal arguments about admissibility of evidence. Many of these cases are reported in the local and national press, but they are only really interesting to a lawyer if and when they go on appeal, for it is at that point that the real legal arguments start to bite.

Civil cases are obviously different. Here, the usual position is that one individual or company is suing another for some form of compensation arising from a loss. But suing for what? A litigant cannot just ‘sue’ someone: they have to sue them for some identifiable legal reason; they must have what is called a ‘cause of action’. This means that the set of facts must show something which the law recognises as giving rise to potential liability. So, if you are injured in a car accident, for instance, you do not just ‘sue’ the other driver, you must sue for and show ‘negligence’; if someone does not do what they promised to do you may have a claim (a cause of action) for breach of contract. If someone floods your land, you may have

claims in negligence, breach of contract, or nuisance (to name but a few). The point of this is that when you fill out your claim form you must identify what it is you are suing for—otherwise neither the court nor the defendant can respond. Indeed, the importance of establishing the cause of action lies even earlier than this: if you write to a potential defendant in advance of bringing a claim (which you have to do in many instances) you must spell out why you think they are liable and what level of damages you are claiming.

So, from the moment a client walks into the office and starts to tell her story, a lawyer has to be thinking: (i) what legal principles are involved (what is the cause of action here?); (ii) what is the relevant law regarding these principles (where can the up-to-date authorities be found?); (iii) what evidence will we need to prove or defend the case?; (iv) which court do I have to apply to? In fact, this is a very similar thought process to that in a criminal law case—just substitute the word ‘charge’ for ‘cause of action’.

Looking at civil cases: let us assume all attempts to settle the case fail. There are procedures to go through before trial (these form part of what is generally called the ‘case management’ system). These will include things such as exchanging relevant documents, obtaining experts’ reports and agreeing how long the case will take. Assume these have happened but the case is going to trial—perhaps in a county court (in Bristol, London, Leeds, etc.—wherever is appropriate). The case is for a relatively small amount and is heard by a District Judge. The judge sees all the documents, sees any witnesses being examined and cross-examined, hears arguments on the law and makes a decision. One party loses (there is no system of ‘drawing’). They wish to appeal. In nearly all instances they can only do so on points of law and they need permission from a court to do so (it is not automatic right). They get permission but lose again. The same mechanism operates. Now let us say they have arrived in the Court of Appeal. This is the stage where most decisions will be reported and find their way into the law reports (it can happen lower down in the hierarchy but, aside from specialist courts such as the Employment Appeal Tribunal, this is not common). All the arguments are about the legal principles involved. The facts are taken as proved by that stage. The same is true of criminal cases: the lower courts deal with both law and fact, but by the time a case reaches the Court of Appeal (Criminal Division) the issue are purely legal ones.

So now, when we talk below about precedents, *ratio decidendi* and other matters, we are usually talking about cases heard in the Court of Appeal or the House of Lords. And what we are concerned with is not who won or lost but the legal principles that can be extracted from the case. As a law student, this is the setting you are most concerned with (if you become a practitioner you will of course have had to concern yourself with questions of fact and evidence, as well as the law, in the lower courts).

This is a very sketchy view of case law, but it serves our purpose: we now know that there must be a cause of action (or a charge); that analysing this involves matching the facts to legal principles; that the facts must be proved in court (balance of probabilities in civil actions, beyond all reasonable doubt in criminal cases); that it is generally arguments about the legal principles that form the basis of appeals; and that it is the legal analysis in these appeals which form the basis of ‘law reports’ and therefore precedents.

‘Case law’ is the therefore the term we use to describe the collection of all the legal principles emanating from all the reported cases on a given topic. The ‘case law’ on the law

of negligence, for example, consists of thousands of individual cases, all building one on another, year after year, exploring different aspects of the law and seeing whether the principles of law apply or do not apply (or need changing) to different sets of facts.

Indeed, it is often said to be a strength of English law that it is built upon the concrete examples of case law rather than hypothetical models. This contrast with the European approach, which does depend upon ‘models’, will be drawn and expanded upon later. As regards the Common Law fixation with a case-by-case development of the law, it is worth noting the observations of Lord MacMillan that, unlike the Civil Law lawyer, the Englishman

has found that life is unconformable to any fixed theory and that principles always fail because they never seem to fit the case in hand, and so prefers to leave theory and principle alone. (1937:81)

We shall explore the significance of this statement over the next two chapters.

5.1.2 What is Precedent?

The doctrine of judicial precedent is concerned with the importance of case law in our system. It is really the lawyer’s term for legal experience. We all tend to repeat things we have done before: law is essentially no different. If one case has decided a point of law then it is logical that that solution will be looked at in the future. The American judge, Oliver Wendell Holmes Jr, once said that ‘The life of the Law has not been logic; it has been experience’. Miles Kington put it another way in *Punch*: judicial precedent means ‘A trick which has been tried before, successfully.’

But if judicial precedent is simply experience in legal jargon, why does it deserve our attention? Why can we say that, during your training in law and afterwards, you will have to possess a clear understanding of the intricacies of judicial precedent? The answer lies in the fact that the term ‘experience’ only begins to describe the situation.

First, even when a layman uses the term ‘precedent’ there is an implication that what was done before should be done again—that a starting point in trying to solve a problem is to see what examples exist where this (or similar) problems have been tackled before. The example—the precedent—is at least a good guide and probably will be followed. This achieves consistency, if nothing else. And the corollary is that people making decisions are often afraid to do something in case ‘it creates a precedent’. As MacCormick states:

To understand case-law . . . is to understand how it is that *particular* decisions by particular judges concerning particular parties to particular cases can be used in the construction of *general* rules applying to the actions and transactions of persons at large. (1987:155)

In other words, combining the remarks of Lord MacMillan and MacCormick, the principles of English law are derived from observing the development of a line of particular cases on a particular topic. This is a key factor in English law. Because English lawyers are so avidly fixed on case law, principles do not develop unless claimants bring cases. Academics and practitioners may speculate on the development of legal principles, but it takes real-life cases to settle them. And the judges in each case, to a greater or lesser extent, draw upon the principles established in those earlier cases in reaching their decision.

As we noted above on the development of case law in negligence, this is a piecemeal, case-by-case progression. Lord Wright put it more graphically in 1938 when he described how the judges ‘proceed from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point, and avoiding the dangers of the open sea. . .’. As an example of this: imagine that a case in 1920 decided that any person selling parrots was under an implied contractual duty to ensure that the parrot could talk. A layperson reading about this case might think it interesting, especially if he has just bought a dumb parrot. A lawyer, however, immediately starts to think of the ramifications of the case: what is the significance of the case? How does it stand with other cases? What level of court made the decision? Thus, to the lawyer, the case presents further questions:

- (a) Would this principle still apply if the pet shop owner clearly told the customer that the parrot could not talk?
- (b) Does the same principle apply to related birds such as budgerigars?
- (c) Should the principle apply to other birds?
- (d) Wider still, is there a general principle to be found in the case which might mean that a similar duty (say as to standards of health) might apply to other animals?

Thus, as MacCormick indicates, the particular case concerning parrots may consequently be seen as giving birth to a more general principle on the duties owed by pet shop owners to their customers, e.g., that they owed a duty always to deal in good faith. It is not beyond speculation that the same principle might one day then be applied to sellers of other types of goods such as televisions or cars. Eventually a textbook writer will sum up the case law in one general statement on the duties owed by vendors of goods. Looking back at the history of the cases, we might find that one case concerning a mute parrot is now applied to all cases on defective merchandise.

5.2 The Idea of Binding Precedent

We now need to add one further ingredient. It is this: an important and distinctive element of English law is that the reasoning and decisions found in preceding cases are not simply considered with respect or as a good guide, but can be **binding** on later courts. This is known as the principle of *stare rationibus decidendis*; usually referred to as *stare decisis*. It translates simply as ‘Let the decision stand’. *Stare rationibus decidendis* is the more accurate statement because, as we shall see, it is the reasoning (*rationibus*) that is the vital binding element in judicial precedent. However, nobody actually refers to it this way.

What *stare decisis* means in practice is that when a court makes a decision in a case then any courts which are of equal or lower status to that court **must** follow that previous decision if the case before them is similar to that earlier case. So, once one court has decided a matter other inferior courts are bound to follow that decision.

You must be careful here: the ‘decision’ of a case can mean a number of different things. At its simplest, the ‘decision’ is that X won and Y lost. Thus X and Y are (subject to any appeal) bound by that decision; this is referred to as *res judicata* (a matter which has been

adjudicated upon). But when we use the word ‘decision’ in the context of legal analysis we are referring to something much wider. We are referring to the *whole* reasoning process that went into deciding that X won—we are referring to *why* X won; and we shall explore how we set about this below.

So, first, you must be aware right at the start that legal reasoning is not simply a process of matching one case against another; it is not merely a question of drawing analogies. There will always be differences in the facts of the two cases, if nothing else. As precedent is founded on comparing cases a primary question is: how significant are the differences? Just because the facts of two cases are apparently similar does not mean they should be decided in the same way. You would not, for instance, say that if a tabby cat called Henry miaows like a banshee, then every other tabby cat called Henry will do so too.

We can translate this into something more realistic and legally orientated:

EXERCISE 9 Zebras on the North Circular

Let us say that in *case (1)* a man driving a Ford Mondeo runs over an old lady who was lawfully using a zebra crossing. The man is held to be liable in negligence.

Let us say that in *case (2)* a woman driving a BMW runs over an old man who was crossing the road. Should she be found liable, too, or do you need to ask some further questions? If there are other questions, what might they be?

We do not present a formalised answer to this, because we wish to explore the ramifications of the issues it raises; but you may check your ideas against the comments which follow. We have seen in earlier exercises that a proper assessment and analysis of factual detail is essential to the application of rules. You might wish to know, for instance, what were the weather conditions in each case; were either of the drivers speeding; was the old man crossing the road at a safe point?

All these matters will come out in the evidence given by the parties. The judge will decide, on the strength of the evidence, which version of the ‘truth’ he or she believes. The judge will then apply the law (i.e. the judicial precedents) to the facts of this case to decide whether the defendant is liable to pay damages to the claimant. The more similar the facts of this new case are to existing precedents, the easier it is for the judge to decide that the law which is found in those precedents applies to the new case; the more the new facts differ from existing precedents (or raise completely novel points), the more difficult it will be to find a match. As you will see much later in this book (in **Chapter 11**) there are various reasoning techniques a judge may employ (reasoning by induction, deduction, analogy, or even through policy considerations) but the basic idea is he or she has to decide whether the new case should be decided in the same way as the older cases. This leads us to ask: what similarities or differences in the facts might be significant here? Are the cases, for instance:

- (a) sufficiently similar that the decision of *case (1)* should be applied in *case (2)*? or
- (b) sufficiently different that the decision of *case (1)* should not be applied (never mind be considered binding) in *case (2)*? or

- (c) are the factual differences of minimal significance? or
- (d) are the facts different, but the principle underlying the decisions in the cases similar? Here you need to be sure what was the principle that was established in the first case: does the reasoning—‘*why?*’—in the first case apply to the second?

In the next chapter we shall explore in more depth how we assess the ‘*why?*’ in a case. For the moment, imagine that when you read the report of *case (1)* you found that the House of Lords had pronounced that whenever a driver injures a pedestrian, irrespective of how careless the pedestrian was, the driver is to be held to be at fault. This would mean that, whatever the differences in fact between *case (1)* and *case (2)*, it looks as if the driver will be liable because the **general** principle established in *case (1)* would apply. On the other hand, perhaps the principle in *case (1)* was that drivers will be held to blame if pedestrians are using a zebra crossing. If that is the principle established in *case (1)*, it is arguable that it should not apply to the facts of *case (2)*.

5.3 Establishing the Principle in a Case

As can be seen from the above, the doctrine of judicial precedent is not simply a mechanical process of matching similarities and differences. It is not merely a science of comparisons for it embodies the art of interpretation; the art of propounding the **principle** to be derived from each case. It also involves the lifeblood of a lawyer: argument. We will deal with this aspect of precedent in depth in the next chapter. However, by way of introduction we can look at one case from the nineteenth century (the one which appears in the box below: *Household Fire Insurance v Grant*) and see how it was treated as a precedent when cases, which at first sight seemed quite similar to it, came before later courts.

Household Fire Insurance Co. v Grant (1879) 4 Ex D 216

Grant made an application in writing to the company for shares. A deposit was paid, the remainder to be paid within twelve months. The company allotted shares to Grant and posted the allotment to him. The letter never arrived. The company later went into liquidation and the liquidator sought the balance of Grant's application which was still outstanding. Grant maintained he had no contract with the company because his offer had not been accepted. No contract would mean no liability to pay. The company maintained that the offer had been accepted when their letter of acceptance had been posted even though it never arrived.

In case you have not studied Contract Law yet (or are not going to) we should explain that a contract is formed when there is an offer which is accepted, without the addition of new terms, by the other party. A person making an offer is termed the *offeror*; the person receiving the offer is the *offeree*. The general rule is that acceptance has to be communicated by the offeree. There is no contract simply because, in his or her own mind, the offeree is willing to accept. However, a major problem arises when the parties are not

face to face. If they communicate by post, for instance, when does the acceptance take place? Should it be when the letter of acceptance is posted by the offeree, or only when it arrives with the offeror?

By the end of the nineteenth century there existed a number of authorities on what is now termed the 'postal rules' of acceptance in contract. These stretched back to *Adams v Lindsell* (1818) 1 B & A 681, but the key case under scrutiny was to be the House of Lords case of *Dunlop v Higgins* (1848) 1 HLC 381; 9 ER 805. In this case Dunlop wrote to Higgins offering to sell some iron, reply to be by return of post. The offer was accepted by Higgins in a letter but bad weather delayed the post. In the meantime there had been an increase in the price of iron. It would have been in Dunlop's interest if no contract had been concluded with Higgins because then Dunlop would still own the iron and be able to sell it to other customers at the new (higher) price. The House of Lords decided otherwise: a contract existed when the letter of acceptance was posted.

In *Household Fire Insurance v Grant* all three judges in the Court of Appeal analysed whether *Dunlop v Higgins* applied to the case before them. Thesiger LJ said that the decision in *Dunlop v Higgins* rested 'upon a principle which embraces and governs the present case'. To say that the acceptance takes place when the letter is posted and arrives late (as with *Dunlop v Higgins*) but not if it never arrives (as with *Household Fire*) would be illogical. The principle was, therefore, that once the letter of acceptance was posted the parties were bound. Of course, the offeree would have to convince a court on the facts that his had happened; but that point of evidence was irrelevant to the legal principle.

When Bagallay LJ looked at *Dunlop v Higgins* he concluded (at 227–8):

I think that the principle established by that case is limited in its application to cases in which by reason of general usage, or of the relations between the parties... or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorised.

Thus the principle in *Dunlop v Higgins* was seen by Bagallay LJ as being more limited than Thesiger LJ's approach; but on the facts Bagallay LJ decided that the present case still fell within the rule.

Bramwell LJ dissented. He thought there was *no contract* because the letter never arrived. He argued that *Dunlop v Higgins* had been completely misinterpreted; at best it was authority for the rule that acceptance takes place on posting only where the letter arrives (albeit late and within a reasonable time).

So the same authority was used by two Lords Justices to find for the company; but they had quite different interpretations of what *Dunlop v Higgins* really decided. The same case was also used by Bramwell LJ to argue a completely different conclusion—showing at least that simply knowing about the existence of a case is not enough; you must be able to argue its relevance or irrelevance to the case in hand. This means that you must read cases in depth. In this chapter we shall concentrate on the position where the facts are sufficiently similar that the cases are 'alike'. How will the doctrine of *stare decisis* affect our analysis? In answering this question it becomes important that we should look at the mechanical side of precedent. The courts stand in a defined hierarchy: which courts are **bound** to follow the decisions of which other courts? This is not usually perceived as

the most stimulating part of legal studies, but understanding the workings of *stare decisis* depends upon having a sound grasp of the court structure. In turn, an efficient system of precedent depends upon dependable law reporting. You should familiarise yourself with the court structure and know how to use a law library. You will find these matters explained earlier in this book, detailed in any text on the English legal system, and nearly every Law course now includes instruction on how to use a law library. These are hardly the thing examination questions are made of, but a lawyer who cannot describe the structure in which the law operates, or find the law, will lose credibility fast.

5.4 The Mechanics of *Stare Decisis*

The system of precedent itself involves a fair degree of detail, but the basic principle to keep in mind is that the precedents created by superior courts bind lower courts and, generally, courts of equal status. We considered the basic court structure in **Chapter 1** (at **1.5.3** and **Figure 1.1**). You are advised to refer to that diagram to see the relationship of the courts discussed below. Nothing we have to say here will be affected by the Constitutional Reform Act 2005 when it comes into force, except that the House of Lords will have had a name change.

One other idea you need to bear in mind is that not all precedents are binding. For if some precedents are binding there must be others which are not. These we call **persuasive** precedents. **Persuasive** precedents arise out of a number of contexts:

- (a) Decisions of *lower* courts cannot bind. They may be persuasive.
- (b) Decisions of the High Court at first instance (i.e. the trial stage) are persuasive authority for later cases in the High Court.
- (c) Decisions of the Judicial Committee of the Privy Council (see below).
- (d) Decisions of the Scottish and Northern Irish courts.
- (e) Decisions of other courts within the Common Law world: see, e.g. the use of the Australian case of *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 in *Murphy v Brentwood DC* (1990), detailed below.

5.4.1 The House of Lords

The decisions of the House of Lords bind all lower courts. There has been a long debate as to whether decisions of the House of Lords should bind a future House of Lords. For some 100 years the Law Lords considered themselves bound. This was changed by the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 where it was said that though the doctrine of being bound had many commendable points: 'too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.'

Thus the Lords can depart from their own previous decisions; but they will do so only in rare circumstances (there is a technical distinction between *departing from* a decision and *overruling* it, but the terms are used interchangeably even by the House of Lords itself). Remember that the House of Lords is the highest court in the land (save, in a quite different

way, on European Community law matters). Its pronouncements (only about 100 a year) must be seen as creating an air of certainty in business dealings, in criminal law, in land law, and so on. Changing its mind may do 'justice' to a particular case, but at the cost of certainty.

However, despite this, the Law Lords will change their minds. Such occasions are rare, but here are a few cases which show this in action (see also the excellent analysis of this topic in Harris, 2002).

***British Railways Board v Herrington* [1972] AC 877; [1972] 1 All ER 749**

The Lords faced a number of nineteenth-century and early twentieth-century decisions wherein they had held that there was only a limited duty of care in negligence owed to children who trespassed onto property. This duty was that the occupier should not act recklessly with regard to children whom he knew to be there; and public policy dictated that there was no duty at all to keep out such children or to make the premises safe for them. Since then changes in perceptions of public policy and the development of the law of negligence had altered the approach to the whole topic of responsibility for negligent actions. Thus their Lordships felt able to ignore the earlier decisions and impose on British Railways a duty of care in keeping railway line fences repaired.

***Miliangos v George Frank (Textiles) Ltd* [1976] AC 443; [1975] 3 All ER 801**

The House of Lords had previously decided that all awards of damages in an English court had to be made in sterling. In this case, however, because of changes in international trade and the status of sterling they felt the time had come not to adhere to their previous decisions.

***R v Shivpuri* [1987] AC 1; [1986] 2 All ER 334**

The case concerned the law as to criminal attempts. A decision of the House of Lords one year earlier (*Anderton v Ryan* [1985] AC 567; [1985] 2 All ER 355) had received great criticism. In *R v Shivpuri* the House of Lords changed its mind on whether it was possible to attempt to do the impossible. This is a rare example of the House of Lords overturning its own decisions **simply because it felt the earlier decision was wrong**. Usually the Lords look for wider policy considerations.

Indeed, in *Food Corp. of India v Antclizo Shipping Co.* [1988] 1 WLR 603, [1988] 2 All ER 513, Lord Goff (on behalf of the court) stated that their Lordships would not depart from a previous House of Lords' decision unless:

- (1) it felt free to depart from *both* the reasoning and decision of the earlier case; *and*
- (2) such a review would affect the resolution of the actual case before them and not be of mere academic interest.

This decision, however, has not had the impact first anticipated and has not been referred to on many occasions. But the *Antclizo* case does allow us to say one further thing, to which we shall return. That is, when a case first appears, stating a principle of law, one can never really be sure of the impact the case will have. At the instant it appears, when there are no other cases which have attempted to apply it, one can only speculate as to its impact. One famous example is a case called *Junior Books v Veitchi* [1983] AC 520; [1982] 3 All ER 201.

When this case was decided many lawyers believed it had cleared the way for major changes in legal thought. A decade later the case had all but fallen into oblivion.

There is thus no one principle by which the House of Lords sets about overturning its own precedents. In *Murphy v Brentwood District Council* [1990] 3 WLR 414; [1990] 2 All ER 908, for instance, their Lordships were again prepared to overturn one of their previous decisions (*Anns v Merton London Borough Council* [1978] AC 728; [1977] 2 All ER 492). There are various reasons given by their Lordships for why they were prepared to make this decision. Lord Mackay, then Lord Chancellor, felt that the earlier case was taken as a preliminary issue of law so that the facts had not been considered in detail. The case may have worked in theory but did not relate to real facts. Lord Keith looked at *Sutherland Shire Council v Heyman* (1985), an Australian case which had rejected *Anns*, as well as US cases which had analysed the cases on which *Anns* itself was based and proved these to be faulty. Thus, departure from *Anns* could be justified on the ground that the case was 'unsatisfactory'. Lord Oliver also noted academic criticism of the decision in *Anns*.

Indeed, *Antclizo* itself appears to have become one of the 'lost' cases along with *Junior Books v Veitchi*. The case, for instance, makes no appearance in *Pepper (Inspector of Taxes) v Hart* [1992] 3 WLR 1032; [1993] 1 All ER 42, in which the House of Lords overturned a long-established principle on the sources that could be referred to in interpreting a statute. For the moment at least *Antclizo* appears to have gone to ground.

In 1998–9 a novel twist was added to this area in the case of *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (Amnesty International and others intervening)* [1998] 4 All ER 897. This case concerned the legality of extraditing former Chilean President Pinochet to Spain to face various charges of torture and murder. The matter went before the House of Lords, which decided by majority that Pinochet could be extradited. However, one of the Law Lords (Lord Hoffmann) had connections with Amnesty International, one of the parties allowed to make representations in the proceedings. These connections had not been declared by Lord Hoffmann (who found against Pinochet). Thus the decision was questionable, but there was no established mechanism for overcoming this. In the circumstances, the House of Lords decided to review their decision by way of a re-hearing of the appeal: [1999] 2 All ER 97. It is doubtful, however, that such a procedure will be used again in the near future; though it is noticeable that in practice many judges at all levels now make very clear announcements at the start of cases of potential conflicts of interest (e.g. that they were once instructed by one of the parties when they were barristers in practice).

More recent cases show the House going in both directions on the question of overruling. Thus, *Arthur J.S. Hall & Co. (a firm) v Simons* [2002] 1 AC 615 saw the House of Lords, by majority, depart from their own decision of *Rondel v Worsley* [1969] 1 AC 191 and remove the immunity from being sued previously enjoyed by advocates (for alleged negligence in the conduct of civil proceedings). This was done on the basis that the public policy reasons for the immunity being granted no longer stood up to scrutiny in today's society. On the other hand, in *R v Kansal (Yash Pal) (No. 2)* [2001] UKHL 62; [2002] 2 AC 69 (again with dissenting voices) the House criticised their own previous decision in *R v Lambert (Steven)* [2001] UKHL 37—on the application of the Human Rights Act 1998 to matters arising before that Act came into force—but did not overrule *Lambert*.

At the heart of the issue whether the House of Lords should overturn its own previous decisions lies the dilemma we noted above that the House, as the final court of appeal, needs to provide both certainty and flexibility: and these concepts are often in direct conflict. It is hardly surprising, therefore, that no pattern emerges as to when their Lordships will change their mind. Nor is the problem any different when considering criminal law cases as opposed to civil matters.

There is also another problem which lies hidden in all this: it travels under the name of 'prospective overruling'.

5.4.2 Retrospective and Prospective Overruling

As we have seen above, courts make findings on disputed questions of fact, identify and apply the relevant law to the facts agreed by the parties or found by the court, and award appropriate remedies. But when a court is faced with a decision on what the law means (whether on 'pure' case law or the interpretation of statutes) it might depart from or overrule a previous decision on the same point of law. When it does this the court can adopt one of three different approaches:

- (i) *Approach 1*: say that the law is [x] and, if that differs from what everyone thought the law was, then hard luck—it was always [x] but we did not know it until now. Here, any decision which changes the law from what it was previously thought to be operates *retrospectively* as well as *prospectively*. It is retrospective in that the parties to the case are caught by the ruling and so are all those who have, say, created leases or contracts on the basis of what was thought to be the law. Despite their best endeavours, it now turns out they were wrong. You can imagine that this can produce very unfortunate results. *Approach 1* is prospective in that this is the 'new law' so all future cases will be decided this way. In the case of *In Re Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41; [2005] 3 WLR 58 Lord Nicholls explained the position this way:

[7] The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned . . . Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the [the court] in that case even though the relevant events occurred before that decision was given.

[8] People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences.

The *retrospective* effect of precedents has been made abundantly clear in the House of Lords case of *Kleinwort Ltd v Lincoln City Council* [1999] AC 349; [1998] 4 All ER 513. In this case, the House of Lords overruled long-established Court of Appeal authorities and abolished the rule that money paid under a mistake of law could not be recovered. Their Lordships were agreed that the idea of retrospective effect means that once the law has been changed it applies not only to the case in hand but to all subsequent cases coming before

the courts even though the events in question occurred before the previous authority was overruled. What they were not in agreement over was how this applied to the actual case on whether a mistake of law arose *at the time of the contract* when the law was later changed; on this they were divided 3 : 2 in favour of saying there was a mistake of law.

- (ii) *Approach 2*: say that the law is [x] but, because everyone has organised their affairs until now on the basis that the law was [y], the new view of the law only affects events occurring after the decision. So, using our examples above, only contracts or leases formed *after* the date of the judgment would be affected by the 'new' law, [x]. Contracts and leases, etc. formed *before* the judgment continue to fall under the 'old' law, [y]. This is the 'purest' form of *prospective* overruling. It was popular in the US courts for a while. The law is said to 'change' only from that decision in the case onwards. Prospective overruling (sometimes described as 'non-retroactive overruling') is therefore a judicial tool fashioned to mitigate the adverse consequences of making major changes in the law. This is what Lord Nicholls had to say:

[9] In its simplest form prospective overruling ... has the effect that the court ruling has an exclusively prospective effect. The ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the court gave its ruling.

- (iii) *Approach 3 (mixtures)*: it is possible to come up with other variations on this theme. For instance, the decision might be held to be prospective as regards everyone not involved in the case but retrospective in its effect as between the parties to the case in which the ruling is given. Or the ruling may be prospective as regards everyone not involved in the case but retrospective as between the parties in the case in which the ruling was given *and also* as between the parties in any other cases already pending before the courts. Lord Nicholls also noted at [11] that:

Recently Advocate General Jacobs suggested an even more radical form of prospective overruling. He suggested that the retrospective and prospective effect of a ruling of the European Court of Justice might be subject to a temporal limitation that the ruling should not take effect until a future date, namely, when the State had had a reasonable opportunity to introduce new legislation: *Banca Popolare di Cremona v Agenzia Entrate Ufficio Cremona* (Case C-475/03) (unreported) 17 March 2005, paras 72–88.

What does this mean in practice? Imagine that you have just completed some complicated contractual negotiations, basing your law on a case from 1990. One morning you read that the House of Lords has 'changed' the law of Contract: it is no longer what you (and everyone else) thought it was. Under this new interpretation the deal you have just concluded is worthless. Now, you know that this means if you are negotiating a contract *today* you must take into account the 'new law'. But does the ruling affect the contract you concluded last week? If the House of Lords' ruling is retrospective then the answer is 'yes'. If it is only prospective then your contract is safe (it will be interpreted under the 'old'

law) but any new contracts would have to be drafted with the recent House of Lords' decision in mind. The idea of prospective overruling therefore looks attractive but it hides a real problem: we could have different laws applying to the same types of contract—the only differences being when they were dated.

You may have guessed from the quotes above that the House of Lords' decision in *In Re Spectrum Plus* reviewed the law regarding retrospective and prospective overruling—and Lord Nicholl's crystal-clear speech is worth reading for its explanation of case law. In the end, Lord Nicholls showed some enthusiasm for allowing prospective overruling (but only in exceptional circumstances) and Lords Hope and Walker agreed with Lord Nicholls; Lords Steyn, Scott and Brown accepted that one should never say never about such matters, but were not in favour of using prospective overruling—Lords Steyn and Scott expressly stating that they would not allow prospective ruling in relation to statutory interpretation, only 'pure' case law. On this basis, retrospective overruling is still the norm.

5.4.3 The Court of Appeal

The importance of this court, both because of its place in the hierarchy and because of its heavy workload, means that you need to be aware of how it deals with precedent. Most of the important cases you will deal with in your studies were reached by this court or its predecessors such as the Court of Exchequer Chamber.

There are two important questions concerning the Court of Appeal and the notion of *stare decisis*.

5.4.3.1 To what Extent is the Court of Appeal Bound to Follow Decisions of the House of Lords?

Strictly speaking the answer is always. But there have been campaigns in the Court of Appeal to overcome the principle. The principal crusader was Lord Denning MR. His retirement signalled a halt to the conflict.

The *per incuriam* campaign

In his major attack Lord Denning advocated that if a House of Lords' decision had been made *per incuriam* it need not be followed. *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. The analogy might be made with the writing of a scientific paper. Let us say a famous scientist produces a theory, and that a few years later it is discovered that his research was faulty: he had not read two of the leading papers. Would you say there are grounds for arguing that the theory should be open to scrutiny or even doubt?

The *per incuriam* rule is a well-established technical rule; but you must be careful here. *Per incuriam* does not simply mean the earlier court got things wrong. It only means there was a significant oversight. As we shall see later in this chapter, 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. So, with the example of the scientist, if it is now discovered that if he had researched thoroughly and read the two leading papers this would still have had

no effect on his theory, the fault is a technical one of methodology and does not affect the conclusions drawn.

Lord Denning MR tried this form of reasoning in *Broome v Cassell* [1971] 2 QB 354; [1971] 2 All ER 187. Lord Denning persuaded the other members of the Court of Appeal to reach a decision which was contrary to that of an earlier House of Lords decision, *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367. Lord Denning pointed out that *Rookes v Barnard* was a decision made *per incuriam* because it had failed to consider even earlier House of Lords authorities.

However, when *Broome v Cassell* went to the House of Lords, the Law Lords rebuked Lord Denning for adopting such a rule because they believed he had plainly looked for an excuse not to adhere to *stare decisis*. As Lord Hailsham, the then Lord Chancellor, said:

I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v Barnard* as decided 'per incuriam' or 'unworkable' they really only meant that they did not agree with it . . . [I]n 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. [1972] AC 1027, 1054.

The 'lapsed rule' campaign

Let us say that the House of Lords reached a decision some years ago based upon a particular rule or set of facts, e.g., that damages in English courts can be given only in sterling because of the stability of the currency and established forms of procedure. Now let us say that the reason for the rule has disappeared: the forms have changed and sterling has lost its stability. Should the precedent created by the House of Lords be followed even though the whole basis of this precedent has disappeared?

This was the question considered by the Court of Appeal, led by Lord Denning, in *Schorsch Meier GmbH v Hennin* [1975] QB 416; [1975] 1 All ER 152. Like so many things in law, a Latin maxim describes the rule thus: *cessante ratione legis, cessat ipsa lex* (with the reason for the rule ceasing, the law itself no longer exists). On this occasion the Court of Appeal was split. Lord Denning and Foster J agreed that a 1961 decision of the House of Lords had run its course. That earlier case, *Re United Railways of Havana and Regla Warehouses* [1961] AC 1007; [1960] 2 All ER 332, is referred to as the *Havana* case. In fact, the rule that damages should be awarded only in sterling seems to have existed for over 300 years. Lawton LJ, however, did not recognise that the Court of Appeal had such power and found himself bound to follow the House of Lords.

This case did not go on appeal to the House of Lords. However, as we shall see below, the House of Lords soon had opportunity to comment on this issue in a case named *Miliangos v George Frank (Textiles) Ltd* [1977] Qb 489; [1976] 3 All ER 599; and once again disapproved Lord Denning's attempts to vary the notion of *stare decisis*. As you will have noted above, however, their Lordships did overrule their own previous decisions on the same grounds proposed by Lord Denning, i.e. the 'lapsed rule' idea.

Thus one is forced to say that the campaigns failed. It is for the House of Lords to change its mind; not for the Court of Appeal to decide the issue for it. On the positive side, this helps to create certainty. Equally, such strict adherence to *stare decisis* may increase costs (because of the need for further appeals), as well as appearing to invite the veneration of rules whatever the logic or perceived justice. This is an age-old problem in law: balancing the need for certainty with the desire for the law to be flexible.

5.4.3.2 To what Extent is the Court of Appeal Bound by its Own Previous Decisions?

The basic rule is that it is bound. Three exceptions were given in the leading case of *Young v Bristol Aeroplane Co. Ltd* [1944] KB 718, 723 by Lord Greene MR. Thus:

The Court of Appeal can choose between its own conflicting decisions

Such conflict should not arise in an ideal world, but it does, and Lord Greene MR did not explore *which* of the conflicting decisions should be followed. Academic and judicial debate over the years tended to indicate that a later Court of Appeal faced with this problem would probably be free to decide which authority it should follow, with the result that the one not chosen is overruled (for a full debate see Cross (1991:144)). If a general rule has emerged it has been that the latest case would probably be followed in preference to the earlier decision.

The situation can occur for a number of reasons; the most usual ones are:

- because the Court of Appeal does not hear one case at a time (there may be two or three hearings going on at the same time in different courtrooms in the Strand, before different members of the court). These cases may involve similar legal principles and the various courts may reach different conclusions which later appear contradictory;
- it is also possible that some earlier cases may not have been reported;
- equally, one court may look at the previous decisions and consider them distinguishable for one reason or another whilst another may think they are not distinguishable and should be followed (which highlights the point we have made before on this being a matter of interpretation rather than pure science).

It was this last reason that gave rise to the problem in *Starmark Enterprises Ltd v CPL Distribution Ltd* [2001] EWCA Civ 1252; [2002] 4 All ER 264. The case concerned a rent review clause in a lease of property. Two earlier Court of Appeal decisions (which we shall simply call decisions 1 and 2) had followed on from, considered, and applied an earlier decision of the House of Lords. The two Court of Appeal cases appeared to be in conflict. In *Starmark* the landlord argued that decision 2 (the latest) was unsupported and decision 1 should be preferred; alternatively, that decision 2 was distinguishable on the facts from the present case; it should therefore be ignored and, again, decision 1 should be followed. The tenant argued that there was no conflict between

decisions 1 and 2 and decision 2 was entirely consistent with the original House of Lords approach; equally, the facts in the present case and decision 2 were indistinguishable and so decision 2 plainly had to be followed.

Kay LJ decided that decisions 1 and 2 did conflict and that he preferred the views expressed in decision 1 (which was also the minority judgment in decision 2) and was bound to follow the reasoning in decision 1. Arden LJ held that decisions 1 and 2 involved the same principle and could not be reconciled; it was not possible to distinguish them. But Her Ladyship agreed with Kay LJ and held that decision 2 was faulty and should not be followed. The final judge, Peter Gibson LJ, stated at [97]:

Where the ratio of an earlier decision of this court is directly applicable to the circumstances of a case before this court but that decision has been wrongly distinguished in a later decision of this court, in principle it must be open to this court to apply the ratio of the earlier decision and to decline to follow the later decision. In my judgment the majority of this court in [decision 2] wrongly distinguished [decision 1]. The ratio decidendi in [decision 1]... should in my judgment have been applied in [decision 2] and is decisive of this case.

Thus, in *Starmark*, the latest authority was not followed. Kay LJ's remark (at [3]) perhaps sums up the frustration of encountering conflicting decisions, when he said: 'It is unfortunate that over 15 years after... [decisions 1 and 2]... were decided, the legal effect of a common provision in a rent review clause is still unknown. This is the common law at its least impressive.'

It is also worth noting that Lord Denning led another attack on what he clearly perceived to be the fetter of *stare decisis* in the case of *Davis v Johnson* [1979] AC 264; [1978] 1 All ER 1132 (HL); [1978] 2 WLR 182; [1978] 1 All ER 841 (CA). This was not an instance of cleverly adopting rules to excuse departure from precedents. Here, Lord Denning sought to apply the 1966 Practice Statement to the Court of Appeal as well as the House of Lords. The argument was that, if the Court of Appeal could simply depart from previous decisions when justice demanded (as the House of Lords can now do), this would save wasting time and costs of further appeals to the House of Lords. Once again, however, the attempt failed (not least because Lord Denning had conveniently forgotten that procedures already existed whereby a case could be allowed to 'bypass' the Court of Appeal for this very reason: see 5.6 below).

If its own previous decision has been overruled expressly or impliedly by the House of Lords it need not be followed

Thus if the order of cases ran:

- Court of Appeal's *decision* (1954)
- House of Lords' decision (disapproving the Court of Appeal's reasoning) (1990)
- Your case in the Court of Appeal (today)

then the Court of Appeal in your case **must** follow the House of Lords and not the first Court of Appeal decision

But this does not answer the question which path should be chosen where the order of cases is:

- House of Lords' decision (1980)
- Court of Appeal's *decision 1* (which, for some reason, is contrary to the earlier House of Lords' decision) (2001)
- Your case in the Court of Appeal (today)

Now the Court of Appeal is caught between two rules: one saying it is bound to follow its own previous decisions, the other that it is bound to follow the House of Lords.

This situation arose in *Miliangos v George Frank (Textiles) Ltd*. Only a year after the Court of Appeal (in the *Schorsch Meier* case) had ignored earlier House of Lords' authority and decided to award judgment in a currency other than sterling, the same issue came before the Court of Appeal again. Should it follow its decision in *Schorsch Meier* or follow the decision of the House of Lords which had been bypassed in *Schorsch Meier*? You may wish to speculate as to which answer, which strand of *stare decisis*, you think should be the most appropriate.

The Court of Appeal in *Miliangos* chose to follow its own previous decision and not the House of Lords. When the case went before the House of Lords their Lordships agreed that judgment could be given in a currency other than sterling, thereby overruling their own previous decision; but took the opportunity to criticise Lord Denning's approach in the *Schorsch Meier* case for ignoring the doctrine of *stare decisis*. However, to add to the confusion, whereas Lord Simon in the House of Lords agreed that the Court of Appeal in *Miliangos* should have follow its own precedent created in *Schorsch Meier*, Lord Cross felt that the Court of Appeal in *Miliangos* should have ignored its own precedent in *Schorsch Meier* because that decision was in conflict with the earlier House of Lords decision! So the short answer is: nobody really knows.

As a side point, it is interesting to note that Lord Greene's statement in *Young v BAC* (that the Court of Appeal is bound by its own decisions) actually conflicts with some earlier Court of Appeal decisions which stated that the Court of Appeal was *not* bound by its own previous decisions. The sort of panic that this can send a student into should be avoided; Lord Greene's words reflected the history of the Court of Appeal since its creation and are generally taken as gospel today.

The court is not bound by its own decisions found to have been made *per incuriam*

We have discussed the *per incuriam* rule to some extent already. For some reason this rule appeals to students and it tends to be used on many occasions (usually incorrectly). It is worth repeating, therefore, that it does not mean that the court made a mistake. The fact that the case being examined had weaknesses in argument, or in the judgment, does not make the decision *per incuriam*. Thus in *Morelle v Wakeling* [1955] 2 QB 379; [1955] 1 All ER 708, Lord Evershed MR limited the use of the *per incuriam* rule to cases where:

- there was ignorance of authority which would have been binding on the court; *and*
- that ignorance led to faulty reasoning.

The *and* is very important. To this the Court of Appeal has added that the rule can be applied only where, had the court reviewed these authorities, the court *would* (not just might) have reached a different decision. Thus in *Williams v Fawcett* [1986] QB 604; [1985] 1 All ER 787 and *Duke v Reliance Systems* [1987] ICR 491; [1987] 2 All ER 858 the Court of Appeal has shown itself ready to use the *per incuriam* rule regarding its own decisions, but with reservations.

In the case of *Rakhit v Carty* [1990] 2 WLR 1107; [1990] 2 All ER 202, the Court of Appeal was faced with the situation where a Court of Appeal decision (*decision 1*) was plainly *per incuriam* as it had missed some vital statutory provisions. *Decision 1* had been followed without question in another Court of Appeal case (*decision 2*). Could the present Court of Appeal still declare *decision 1* to be *per incuriam* and therefore *decision 2* of no binding effect? Lord Donaldson MR said (at 208):

If, therefore, that court [*in decision 2*], having all the relevant authorities before it, had concluded that [*decision 1*] was rightly decided, I would have felt bound to follow it, leaving it to the House of Lords to rectify the error.

As this was not the case, the Court of Appeal in *Rakhit v Carty* declared *decision 1* to have been reached *per incuriam*, thereby invalidating both *decision 1* and *decision 2* as precedents.

The latest pronouncement by the Court of Appeal on this matter confirms all that has been said above: *Peter Limb v Union Jack Removals Ltd and Honess* [1998] 1 WLR 1354; [1998] 2 All ER 513 (see 5.7 below). In *Young v BAC* Lord Greene stated that a finding of *per incuriam* would only occur in the rarest of cases. This has been proved true: a search of the law reports reveals very few cases where a *per incuriam* argument has proved successful.

5.5 Are there any other Exceptions to the Application of *Stare Decisis* to the Court of Appeal that have Emerged since 1944?

The short answer to this is: yes, but not many.

5.5.1 Criminal Matters

The Criminal Division of the Court is traditionally more relaxed on *stare decisis*, especially where an individual's liberty is at stake. This seems a little strange, given that the House of Lords usually espouses the view that it should rarely change its mind on criminal law matters in order to promote certainty! See, for instance, its reluctance to change its mind in *R v Shivpuri*. But then, in the hands of the House of Lords rests the final appeal; which is the very issue that caused all the controversy discussed above.

For further explanation on this topic, see *R v Spencer* [1985] 1 All ER 673 and note Pattenden (1984:592). The Court of Appeal addressed this issue again in *R v Parole Board, Ex parte Wilson* [1992] 2 WLR 707; [1992] 2 All ER 576. The case concerned the right to see documents submitted to a parole board. The Court applied the principle that, where

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liberty is at stake and injustice might occur, *stare decisis* was not applicable. However, the Court of Appeal found the earlier precedents distinguishable in any case so that the comments on *stare decisis* were not strictly necessary. In *R v Simpson* [2003] EWCA Crim 1499; [2003] 3 All ER 531 the Court of Appeal affirmed this approach. There, Lord Woolf CJ stated that the power to depart from earlier decisions was not akin to the power of the House of Lords under the 1966 Practice Statement. He said:

We appreciate that there may be a case for not interpreting the law contrary to a previous authority in a manner that would mean that an offender who otherwise would not have committed an offence would be held to have committed an offence. However, we do not understand why that should apply to a situation where a defendant, as here, wishes to rely upon a wrongly decided case to provide a technical defence. While justice for a defendant is extremely important, justice for the public at large is also important. So is the maintenance of confidence in the criminal justice system.

5.5.2 Blocked Appeals

If, in exceptional cases, the House of Lords cannot review a decision of the Court of Appeal then the Court of Appeal can choose not to follow its own precedent: *Rickards v Rickards* [1989] 3 WLR 748; [1989] 3 All ER 193. The *Rickards* case involved very technical arguments concerning extensions of time in which to bring a case. Under those special rules the case could not go the House of Lords: so such occasions are not common.

5.5.3 Decisions of a Two-judge Court of Appeal

The normal number for a panel in the Court of Appeal is three or five. In *Boys v Chaplin* [1968] 2 QB 1; [1968] 1 All ER 283 it was held that if the court consists of only two judges this will not bind a later full Court of Appeal. That is no longer the position. A two-judge Court of Appeal is now accorded the same powers of creating binding precedents as a full court: *Langley v North West Water Authority* [1991] 1 WLR 697; [1991] 3 All ER 610.

Most two-judge Court of Appeal panels deal with what are called interim (previously called interlocutory) matters, though over the years they have taken on what are called more 'substantive' cases. 'Substantive' means cases that deal with the full issues.

An interim decision concerns pre-trial matters. For instance, if there is a dispute as to procedure this will be an interim matter. Some issues depend on interim matters and the main case never actually comes to court. One example is where an employer points to a clause in an employment contract which seeks to stop an ex-employee working for another in the same business once that employee leaves the company. This is known as 'restraint of trade'. If the employer had to wait for a full hearing it would be pointless because the restraint usually lasts for about a year and the case could take longer than this to come to court. The employer will therefore seek an injunction, which (if granted) will prevent the employee from working for the other company until the full case can be heard. The reality is, however, that if the employer obtains the injunction the full case rarely gets heard.

As two judge panels have become more common, cases have arisen which were not interim matters but proved to be important decisions (e.g. *National Westminster Bank v Morgan* [1983] 3 All ER 85, *Harris v Wyre Forest District Council* [1988] QB 835;

[1988] 1 All ER 691, and *Interfoto Picture Library v Stiletto Visual Programmes Ltd* [1988] 2 WLR 615; [1988] 1 All ER 348). The *Interfoto* case, as we shall see, had the added complication of the judges agreeing on the decision but disagreeing on the reasoning.

It is rare for a two-member Court of Appeal to disagree on the decision. However, this did happen in *Farely v Skinner* (Court of Appeal, unreported November 1999). One judge allowed the appeal and the other dismissed it. Therefore there was no actual result. The parties sought a re-listing of the appeal before a three-member panel as is permitted under section 54(5) Supreme Court Act 1981, which state that: ‘Where (a) an appeal has been heard by a court consisting of an even number of judges; and (b) the members of the court are equally divided, the case shall, on the application of any part to the appeal, be re-argued before and determined by an uneven number of judges not less than three, before any appeal to the House of Lords.’ The case was re-heard accordingly (and expensively): see *Farely v Skinner* [2000] Lloyd’s Rep. PN 516. By way of contrast, in the House of Lords, if you start with an odd number of judges, lose one on the way and then find the voting divided equally it seems that the old maxim *semper praesumitur pro negante* still applies. This means that the presumption is always in favour of the negative, which means that the appeal fails. A fascinating example of this arose in *Charter v Charter* (1874) LR 7 HL 364, where four of their Lordships were divided evenly as to the outcome and the remaining member died without leaving an opinion.

5.5.4 Decisions made by other courts

The Court of Appeal may find itself in the position where decisions on a topic have been made by the House of Lords, the Judicial Committee of the Privy Council, the European Court of Justice or the European Court of Human Rights. If these decisions conflict with existing precedents of the Court of Appeal (or, indeed, with each other), what is the Court of Appeal to do?

Decisions of the House of Lords and the Judicial Committee of the Privy Council

We saw above that where a Court of Appeal decision is followed by a House of Lords’ judgment then any later Court of Appeal must follow the Lords (see 5.4.3.2). And, as we noted earlier at 1.5.3, whereas the Judicial Committee of the Privy Council (JCPC) was once the final court of appeal for the courts of the British Empire, it now acts as the final court of appeal for a diminishing number of countries in the Commonwealth. The JCPC is therefore not part of our system and cannot create **binding** precedent, but, practically speaking, as the judges are made up from the Law Lords sitting in a different guise, any decision of the JCPC is treated as highly persuasive.

So what should the Court of Appeal do in the light of a JCPC decision which conflicts with an earlier Court of Appeal authority? This issue arose in *Doughty v Turner Manufacturing Co. Ltd* [1964] 1 QB 518; [1964] 1 All ER 98 and the Court of Appeal chose to follow a JCPC decision (that of *The Wagon Mound (No. 2)* [1967] 1 AC 617; [1966] 2 All ER 709) rather than its own precedent which had been set in *Re Polemis* [1921] 3 KB 560; [1921] All ER Rep 40.

But what if we raise the stakes? What if the JCPC decision conflicts with a previous House of Lords' ruling? In *HM Attorney General for Jersey v Holley* [2005] UKPC 23; [2005] 3 All ER 371 there was an appeal from the Court of Appeal of Jersey to the JCPC concerning the law on provocation as a (partial) defence to murder. Jersey law on this subject was the same as English law. In *R v Smith (Morgan James)* [2000] 4 All ER 289; [2001] 1 AC 146 the House of Lords had considered this defence in English Law. Unfortunately, the decision in *Smith* was in direct conflict with the decision of the JCPC in *Luc Thiet Thuan v R* [1996] 2 All ER 1033; [1997] AC 131. Further, *Smith* was not easy to reconcile with some other House of Lords' decisions. In *Jersey v Holley* the JCPC formed a specifically-enlarged Board of nine to resolve this conflict and clarify both English and Jersey law. The majority disapproved the House of Lords' decision in *Smith* and approved the previous JCPC decision in *Luc Thiet Thuan*. So, what should be considered the precedent in English law: *Smith* or *Jersey v Holley*? The answer came fairly soon in the case of *R v Faqir Mohammed* [2005] EWCA Crim 1880: the Court of Appeal followed the JCPC without any hesitation as it represented the latest, considered and authoritative statement on the law. That the JCPC could, at least in these circumstances, overturn a House of Lords' decision was confirmed by the Court of Appeal in *R v James; R v Karimi* [2006] EWCA Crim 14. Leave to appeal to the House of Lords was refused, but the court did declare two points of public importance relating to the rules of precedent.

So, despite the fact that the JCPC is not part of our system and cannot create **binding** precedent, its decisions are still highly persuasive (to the point of overcoming the strict rules of *stare decisis*).

Decisions of the European Court of Justice

As we shall see shortly (at 5.8.3 below) and again in **Chapter 10**, the European Court of Justice (ECJ) is the only court that can make authoritative rulings on the meaning and interpretation of European legislation. Thus, all courts in the EU should follow the ECJ's decisions. It should be noted, however, that the ECJ only decides what the law means; it does not decide the cases themselves. In other words, once the ECJ has made an authoritative ruling on the meaning of the law the *application* of that interpretation to the facts of the particular case is the province of the national court. So, if there is a decision of the ECJ on the meaning of European Law which the House of Lords then applies, the Court of Appeal should, strictly, follow the House of Lords on the factual analysis and the ECJ on the pure legal analysis.

The ECJ itself has frequently stated that EC Law takes supremacy over national laws. The issues usually arise in the context of conflicts between national legislation and EC Law, but the principles must apply equally to questions of *stare decisis*. Certainly, where there is an existing precedent and a later decision of the ECJ in that area then, as the Employment Appeal Tribunal commented in *Sharp v Caledonia Group Services Ltd* [2005] All ER (D) 09 (Nov), insofar as there is a conflict between the later ECJ decision and earlier United Kingdom decisions, the ECJ decision should be followed. To this extent, therefore, *stare decisis* is disapplied.

Decisions of the European Court of Human Rights

What should lower courts (such as the Court of Appeal) do when a House of Lords' decision conflicts with one made by the European Court of Human Rights (ECtHR)? As you will see in **Chapter 11**, the ECtHR is not part of our system. Indeed, it is even less a part of our system than the ECJ. Decisions of the ECtHR must simply be 'taken into account' by our judges, but they do not create precedents (and the decisions are not enforceable in our courts).

The question of which decision to follow was answered in *Price v Leeds City Council* [2005] EWCA Civ 289; [2005] 1 WLR 1825. The case concerned the rights of gypsies to occupy land and whether attempts to remove them breached their rights under Article 8 of the European Convention on Human Rights (Article 8 concerns 'respect for private and family life'). The problem here was that a House of Lords' decision (*Harrow London Borough Council v Qazi* [2003] UKHL 43; [2004] AC 983) was incompatible with a subsequent decision of the ECtHR (*Connors v United Kingdom* (2005) 40 EHRR 9). Lord Phillips MR provided the solution on behalf of the court at [33]:

It seems to us that in these circumstances, the only permissible course is to follow the decision of the House of Lords but, to give permission, if sought and not successfully opposed, to appeal to the House of Lords, thereby and to that extent taking the decision in *Connors* into account. If in due course the House considers that we have not followed the appropriate course, it will no doubt make this plain.

5.6 Does Every Case have to be Heard by the Court of Appeal before it can Proceed to the House of Lords?

Fortunately the answer is no. If the Court of Appeal is bound by the House of Lords and itself then a system which demanded it hear every case anyway would be ludicrous. Thus a civil case may be allowed to go on appeal from the High Court to the House of Lords, bypassing the Court of Appeal. This is known as the 'leap-frogging' procedure. However, if the case began life in the county court then an appeal from that court lies to the Court of Appeal, not the High Court; thus the 'leap-frogging' procedure would be irrelevant.

It is only fair to say that however much writers and judges try to explain the system on a rational basis, there will always be some uncertainty and some cases that simply break the rules. For one thing we have yet to consider in depth how one case can be distinguished from another so that the precedent in question (and therefore the application of *stare decisis*) is sidestepped. For another, judges occasionally surprise everyone with an admission that they were wrong in an earlier case (see Lord Denning in *Dixon v BBC* [1979] QB 546; [1979] 2 All ER 112, discussing his earlier judgment on the same issue in *BBC v Ioannou* [1975] ICR 267; [1975] 2 All ER 999). This is reassuring when considered in the context of human frailty, but likely to set a practising lawyer's teeth on edge; and is little consolation to the party in the overruled case who originally lost (and probably paid costs). Even more surprising, perhaps, was Lord Denning's admission in one case that his own reasoning in an earlier case (which he now wished to avoid) was not legally correct, but that he had reached that earlier decision to do justice—'It was not really [a case which fell within the

definition of dismissal]...but we had to stretch it a bit', he commented. The comment occurred in *Western Excavating v Sharp* [1978] ICR 221, 227; [1978] 1 All ER 713, 718 in relation to *Marriott v Oxford and District Co-operative Society Ltd (No. 2)* [1970] 1 QB 186; [1969] 3 All ER 1126.

It is also worth commenting at this stage that (as we noted above at 5.4.2 on retrospective and prospective overruling), when a decision of a higher court alters the law by overruling a line of established precedents, that decision does not merely affect the law from that moment on. The court setting the new precedent is stating the law as it *always has been*. Thus, commercial contracts concluded on the old law are in danger of being open to a different interpretation from that intended when they were formed; so too, property deals, licences, employment contracts, and so on. Therefore, one part of the work of lawyers is to review these earlier matters in the light of the new decision.

A question often posed by students is whether the aggrieved party in the case which has been overruled can now revive the case with the cry, 'There you are, I was right all along'. The answer is no. Parties to a case have to lodge an appeal within time limits. If these have expired it is unfortunately too late to do anything about it.

5.7 Precedent in the Higher Courts: Summary

In discussing the *per incuriam* rule above we noted the case of *Peter Limb*. That case also made some general comments on precedent and the Court of Appeal. Brooke LJ stated that there were five main principles to be derived from the authorities:

- (a) Where the court has considered a statute or a rule of law having the force of a statute, its decision stands on the same footing as any other decision on a point of law.
- (b) A decision of a two-judge Court of Appeal on a substantive appeal (as opposed to an application for leave) has the same authority as a decision of a three-judge or a five-judge Court of Appeal.
- (c) The doctrine of *per incuriam* applies only where another division of the Court has reached a decision in ignorance or forgetfulness of a decision binding upon it or of an inconsistent statutory provision, and in either case it must be shown that if the court had had this material in mind it must have reached a contrary decision. In *Cave v Robinson Jarvis & Rolf* [2001] EWCA Civ 245; [2002] 1 WLR 581 the Court of Appeal expressed the view that the decision in question had to be 'manifestly wrong' before it would be declared *per incuriam*.
- (d) The doctrine does not extend to a case where, if different arguments had been placed before the Court or if different material had been placed before it, it *might* have reached a different conclusion.
- (e) Any departure from a previous decision of the Court is in principle undesirable and should be considered only if the previous decision is manifestly wrong. Even then it will be necessary to take account of whether the decision purports to be one of general application and whether there is any other way of remedying the error, for example by encouraging an appeal to the House of Lords.

Lastly, it is worth noting a trend over recent years for the Court of Appeal to bunch together issues arising in a number of cases, set aside a specialist panel to look at all the cases, hear a selection, and issue general guidelines on the area. This has mainly happened in connection with procedural matters (*Peter Limb* was such a case). It happened again in *Bannister v SGB plc* [1998] 1 WLR 1123; [1997] 4 All ER 129 (which was also the first Court of Appeal decision to be published on the Internet immediately after the decision was given, so that all 200-plus affected parties could know the outcome as soon as possible). And, interestingly, in *Greig Middleton & Co. Ltd v Denderowicz* [1998] 1 WLR 1164; [1997] 4 All ER 181 (which was on the same issue as *Bannister*) the Court of Appeal took the opportunity to add as annexes to the *Greig* judgment some reserved judgments in other related cases and to produce a revised judgment of *Bannister*, directing that it would be the revised version which should appear in the Law Reports.

5.8 Other Courts

5.8.1 Trial Courts

All courts which are lower in status than the Court of Appeal (such as the High Court, Crown Court, magistrates' court, county court, and the various tribunals) are bound by *stare decisis* in the normal way. It should be noted, however, that the important tribunals also have their own appellate tribunals (e.g. the Employment Appeal Tribunal for employment tribunals) which often incorporate their own variations on the rules of right to appeal and the binding nature of precedent within that system. Courts like the Crown Court are trial courts, dealing for the most part with fact and evidence rather than questions of high legal analysis. They do not, therefore, create precedent. There is, however, some attempt to follow the reasoning employed in courts of the same level, e.g., as between divisions of the High Court when these courts are sitting as 'courts of first instance', i.e., trial courts. In *Colchester Estates (Cardiff) v Carlton Industries plc* [1984] 3 WLR 693; [1984] 2 All ER 601 it was stated that the latest decision should be preferred provided it was reached after full consideration of the earlier decisions. An example of this in operation arose from a decision of Butler-Sloss J (as she then was) in *Re Cherrington* [1984] 1 WLR 772; [1984] 2 All ER 285 which was not followed in a case on exactly the same point (*Re Sinclair* [1984] 3 All ER 362) because there had not been a full discussion of all the issues in *Re Cherrington*.

5.8.2 Divisional Courts

For mainly historical reasons the High Court has a supervisory and limited appellate jurisdiction over the trial courts. Each division of the High Court—Queen's Bench, Family, and Chancery—has what is termed a 'Divisional Court'. Thus:

- (a) The Divisional Court of the Chancery Division can hear appeals from a county court in bankruptcy cases.
- (b) The Family Division may hear appeals on guardianship matters from either the magistrates' courts or county courts.

- (c) The most common appellate function relates to the Queen's Bench Division. Say a party to a criminal case in a magistrates' court wishes to appeal on a question of law from the magistrates' decision. This can be done by asking the magistrates to **state their case**, i.e. to set out their legal reasoning, and the issue goes before the Divisional Court of the Queen's Bench Division. This is therefore known as an 'appeal by way of case stated'. A full re-hearing (e.g., an appeal against the conviction relating to fact rather than law) of the case would go to the Crown Court. An appeal by way of case stated can also lie in limited circumstances, from the Crown Court to the High Court.

These Divisional Courts are bound by *stare decisis* in the usual way as regards decisions of higher courts. When it comes to Divisional Courts binding themselves, the rule is similar to that used in the Court of Appeal: on civil matters they are bound but not necessarily so on criminal issues: *R v Governor of Brockhill Prison* [1997] 1 All ER 439, 451.

5.8.3 The Court of Justice of the European Communities

Though **Chapter 10** deals extensively with the European influence and 'European Legal Method', specific reference to European Community institutions and legal method is needed here to explain the context in which our law now operates. As we said in **Chapter 1**, leaving the 'European dimension' until later in the book should not be seen as relegating the topic to some form of afterthought.

Throughout this book you will see that both the 'European' way of dealing with cases (the procedure) and the technique of analysing cases (the legal method) are quite different from our approach. This is because the system used by the Court of Justice was created by countries (e.g. France and Germany) which rely on the Civil (or Roman) Law system. For various reasons our Common Law system developed separately from the Civil Law system used on the Continent. As Britain did not join the Community until 1973 there is minimal (but perhaps growing) Common Law influence to be seen in the Court of Justice.

The final court to note then (one of increasing importance) is the European Court of Justice (ECJ). Today we tend to think only of the European Community (the EC—also known as the European Union or EU), but prior to the EC there existed the European Coal and Steel Community (ECSC), founded under the Treaty of Paris 1951. The Court of Justice began life as the Court for the ECSC and therefore pre-dates the European Community. The Court of Justice became part of the European Economic Community (as it was then known) when that Community was founded under the Treaty of Rome 1957. It remained the Court of Justice for the ECSC and became the court for the other Community created at the same time as the Economic Community, viz. the European Atomic Energy Community (Euratom).

There are four major institutions which are common to all the European Communities: the Court of Justice, the Parliament, the Commission, and the Council. We will deal with the institutions in depth in **Chapter 10**. Note that the Court of Justice is commonly referred to as the 'European Court of Justice' or the 'European Court'.

We have listed below a few general points on the Court of Justice which you should bear in mind when reading about the legal method used in English law. For a more

detailed description of the Communities and the Court of Justice we recommend reference be made to Steiner and Woods (2003) and Brown and Kennedy (2000).

Most of the law you will deal with in your studies will be 'pure' English law; but this will become less true over the years: see Lord Denning MR's famous statement in *HP Bulmer Ltd v Bollinger SA* [1974] Ch 401, 418; [1974] 2 All ER 1226, that 'when we come to matters with a European element, the Treaty is like an incoming tide. . . . It cannot be held back'. Remember here, however, that we are dealing with the Court of Justice, not the way individual countries' legal systems work.

What is the jurisdiction of the ECJ?

The Court of Justice exists to ensure that in the interpretation and application of the Treaty of Rome the law is observed. It is therefore the supreme authority on the interpretation of the law relating to the European Community. It deals only with the interpretation and validity of Community-generated law. Therefore, unless the law in question was generated by the European Community (and there are various ways this can occur), the Court of Justice has no jurisdiction. Many criminal law matters, for instance, are questions of domestic law and have nothing to do with the European Community though this is changing with matters such as the European Arrest Warrant, financial crime and money-laundering.

However, as seen in Chapter 1, the impact of Community law is growing. As well as dealing with general agricultural matters, administrative law, company law, etc., its effect can now be seen in everyday life such as employment rights and social law. Thus an increasing number of matters fall within the jurisdiction of the Court of Justice.

How does a case come before the ECJ?

Actions may be brought against individuals, Member States, or the institutions of the Community. We will concentrate in this book on the most common way in which a case will come before the Court of Justice—a reference to the court for a *preliminary ruling* under Article 234 of the EC Treaty.

Under Article 234, any country's domestic courts or tribunals can ask the Court of Justice for a ruling on Community law; but it is that domestic court or tribunal which implements the decision.

It is for the court to decide whether it wishes to refer a matter to the Court of Justice and there are various rules relating to this which we shall explore later. The national court is only asking for an authoritative interpretation of that particular part of Community law. It does this by posing questions in the abstract; it does not ask for the solution to the particular case before it.

Article 234(3) states that a court or tribunal *shall* refer the matter where, as against that court's decision, there is no judicial remedy under national law. So, any court has a discretionary power to refer a case to the Court of Justice and if a court is the final appeal court it *must* refer the matter. Thus the House of Lords should in theory be bound to refer all cases to the Court of Justice which involve a problem of Community law. The House of Lords does not, however, refer all relevant cases to the Court of Justice. This is because it is required to do so only if it considers that such a referral is 'necessary'. What 'necessary' means we will have to leave until **Chapter 10**. Suffice it to say here that for a national court

to decide that it is not 'necessary' to refer the matter basically requires that the provision has already been interpreted by the Court of Justice in previous references made by courts in Member States or the correct application is obvious to the national court.

A key point to note here, however, is that the use of Article 234 **is not an appeals procedure**. The Court of Justice does not decide the case, it merely gives its interpretation of Community law. Most importantly, however, the Court of Justice is the *only* court that can authoritatively interpret Community law. The domestic court has then to apply the ruling as it sees fit to the case in hand.

Does the ECJ use a system of judicial precedent?

A major distinction between how European lawyers (and courts) reason and the reasoning of Common Law lawyers is the use of *stare decisis*. European lawyers are, traditionally, merely persuaded by precedent. The same is true of the Court of Justice.

Obviously, as Stein has said, 'Every legal system has case law in the sense that the scope of the rules is illustrated by their application to a set of facts' (1984:85), but this is not the same thing as holding to a doctrine of precedent. Further, any legal system seeks to avoid inconsistencies; but, as we have seen, this is certainly not the same as holding to a strict doctrine of *stare decisis*. For whereas the Common Law relies on declaring law only when the occasion requires it (i.e. through litigants bringing cases), the Civil Law system relies heavily on Codes: written, logical, reasoned, and systematic statements of principles of law. As Lord MacMillan observed:

From these principles the whole law [can] be deduced, and with the aid of these principles the law [can] be methodised and arranged. It is the conception of order, logic and reason in the regulation by law of human affairs. (1937:79)

Cases, in simple terms, become examples of applications of the Code; hardly the stuff of which *stare decisis* is made.

The Codes vary in form and technicality of language. The language employed in the French Code is aimed more at the layman than is the case with the German Code, for instance. Now, the Civil Law lawyer bases his argument on the explicit or implicit statements in the written law (the Codes and academic writing), not overtly on the opinions given in earlier cases. Developing this point, reliance on the Codes and the principles stated therein drives the Civil lawyer away from an obsessive interest in the facts of earlier cases. It is the issue that matters. The Common Law lawyer, on the other hand (as we shall explore in the next chapter), holds tightly to the concept of 'material facts' and the importance of individual cases.

Indeed, the predominance of issue over fact has to be the pattern of thought employed by the Court of Justice because the function of the court is to *interpret* Community law. As the court is required only to answer abstract questions from the national court and does not make decisions in a particular case, so the facts of a case (which are so important to the English law lawyer in distinguishing one case from another) take on less significance. This does not mean the facts are ignored, because it is almost impossible to answer a legal question without some reference to the context in which it has arisen. But it does mean that our system of *stare decisis* cannot apply to the Court of Justice. Further, the

court is the final court on these questions and the only thing that can alter such a decision (other than the court changing its mind at a later date) is an alteration made to the Treaty itself. As annual minor alterations to the Treaty are an impossibility—major or complete revisions for political reasons are the only likely source of alterations—the court has to favour flexibility over certainty.

However, it is worth noting here the point we made above that the Court of Justice, in trying to define when it is ‘necessary’ for a domestic court to refer a matter to the Court of Justice, has stated that it would not be necessary if (amongst other things) the provision in question had already been interpreted by the Court of Justice. This at least shows the value of precedent in any system; but it does not mean that the Court of Justice is moving towards our system of *stare decisis*.

5.9 Impact of Human Rights Legislation

We noted in **Chapter 1** that the Human Rights Act 1998 came into force in October 2000. We shall explain this in greater depth in **Chapter 9**, but for the moment we can say that all Common Law rules and precedents that are incompatible with Convention rights are potentially open to challenge, especially if those precedents relate to the interpretation of statutory provisions. Further, the Act expressly requires the British courts to *take into account*, among other things, the judgments, decisions, and advisory opinions of the European Court of Human Rights, thereby adding another court to the list of things to be aware of in giving legal advice (though note the comments made above at 5.5.4.3 on the case of *Price v Leeds City Council* and the question of the precedent value of such decisions).



CONCLUSION

Both the Common Law and the Civil Law traditions utilise the concept of precedent. No case has a meaning by itself; each case stands in a relationship to other cases. Like tracing one’s ancestors, therefore, it is at least theoretically possible to go backwards in time, step by step, to see how a complicated principle emerged from perhaps a single case. It is not uncommon to find gross inconsistencies or jumps in logic, but for the most part the changes will be evolutionary rather than revolutionary. Inevitably one will face the same problem as with the ‘Big Bang’ theory of how the Universe began: what came before the original case?

Sometimes the answer is that the seminal case derived its principle from a mixture of other cases on related (often barely related) principles: see, for instance *Rylands v Fletcher* (1868) LR 3 HL 330. On other occasions the principle may be derived from ancient Roman, Greek, or Biblical laws. Or the source may lie in a perception of fundamental rights and wrongs, such as laws prohibiting murder. Often the answer lies in works written by eminent scholars centuries ago—their views on the law being accepted by judges in later cases and then set as legal doctrine by the mechanisms of judicial precedent. The fact

that these initial cases or scholarly writings were illogical, have exceeded their 'best before' date, or have been misinterpreted does not mean that they can be easily upset.

Much of this reification of (sometimes) archaic principles is due to the fact that there is a world of difference between merely recognising the source and value of precedent and the concept of *stare decisis*. The great value of the doctrine of *stare decisis* is that it provides certainty. On the other hand, there are dangers: first, that in order to avoid the conclusions of *stare decisis* courts are sometimes forced to find hair-splitting distinctions between cases; secondly, the doctrine limits flexibility and can make unassailable some principles which should have been abandoned long ago.

A rare example of a long-established legal concept being overturned can be found in *R v R* [1991] 3 WLR 767; [1991] 4 All ER 481. In *R v R*, public policy, together with historical and social considerations, came under review. This case concerned 'marital rape' and posed the question whether a husband could be criminally liable for raping his wife if he had sexual intercourse with her without her consent. The idea that a man would not be guilty in these circumstances could be traced back to Sir Matthew Hale in his *History of the Pleas of the Crown* written in 1736. Texts and cases since that time had taken this proposition as an accurate expression of the law (which it probably was in 1736). In *R v R*, however, the House of Lords took the opportunity to restate the law concerning marital rape and declared that the husband could be guilty of rape in these circumstances. As Lord Keith said: 'The common law is . . . capable of evolving in the light of changing social, economic and cultural developments.'

You may, however, ask yourself one final simple question: why should we stand out from the rest of the legal world with our fixation that once a superior court has decided a matter an inferior court *must* follow it?



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