

'Using cases to illustrate, explain how and why the courts make use of the doctrine of judicial precedent and statutory interpretation to resolve points of law.'

By Amy Cross (Nov 2008)

Introduction:

Statutory Interpretation and Judicial precedent play a key part in the English legal system, with both of these it makes sure that court can apply the correct law from which parliament has established. Also that individuals feel they have been appropriately and fairly dealt with. Without these two systems then they many points of law which would never be resolved and that means more time and money wasted in court, so both of these systems benefits the court and parliament a lot and make sure important points of law are resolved.

What is statutory interpretation?

Statutory Interpretation is when cases come before the courts sometimes they can be disputes over the exact meaning of some of the words in the act of parliament, courts make it their job in deciding the exact meaning of a particular phrase or word.

The main reasons on why a phrase or word may be unclear could be that there is a broad term, were the word could be designed to cover several different possibilities which was seen in the case Dangerous Dogs Act (1991) where there was confusion with what was actually meant with the word 'type'¹ and does that word mean the same meaning of 'Breed'².

Another reason on why a word may be unclear would be to do with ambiguity, were a word may have two meanings and that it is not clear in the act in which word they are meaning. With an example of park, park your car or a park were you play in. In acts of parliament we also see draft errors occur, were when the parliamentary counsels who are in charge of drafting the original bill may have made an error in what they have written and had not been noticed when read over but then was noticed in court.

Through times we see new developments, were an old act of parliament does not cover present day situations, we can see a clear example of this in the case Royal College of Nursing V DHSS (1967) where now in the 21st century we see a clear change in medical science and methods which were different in the 1900's especially in the 1960's when the Abortion Act (1967) was passed. We

¹ Chapter 17 – OCR Law for AS

² Chapter 17 – OCR Law for AS

also see changes in the use of language, where words have changed their meaning over the past years.

Over the years in the English legal system there have been four developed different rules of interpretation to discover the meaning of a particular rule.

The Literal Rule

With the literal rule you literally follow the word exactly what is said and written, if the words of an act are unclear you still must follow exactly what they say no matter even if they are weird and stupid. With this rule courts will just give the words their plain, ordinary or literal meaning. The idea of following literal what the word says was expressed by Lord Esher in R v Judge of the city of London court (1892) where he said *“If the words of an act are clear then you must follow them even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity”*³. In the early 1900’s this rule was used very commonly and still used today to help courts decide what an actual word mean, It is used as the starting point for interpreting any legislation.

With all the rules there is advantages and disadvantages on when using them which are important when solving points of law, the advantages on when using the literal rule is that with this rule it has to literally follow the words of parliament and which words they have used in the past. In the English legal system parliament are the law making body and it is right that judges should apply the law exactly as it is written and said. With the literal rule interprets exactly as it is written, which when in law it makes it easier for people to know the law and how judges will apply it.

The disadvantages of using the literal rule is that with this rule it can lead to obscure outcomes, as it not always possible to word an Act so that it covers every situation that parliament meant it to. In the case Whiteley V Chappell (1868) where we see that the defendant was not literally guilty this made the law absurd, as what the defendant had done was fraud and wrong. As well as obscure decisions with the use of the literal rule we can also see it leading to harsh outcomes, which was seen in the case London & North Eastern Railway Co v Berriman (1946) were a rail worker was killed while doing maintenance work, when his widow tried to claim compensation she was told she would not receive anything due to the worker had been maintaining the line, not ‘Relaying’ or ‘Repairing’⁴ as said in the Fatal Accidents Act. There had been a minor technicality with the words maintaining and repairing as they had been seen as being completely different words when taking the meaning of them literally. After these cases had been seen in court Professor Michael Zander

³ Page 225 – OCR Law for AS – Under subheading of 17.3 The Literal Rule

⁴ Page 225 – OCR Law for AS – Under subheading of 17.3.1 Cases using the literal rule

decided that the literal rule was being mechanical and divorced from the realities of the language which was in use.

The Golden Rule

With this rule it is very similar to the literal rule, but it is a modification of it, the golden rule can be used if the literal rule looks absurd so then the golden rule can try to help distinguish what the phrase or word means. The first thing in which the golden rule looks at is at the literal meaning, they then decide in which view on how the golden rule should be used. Either through the 'narrow application' or the 'wider application'. With the narrow approach there are two meanings which court can choose between, if there is only one meaning then that one must be taken and followed. The second application the wider application is where the word has a clear meaning and can be easily followed but the outcome of the word could lead to result which should not be allowed.

There has been two cases where we have seen the golden rule being used in the R v Allen (1872) where we see it is illegal to marry whilst the original spouse was still alive, when the defendant claimed he was not legally married, the court decided that the word marry means go through a ceremony of marriage, so the defendant was seen guilty due to him going through a marriage ceremony. As the word marry can mean two different things the actual legal binding or the marriage ceremony so the narrow approach was taken when dealing with this case. With the much wider approach we see with the case R v Sigsworth (1935) that the golden rule was used to make sure that a repunat situation was prevented. As when the son had killed his mother he would have been entitled to her money due to him being next of kin but as he killed his mother the courts believed that it was not fair and correct in letting him get all the money when he killed his mother probably for her fortune.

With the golden rule there is many advantages and disadvantages on when using it, the advantages which we see are that the golden rule is an 'escape route'⁵ from having to use the literal. As with the golden rule it respects every word that parliament has said apart from some limited situations. The golden rule allows the judges to choose the most sensible and correct meaning for a word in which they feel will fit in better with the case. It finally can also lead to help situations not become repugnant and make sure sensible decisions are made. The disadvantage in which can occur with the golden rule is that it has a very limited use, so we usually see the golden rule being used in vary rare occasions, people can never predict when the golden rule can be used, with people describing 'feeble parachute'⁶.

⁵ Page 226 – OCR Law for AS – Under subheading Advantages of the golden rule

⁶ Page 227- OCR Law for AS - 17.4.3 – Disadvantages of the golden rule

The Mischief Rule

With the mischief rule it is applied to what parliament actually meant, this rule gives the judges more discretion than the other two rules, the mischief rule comes from the Hayden Case (1584) where four points that were decided that the court should consider and follow when deciding the true meaning of the statute. The four points which were decided were that, 1. ‘What was the common law before making of the act’ 2. ‘What was the mischief and defect for which the common law did not provide’, 3. ‘What was the remedy the parliament hath resolved and appointed to cure the disease of the commonwealth?’ and 4. ‘The true reason of the remedy’⁷. With the mischief rule the court looks to see what the law was before the act was passed in order to try and discover what the gap or ‘mischief’ the act was intended to cover. The court will then interpret the act in a way in which they then can cover the gap.

There are many cases which have used the mischief rule, one of the main cases which has been seen is the Smith v Hughes (1960) where it was seen as a street offence for a ‘common prostitute to loiter or solicit in a street or public place for the purpose of prostitution’⁸ which was interpreted in the Street Offence Act (1959). Six women appealed against this as they said they were not on a street or in a public place but they were at the window of ground floor rooms or on a balcony, the court saw that the women were attracting the men and that is what they wanted to stop happening so they were guilty, the women felt this was unfair due to they were not literally in a ‘street or public place’⁹. Another case in which was seen using the mischief rule was Royal College of Nursing v DHSS (1981) where the wording of the Abortion Act (1976) stated that an abortion can only be issued and done by a ‘registered medical Practitioner’¹⁰, but as times have passed medicine has changed and now abortion can be done by nurses and with tablets, the court was left to decide whether this procedure was legal or not, the court used the mischief rule by letting morals come in the way their decision was that abortions had to be correctly done with proper skills from the hospital.

The advantages of using the mischief rule is that it allows judges to look back at the gap in the law which the act was designed to cover, it is making complete sure that the gap gets correctly filled. The disadvantages of using the mischief rule, is that judges some times try to fill in the gaps in law with their own views on how they believe it should be filled. Again with this rule we see that this rule is difficult for lawyers advising their clients on the law, as the

⁷ Page 227 – OCR Law for AS – Under subheading 17.5 The Mischief Rule

⁸ Page 227 – OCR Law for AS – Under subheading 17.5.1 Cases using the mischief rule

⁹ Page 227 – OCR Law for AS – Under subheading 17.5.1 Cases using the mischief rule

¹⁰ Page 228 – OCR Law for AS – Under subheading 17.5.1 Cases using the mischief rule

mischief rule is not used very much and lawyers never know when it could be used.

The purposive approach

This approach looks at what judges believe parliament were trying to achieve, they look for the purpose of parliament in making that decision and making sure that it interprets the law to ensure the purpose is correct. The way in which purposive rule is used is by looking at past laws and finding gaps in which they wish they need to fill in, Lord Denning's attitude towards statutory interpretation was seen within the case Magor and St Mellors v Newport Corporation (1950), where Lord Denning said "We sit here to find out the intention of parliament and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis"¹¹. However this statement was highly criticized by Lord Scarman who stated that "We are governed by parliament's intentions but by parliament's enactments"¹² so from this we see that there are also problems with the purposive approach in which we can see from the other judges on who have looked at the purposive approach.

With the purposive approach there is many advantages and disadvantages in with using this rule, the advantages in which we see include that this rule has a broad approach in which it allows more situations to be covered which overall can lead to justice in individual cases. Also with the purposive approach we see how it leads to gaps in the law being filled with judges deciding on what is best with this act of law. Finally a main advantage is that it allows new technology to happen, as times change technology gets better which evermore will make old laws out date as we may have new technology in which is used. The disadvantages in which we see is that with all the rules/approaches is that it can lead to law being uncertain as it can make it difficult for lawyers on when they are advising their clients; with lawyers never know when this approach may be used. Many people also see that the purposive approach can make law less certain due to it allows many unelected judges makes laws as they decide what they feel the law should be, rather then using the words that parliament decided, in which many people feel is unfair.

The cases in which we see the purposive approach being used is in the case of R v Registrar General ex part smith (1990), where with the use of the purposive approach we see how smith did not get the permission to see his birth certificate at the age of 18 due to he was dangerous murderer in Broadmoor Mental Hospital and the judges believed it was not right for a murderer to be able to have contact with his biological mother as it could put him into danger and also the mother.

¹¹ Page 230 – OCR Law for AS – Jacqueline Martin

¹² Page 230 – OCR Law for AS – Jacqueline Martin, Essay competition winner

Along with Statutory interpretation there is also judicial precedent in which is very important in when trying to solve a point of law in the English legal system.

Judicial Precedent

The doctrine of precedent in the English legal system is based upon on the Latin word of 'Stare decisis et non quieta movere (Stare decisis)',¹³, which can be translated into 'Stand by what has been decided and do not unsettle the establishment',¹⁴. With this it makes sure that there is fairness and certainty in the law and that a judge is making sure that it is following previous decisions from similar cases in which were heard earlier.

With Judicial Precedent it is a source of law in which makes sure that past decision create binding laws for future judges to follow. After every case there is a judgment in where a speech is made by judge on whom is hearing the case on who gives and reasons and explanations on their decisions on when going over the case they explain many principles in which are very important there is two types of principles of law in which are used to come to a decision.

Obiter Dicta and Ratio decidendi

Ratio decidendi is the only part of the judgment which will form the precedent in which future cases will look at, one problem which can occur from a judgment is when deciding what is obiter Dicta and ratio decidendi is. Sir Rupert Cross defined ratio decidendi "any rule expressly or impliedly treated by the judge as a necessary step in reaching his conclusion"¹⁵. The ratio decidendi will all depend on the level of the court making the decision and whether it has to be followed by lower courts in the hierarchy or just bounded within this court.

With obiter dicta this is reminder of the judgment in which is not ratio decidendi within this it includes the speculation on why and how this decision has been made and if any one did disagree with the final decision. Obiter dicta can be used and considered in future but they are not binding as it is seen as 'things said in passing'¹⁶. Judges may use what it is said in future cases but it is up to them if they wish to it is not forced upon them like ratio decidendi is.

¹³ Chapter 14 – OCR Law for AS – Jacqueline (line 2)

¹⁴ Chapter 14 – OCR Law for AS – Jacqueline (line 4)

¹⁵ Page 182 – OCR Law for AS

¹⁶ Dr Jepson PDF slides – slide 4

Original Precedent

we see judicial precedent being formed when points of law come before a judge in cases in which have never been decided before, when this appears from a case it is up to the judge on who will decide what the future precedent will be and how it will be enforced by all lower hierarchy courts or just that court. The judge will not solely make the decision they will look at past cases which are similar and also will look at cases which are from other countries which may have heard a case like this, the decision in which the judge will make will be a new precedent.

With original precedent there is a for and against argument with it as many people do not like the idea of judges being allowed to become the law-making body which is the parliament. Judges are only allowed to enforce that statutory instruments had created. But by letting judges make the decision we will see them giving a clear idea on what they feel is the right and correct decision in specific cases in where parliament may not.

Binding Precedent

This precedent can only be made by a court in which is higher in hierarchy or at the same level, with this precedent it must be followed by all judges even if they do not agree or believe with it. It will come from the original precedent and binding precedent which is only created when the facts of the second case which come up are similar to the original case.

So when we see a binding precedent being used will be when, for example when we see a criminal case in the magistrates' court in which it must follow the past decisions from the crown court due to the crown court being higher in hierarchy.

Persuasive Precedent

With this precedent we see how it is not bound by the courts, the judge may decide and consider using its principles but he does not have to, but is persuaded into following it.

J Martin claimed that there are five different examples of persuasive precedent, which are *courts lower in hierarchy* were a higher court may decided to follow and agree with the same reasoning as a court in which is lower which is seen in the case R V R (1991) on were they was an appeal in deciding if a man should be found guilty of raping his wife. Another is *decisions of the judicial committee of the Privy Council*, the Privy Council is not part of the court hierarchy in the English legal system, but as it is made up of many members of the House of Lords and other prestigious people then they respect and often follow what was decided in past cases. There is many cases in which

the Privy Council have been connected with such as The wagon mound (No1) (1961), later on with this case we see how the English legal system carried on with the decision in which the Privy Council decided.

Statements made obiter dicta is another example of persuasive precedent as judges do not need to follow this as it is the other things said in passing in the statement, but judges have the decision and can decide to use a statement from obiter dicta to help them in a future case. An example of when statement made obiter dicta is in the case of R v Howe (1987). A *dissenting judgment* is another example in where we see when a case has been decided by a majority of judges (2-1) then the judge who disagreed will have the chance to explain why, if later this case then goes onto the court of appeal the dissenting judgment may be used instead, the dissenting judgment has persuaded them to follow it. Finally *decisions from other countries* plays a large part of persuasive precedent as other countries on who may have had cases which are similar to ours, the English legal system may decide to follow their decisions as many countries such as Canada and Australia have very similar law system.

The House of Lords and the Practice Statement

When solving points of law the House of Lords plays a major part, as in the English legal system the House of Lords is the most senior court in which exists. All courts in which are lower in the hierarchy are all bound by past decisions in which the House of Lords decide. In the 19th century it also came that the House of Lords should also be bounded by its past decisions only if the decision has been made 'Per Incuriam, that is in error'¹⁷. Many people believed this was fair due to if the highest court in the system did not follow its bounded laws then it would be unfair and they would be no consistency in the legal system with the other courts. A case in which was used to show certainty in the law was the London street tramways v London county council (1898) were 'the house of lords held that certainty in the law was more important then the possibility of individual hardship being caused through having to follow a past decisions'¹⁸.

As society moves on, social conditions are changing and with this change we see that many laws may need to be changed completely altered, with this in 1966 The Lord Chancellor issued a Practice Statement which recorded as saying that judicial precedent would still and always provide certainty and consistency with the difference that it would allow for change and growth within the English legal system. Since the practice statement has been established it allows the House of Lords to be alter or change any law it believes was wrongly decided. The first case in which we see the use of the practice statement is the Conway v Rimmer (1968) but with this it only involved a technical point which

¹⁷ Page 186 – OCR Law for AS – Under sub heading 14.3 The House of Lords

¹⁸ Page 186 – OCR Law for AS – Under sub heading 14.3 The House of Lords

was found in one of the documents. The first major case in which see the practice statement being used is in the Herrington v British Railway Board (1972), where we see with the use of the practice statement it held that physical and social conditions had changed since 1929 in which were seen in the case of Addie v Dumbreck (1929). So from the 1929 case the law has now been altered and changed into a new law which was first seen in 1972.

Ways in which Judicial Precedent can be avoided

Overruling

When a court decides that a legal rule which was decided in a earlier case was wrong, so for an example this can be shown when a higher court in hierarchy will overrule a decision which was made in a lower court and also overruling can be used when the House of Lords uses the power of The Practice Statement to overrule one of its past decisions. An example of when overruling was used to solve a point of law was in the case Pepper v Hart (1993) when the House of Lords decided that you could use Hansard when wanting to consult on what particular words meant in a Act of Parliament, this decision overruled a decision in which was made in the Davies v Johnson (1979) when the House of Lords then said that you could not consult Hansard.

Distinguishing

This method can be used by a judge in making sure that it can avoid having to follow a past decision in which it would usually have to follow, due to a judge has found facts and materials in which show sufficiently difference with those of the previous case and the present case and that between them there is a clear distinction. A case in which we can see distinguishing being used is when Merritt v Merritt (1971) distinguished a point of law from the case of Balfour v Balfour (1919).

Reversing

Reversing is When a higher court decision maybe overturned by a decisions in a lower court on the same appeal in the same case, so for example the court of appeal may not agree with the legal decision in which the High Court has decided so the Court of Appeal may reverse the decision in which was made by the High Court.

Conclusion

Overall we can see that both statutory interpretation and judicial precedent are very important within the English legal system with both of them making sure that the courts are able to solve important points of law. Both Statutory interpretation and Judicial precedent are effective within the legal system and

they create a great sense of certainty and fairness within the law in which people can trust and rely on but also the English law system it allows improvements in which we clearly can see in judicial precedent.