

## Using cases to illustrate, explain how and why the courts make use of statutory interpretation and the doctrine of judicial precedent in solving a point of law.

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### Introduction

Both the use of statutory interpretation and the doctrine of judicial precedent are very important when solving a point of law in the English legal system. Judicial precedent is a source of law arising from the decisions of judges which future judges are often bound to follow in similar cases. Statutory interpretation is the method by which judges interpret and apply existing legislation. Both judicial precedent and statutory interpretation allow for individual cases to be judged fairly and to remove ambiguity from the laws made by Parliament.

### The doctrine of judicial precedent and why it is used

The doctrine of judicial precedent is based upon the principle of *stare decisis* which loosely translates to “stand by what has been decided and do not unsettle the established”. The judgement speech given by judges at the end of a case is important in setting the precedent and two principles can be drawn from it. These are the *ratio decidendi* and *obiter dicta*. *Ratio decidendi* is the Latin phrase for “the reason for deciding” and this is the essential part which forms the binding precedent all lower courts must follow. *Obiter dicta*, however, simply means “other things said” and although it is not a necessary part of the judgement it can be followed as a persuasive precedent in the future. *Obiter dicta* can be a hypothetical set of facts, a deep study of a relevant area of law or the courts opinions on the merits of the case, for example. Judicial precedent is primarily used to ensure fairness and consistency in the law. Binding precedents are a way to ensure that all cases of similar facts are judged equally and therefore end in similar results.

### Types of precedent

The three types of precedent are original, binding and persuasive and are all formed by the decisions of a judge, either for the first time or previously.

Original precedents are those made for the first time and therefore the judge is not able to look back at previous decisions on the relevant point of law. In this situation, the judge will have to form his own judgement but may find assistance from cases with similar legal principles. This is known as “reasoning by analogy”. The judgment made here will become a new precedent set for future cases. One example of an original precedent is illustrated in the case *DPP v Smith (2006)* and was created by the Queens Bench division. In this case the defendant had gone to visit his ex-girlfriend and had held her down to cut off her ponytail with scissors. The magistrate decided that although this was assault it was not actual bodily harm under the Offences against the Person Act. On appeal the argument that she did not suffer from bleeding, bruising or psychological harm and that the hair was “dead tissue” was rejected. There was no past precedent in this area and so the judge created one. The judge held that “*Even if, medically and scientifically speaking, the hair above the surface of the scalp is no more than dead tissue, it remains part of the body and is*

*attached to it. While it is so attached, in my judgment it falls within the meaning of "bodily" in the phrase "actual bodily harm... Where a significant portion of a woman's hair is cut off without her consent, this is a serious matter amounting to actual (not trivial or insignificant) bodily harm."* This judgement was an original precedent and was to become binding in the future.

Binding precedents are those which are previous decisions and must be followed regardless of whether the later judge agrees or disagrees. Courts lower down in the hierarchy are bound to follow these previous precedents if the facts of the case are largely similar to those in the past decision. For example, the Court of Appeal is bound by the precedents of the House of Lords. All courts in the hierarchy are bound by the European Court of Justice as it is the most supreme court. Magistrates and County courts do not set precedents but must follow them.

Persuasive precedents are the opposite of binding ones, in which a court can choose to follow them if they wish. No court is bound by them, but are often persuaded by their judgement on a legal principle to apply it in their own case. Persuasive precedents can come from a number of different sources, the first being from courts lower in the hierarchy. In the case of *R v R 1991*, the Court of Appeal became the source of persuasive precedent for the House of Lords who also decided for the same reasons that a man could be guilty of raping his wife. The decisions of the Privy Council can also be influential on judges. Although it is not part of the court hierarchy, many of its members are also Law Lords and so their decisions are highly respected. This was illustrated in the case of *R v Mohammed 2005* where the Court of Appeal followed a persuasive precedent from the Privy Council in *Jersey v Holley 2005*. However, the Court of Appeal was wrong to do so as the binding precedent from the House of Lords in the case of *R v Smith 2000*, should have been followed instead. A further source of persuasive precedent is the obiter dicta of a judge's statement. Evidently, this was used in the case of *R v Gotts 1992*. Here, the Court of Appeal followed the obiter dicta of the House of Lords in the case of *R v Howe 1987*, where it was stated that duress could not be used as a defence by someone charged with attempted murder. A judge may also be persuaded by the precedent formed in a dissenting judgement, where a judge will give reasoning for his disagreement. On appeal, the House of Lords may decide they prefer this dissenting judgement to the others and apply it to either this or a later case. Decisions made by courts in foreign countries who have either similar legal systems or ideas on common law, are also source for persuasive precedent.

### The House of Lords and their previous decisions

Appellate courts (those hearing appeals) are generally bound by their previous decisions under the doctrine of judicial precedent, however, things have developed and now the House of Lords are able to avoid this.

During the nineteenth century the House of Lords became strictly bound by their own decisions whereas originally this rule was flexible. This was held in the case of *London Street Tramways v London County Council 1898* where the House of Lords declared it was to be bound completely by its previous decisions because certainty in the law was more important than the risk of individual hardship. The only exception to this rule was to be if a decision had been made "per incuriam" or "in error" because a relevant act had not been considered. However, this strict regulation caused

implications because if a previous decision did need to be changed it could only be done through the passing of an Act of Parliament which takes a very long time. This was the case in DPP v Smith, which resulted in the Criminal Justice Act 1967. Due to this reason and the fact that the law could not evolve and meet the changing social conditions, the Lord Chancellor passed the Practice Statement 1966.

The Practice Statement gives the House of Lords more flexibility and they are now able to depart from their previous decisions where they feel it is “right to do so” or where the past decision has been wrongly decided. In these situations the House of Lords can reject past decisions and decide on new laws. Despite this power, the House of Lords are reluctant to apply it in cases and the first time it was used in Conway v Rimmer 1968, it was merely to rectify a technicality. As the Practice Statement stresses that there should be certainty within criminal law, the House of Lords is even more reluctant to apply it in this area. One important case where the House of Lords did decide to overrule their previous decision was in R v G and R 2003. Where previously in Caldwell 1982 they had held that recklessness included the situation where the defendant had not realised his actions caused damage, but an ordinary man would have, they decided this was wrong and instead a defendant can only be reckless if he realises there is a risk but takes the chance anyway. This is a fairly recent case which shows the House of Lords are becoming more relaxed in using this Practice Statement. This freedom given to the House of Lords is beneficial in allowing the law to change and gives individuals a fairer result as seen in the case of R v G and R 2003.

### Avoiding judicial precedent

There are a number of ways that judges can avoid binding precedents under the doctrine of judicial precedent. These are distinguishing, overruling and reversing.

Distinguishing can be used when a judge finds that the facts of the case he is dealing with are significantly different to those from the precedent he is bound by and therefore he cannot draw the same conclusion. This allows the judge to avoid the binding precedent he would otherwise have to follow. This is illustrated in the cases Balfour v Balfour 1919 and Meritt v Meritt 1971. Where both cases involved a wife claiming her husband breached a contract the facts of the case were very different. In Balfour, the contract was held to be a domestic agreement and therefore there was no legal intention to make the “contract” binding. However in Meritt the couple made the agreement in writing after they had separated and therefore it was held to be a legally binding agreement rather than a domestic one. Here it is clear to see that the facts of the case were so different that the outcome was affected and that the method of distinguishing was rightly used.

Overruling is the method by which a later higher court can overrule the past decision of a lower court in the hierarchy. This also occurs when the House of Lords use the Practice Statement to overrule their past decisions. This method is illustrated by the case of Pepper v Hart 1993 where the House of Lords decided that Hansard could be used to discover the meaning of certain words in an Act of Parliament where they had previously refused this right in the case of David v Johnson 1979.

Reversing is the last method enabling judges to avoid the judicial precedent and is the process where a higher court overturns the decision of a lower court on

appeal of the same case. An example is the Court of Appeal deciding to make its own judgment on a point of law which the High Court had already judged before appeal.

### Statutory interpretation and why it is used

Statutory Interpretation is used by judges when a question arises on a point of law during a case. There are a number of rules from which a judge can choose to allow them to interpret the statute and apply it fairly to the case. Judges use statutory interpretation to decide the exact meaning of a statute when it may be ambiguous. Often Acts of Parliament are unclear due to the use of a broad term, ambiguity over certain words or phrases, a drafting error by Parliamentary council, new developments (for example in technology), or changes in the use of language over time. The ambiguity over a broad term was apparent in the Dangerous Dogs Act 1991. This Act stated “any dog of the type known as the pit bull terrier” where the term “type” led to dispute as to whether it referred to the breed or similar characteristics. In such situations, the courts are able to interpret an Act taking one of the four approaches. I will explain why each individual approach is used in this following section.

### The Literal Rule

The first and previously the most common method taken by the courts is the literal approach. Using this reasoning, judges give the words of the Act their plain, literal meaning, regardless of its fairness considering the facts of the case. Since the nineteenth century this approach has been the first choice of most judges although it has resulted in absurd decisions in the past. This was illustrated in the case of Whitley v Chapel (1868) involving a defendant who had posed as somebody else, in order to be able to vote. However, the court held that the defendant was not guilty as the person he pretended to be was deceased and therefore he was not impersonating “any person eligible to vote” under the charge. Here, it is seen that the court took the word “eligible” literally in interpreting the Act and so the law applied was absurd. There are two rules under the literal approach. The first is the “noscitur a sociis” rule which says that the word will be defined by its context. The second is the “ejusdem generic” rule which defines a term based on the words which precede it. For example, the Betting Act 1853 prohibited the keeping of a “house, room or other place” for the purpose of betting. When the case Powell v Kempton Park Racecourse (1899) arose the defendant was found not guilty for operating betting at an outdoors ring because an “other place” was interpreted as an “indoors place” like the other words listed. These two cases illustrate the disadvantage of the literal approach in creating an absurd decision however, it can be useful in providing certainty to the law and ensuring the laws Parliament make as the elected body are being followed.

### The Golden Rule

The second approach is the golden rule; an extension of the literal. There are also two ways of using this interpretation, the narrow and the broad approach. Generally the rule is that a judge should first look at the literal approach unless it would be absurd to do so in which case they can choose one of the golden rule approaches. The first, narrow approach allows a judge to choose the meaning of a term which may have multiple definitions. This was illustrated in the case of R v Allen (1872) which involved the offence to “marry whilst one’s original spouse was still alive”. The court held that the word “marry” could mean either to “become legally

married to another” or to “take part in or go through a ceremony of marriage”. The court decided that the first meaning would lead to an absurd decision as no-one can “legally marry” more than once and therefore no-one could be guilty of bigamy. The court here used the golden rule to choose between the two definitions under the Offences against the Person Act in order to avoid an absurd decision. The broader approach of the golden rule allows the court to modify words in the statute, because although the term may have a clear meaning it would result in repugnant law. This was illustrated in the case of *R v Sigworth (1935)* involving the Administration of Justice Act 1925. In this case, a son who had murdered his mother was set to inherit her estate under the act as she had left no will. However, the courts refused to allow him to benefit from his crime and so they wrote in to the Act that a person will not be entitled to inheritance from the person whom they have killed. This decision of the court avoided an obscene result. The benefit of the golden rule is the lenience it gives judges to apply a reasonable decision in a case and ensures justice. Unlike the literal rule, however, it is difficult to predict what the outcome of the case will be, if used.

### The Mischief Rule

The third approach judges may choose to take is by the mischief rule. This rule allows the court to decide on Parliament's intention through the Act and apply it accordingly. This was set out in the *Heydon's case 1584* and the four points the courts were directed to consider were the common law before the Act, the mischief it failed to provide for, the remedy Parliament appointed to “cure the disease of the commonwealth” and the true reason of the remedy. By recognising what mischief the previous Act failed to prevent, the court can apply the recent Act to fill this gap. This was illustrated in the case of *Smith v Hughes (1960)*. Here, the six defendants appealed against their conviction under the Street Offences Act 1959 which held them guilty of “loitering and soliciting in a street or public place for the purpose of prostitution”. They argued that they were not literally “in a street or public place” as they had been either on the balcony or at windows which were half open or shut, when attracting the attention of passing men. Lord Parker decided to use the mischief rule and held that Parliament's intention through the Act was to “enable people to walk along the streets without being molested or solicited by common prostitutes” and so it was irrelevant whether or not they were literally “in a street”. As it is seen here, the mischief rule also prevents an absurd decision that the literal rule would have provided. However, this form of statutory interpretation is seen to undermine the aim of elected law-makers by allowing judges to make the law.

### The Purposive Approach

Finally is the purposive approach, allowing judges to apply laws in light of what they believe Parliament wanted to achieve by them. This approach was taken by judges on the case *Coltman v Bibby Tankers (1988)* on the interpretation of the term “equipment” under the Employers' Liability (Defective Equipment) Act 1969. The judge stated “*The real difficulty in the case, as it seems to me, arises from the fact that the word "equipment" is defined in section 1(3) of the Act, and that the definition expressly includes any vehicle and aircraft, but makes no mention of ships or vessels*” In this case, the court decided to include a ship under the term “equipment” to achieve the intention of Parliament in making employers liable for injury or death of employees. This purposive approach is effective in providing justice to individual

cases; however, it can only be used when Parliaments intention is not clearly expressed in the Act. The disadvantage of this approach is that it is the judge's personal interpretation of Parliaments intention and is, in effect, judicial law-making.

### Conclusion

In conclusion, it is clear that both the use of judicial precedent and statutory interpretation are very important within the English legal system, to solve a point of law. They are both effective in creating certainty and consistency in the law but are flexible enough to allow a fair decision to be made. They also both allow the law to change and adapt over time with this flexibility and ensure that a point of law is decided quickly and efficiently.

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