Ten things you need to know about judicial precedent

Craig Beauman describes and explains the doctrine of judicial precedent, an important cornerstone of the law-making process in the English legal system.

1 The doctrine

The English common law has largely developed through custom and the decisions of judges in the court. When a judge makes a decision, they lay down or set a precedent. Depending upon where in the hierarchy of courts that judge sits, they will dictate how important or binding that decision is. Generally, decisions in the inferior courts are not binding, whereas those in the superior courts are.

2 Court hierarchy

The English courts are set as a ladder or hierarchy of importance of decision-making. The English courts were developed in such a way that an appeal could be allowed against a judge’s decision, so that no single judge or small panel of judges can dictate the fate of the law, and so that mistakes could be rectified.

3 Stare decisis

Judicial precedent is guided by the common law maxim stare decisis. This Latin phrase translates as ‘let the decision stand’, meaning previous judicial decisions should not be changed easily or lightly. Even where there is an ability to change a judge’s decision on appeal, or in the same court, judges prefer not to do so, choosing certainty rather than uncertainty.

4 Ratio and obiter

The decision made by a superior court judge will generally be in two parts:
- The ratio decidendi (‘the reason behind the decision’) — the part that ‘binds’ future cases on the same/similar facts.
- The obiter dicta (‘other things said in passing’) — the part that does not bind but is discussed based on related facts — see R v Gotts (1992) or Central London Properties Trust v High Trees Ltd (1947). A-G for Jersey v Holley (2005) is an exception to the obiter dicta rule.

5 Law reporting

A judicial precedent can only be correctly followed if it is accurately documented. This is called a law report. All judges’ decisions are documented. Certainly, those in the superior courts are written down as a verbatim report for future cases to follow, or for an appeal court to understand how a judge/panel of judges in a previous case came to a decision. Precedent is only as good as its law report.

6 Precedent

- A binding precedent is a decision made in an earlier case by a higher court, which must be followed in a later case by a lower court.
- A persuasive precedent is a previous decision that does not have to be followed, but which a judge may wish to follow, such as an obiter dicta statement.
- An original precedent is where there was no previous case or precedent on that matter — see R v R (1991) and Donoghue v Stevenson (1932).

7 The Practice Statement

Between 1898 and 1966, the House of Lords (now the Supreme Court) decided to be bound by its own previous decisions on the grounds of certainty. This proved an unhelpful shackle to decision-making in the court due to the policy’s rigidity.

In 1966, the Lord Chancellor issued a practice statement asserting that the House of Lords would no longer be absolutely bound by its previous decisions. He was under pressure to move into line with the superior courts in other common law countries, such as the US Supreme Court, in allowing a departure from previous decisions.

8 Operation of precedent

- Overruling is where a court in a later case states that the decision in a previous case is wrong and no longer valid. The court must be superior in the hierarchy to overrule, or can be the same court depending upon certain rules, for example, the Court of Appeal or Supreme Court — see Young v Bristol Aeroplane Co. (1946) and BRB v Herrington (1972).
- Reversing is where a higher court changes the decision of a lower court in the same case — see Gillick v West Norfolk Wisbech Area Health Authority (1986).
- Distinguishing is where a judge can avoid a previous decision by finding that the material facts in a previous case, while similar, are sufficiently different that a distinction can be drawn — see Merritt v Merritt (1970).

9 Arguments for

Arguments for judicial precedent include the following:
- certainty for future cases
- consistency for future cases
- transparency of previous cases
- flexibility for potential change

10 Arguments against

Arguments against judicial precedent include the following:
- rigidity of previous decisions
- complexity of previous decisions
- illogical decisions
- the law is slow to change

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