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SOL10 Judicial Precedent (OCR June 2007)

Source

Lord Denning carried on a one-man campaign to secure a change of practice in the Court of Appeal. The attack was on two fronts. First, he asserted that the Court of Appeal was no longer bound by the decisions of the House of Lords. Second, he claimed that the Court of Appeal was no longer bound to follow its own decisions as a general rule, and not just in the exceptional circumstances laid down in *Young v Bristol Aeroplane [1944]*. These exceptions are:

- 1) Where its own previous decisions conflict, the Court of Appeal must decide which to follow and which to reject.
- 2) The Court of Appeal must follow a later decisions of the House of Lords if its own previous decisions conflicts with it.
- 3) The Court of Appeal need not follow its own previous decisions if it were made *per incuriam* (in error).

Lord Denning's views were based on the Practice Statement itself, which, he alleged, had transformed the stare decisis (doctrine of precedent) principle in the Court of Appeal as well as the House of Lords. But this approach ignored the closing words of the Practice Statement that it was not intended to affect the use of precedent anywhere other than in the House of Lords.

Adapted from The English Legal Process, Terence Ingham

Examination Question - Answer all parts.

(a) Using the Source and other cases, describe the powers of the Court of Appeal. [12 marks]

(a) The Court of Appeal is the main appeal court for the UK and has two divisions, criminal and civil. In terms of judicial precedent the Court of Appeal is technical bound by the courts above it, the UK Supreme Court and the European Court of Justice. With regards to its own decisions each division will bind itself and not the other. However the case of *Young v Bristol Aeroplane 1944* provided the court with several exceptions to this rule.

Decisions of courts above the Court of Appeal

There are only two courts that rank higher than the Court of Appeal in the hierarchy. They are the European Court of Justice and the UK Supreme Court (or formerly the House of Lords). Any decisions made by those courts will create precedent for both divisions of the Court of Appeal to follow. However, Lord Denning was unhappy with this situation and continuously protested against these ideas. In the case of *Broome v Caswell and Co Ltd 1971* he refused to follow the decision made by the House of Lords in *Rookes v Barnard 1964* which concerned the circumstances in which exemplary damages could be awarded.

Young v Bristol Aeroplane 1944

This case established the provisions for when the Court of Appeal could divert from its previous decisions. These exceptions were; if there were conflicting decisions in past cases, the court can choose which one it follows: if the House of Lords makes a decision that effectively overrules one of the Court of Appeal the court must follow the House of Lords: and if a previous decision has been made *per incuriam*. These exceptions gave the Court of Appeal more freedom. However, Lord Denning was still unhappy with this claiming that the Court of Appeal should be completely independent.

The Court of Appeal Criminal Division

This division of the court has the power to take away a person's liberty. The fact that a person's liberty is at stake has led to an extra exception in following its own past decisions. The exception is that the court need not follow past decisions if the law was misapplied or misunderstood. The idea was recognised in *R v Taylor 1950* and *R v Spencer 1985* when judges said 'we must remember that we may be dealing with the liberty of the subject and if a departure from authority is necessary in the interests of justice an appellant, then this court should not shrink from so acting.' This extra exception should be available in each division because when claiming a large amount of money from a small business or individual their livelihood is at risk which can be just as important as a person's liberty.

Distinguishing

This option is available to any judge and it involves finding a distinct difference in cases that allow for the judge to depart from the previous decisions. An example of this can be seen in *Merritt v Merritt 1971*, in this case a wife wished to sue her husband for breach of contract. The precedent for this case would have been *Balfour v Balfour 1919* however, *Merritt v Merritt* was successful because the difference between cases was that Mr and Mrs Merritt had be separated when the agreement was made whereas the agreement between Mr and Mrs Balfour was considered a domestic one made whilst they were together.

Overruling and Reversing

These are also available to any judge. Overruling occurs when a court decides a decision made on a previous case was wrong. A court can only overrule a decision of the court below it. An example of this would be the case of *Pepper v Hart 1993* which overruled the decision in *Davis v Johnson 1979*. Overruling is a way which higher courts can apply their expertise and experience to improve the judicial precedent that will have a massive effect on later cases and peoples futures. Reversing is when a higher court overturns the ruling of a lower court on the same case, this happens frequently in the Court of Appeal, as an appellate court it will either agree with the decisions of lower courts or reverse them.

The Court of Appeal is a very powerful court. In terms of judicial precedent it is below the House of Lords and European Court of Justice and so it is bound by them. The exceptions have been allowed for them in terms of their own decisions because of the size and complexity of the court. All in all its powers in terms of precedent are adequate for the expertise and experience of decision making for its judges.

(b) Consider each of the following situations and explain whether or not the Court of Appeal can depart from the previous decision.

(i) A case concerning a death resulting from medical negligence was heard by the Court of Appeal (Civil Division). A year later, a similar issue is being heard by the Court of Appeal (Criminal Division). [5 marks]

With regards to the decision made a year prior to the current case, because the previous case was heard in a separate division of the court of appeal the court can depart from precedent. This is because it is the law that one division of the court of appeal will not bind another. If the current case was being heard in the Civil Division precedent would have to be followed unless the case could be distinguished.

(ii) A case concerning breach of contract was decided by the Court of Appeal (Civil Division). Days later a similar issue is heard by the same court but the judges now feel that the decision should be different. [5 marks]

In this case it may be possible for the court to divert from its decision. If the judges believe that the previous decision was made *per incuriam* then under the exceptions in *Young v Bristol Aeroplane 1944* they would be allowed to divert from the decision. However, if the judges just disagree with the outcome of this case and know that the law was not misapplied or misunderstood they have no other choice but to stand by what has been said.

(iii) A case concerning murder was decided by the House of Lords. The Court of Appeal (Criminal Division) believes the decision of the House of Lords is out of date. [5 marks]

The Court of Appeal has no other option but to follow what the House of Lords have decided. The House of Lords is above them in the hierarchy and so any decision made by them is binding for the Court of Appeal and every court beneath them.

(c) (i) The **Source** at line 13 refer to stare decisis.

Describe the concept of stare decisis using the source and cases to illustrate your answer. [15 marks]

The way in which judicial precedent works is all centred around the idea of *stare decisis et non quieta movere* which means to stand by what has been decided and not depart from it. Precedent is created from what is known as judgements. Judgements are given by the judge or judges' sitting a case and it explains the reasons behind their decision, the legal reasons they give for reaching that decision are known as *Ratio decidendi*. There are many forms of judicial precedent; these are known as binding precedent, original precedent and persuasive precedent.

Ratio Decidendi

The *ratio decidendi* has been defined as any rule treated by the judge as a necessary step to reaching a conclusion. This could be a reference to the law that was followed and the way in which that law was being applied to the case. There have been the criticisms that the ratio decidendi is difficult to identify within the judgement. The problem comes from older judgement which runs as one long statement. More recent judgements include aids such subheadings to help identify the *ratio*. Many times the *ratio decidendi* has resulted in binding precedent but this depends on the courts position in the hierarchy.

Obiter dicta

This Latin phrase refers to ‘other things said’ and concerns the part of a judgement which is not the *ratio decidendi*. Sometimes a judge will discuss what would have resulted in a different decision. The *obiter dicta* is not binding for any other court but it can often provide persuasive precedent for later cases.

Original precedent

If a case arises for which there is no existing precedent then the decision made by the judge will create a new precedent. It would be original precedent. In these situations the judge is under responsibility to look at cases which could be considered similar and base a decision around them, it is known as reasoning by analogy. This will often occur when a new law is introduced and there have been no cases that ever refer to it because it hadn't been introduced.

Binding precedent

Binding precedent will apply in a later case when decisions from an earlier case have been decided by the same court or a higher one, so the Court of Appeal cannot be bound by decisions made in the High Court. Binding precedent must be followed no matter what the judge's opinion on the law or the case. This precedent will apply when the facts of the later case are significantly similar to the facts of the first.

Persuasive precedent

Persuasive precedent is precedent that is not binding for any court but the judge or judges sitting a case will agree with a certain principle expressed. Persuasive precedent should only be used if there is no binding precedent available and has several sources. These include, courts lower in the hierarchy, for example the Court of Appeal may agree with a decision made in the High Court and stand by it.

Another source would be decisions of the Judicial Committee of the Privy Council. This court is not part of the legal system in England and Wales but since many of its members sit in the House of Lords their decisions are respected, so much so that when conflicting decisions occur between the committee and the House of Lords the lower court chooses which precedent to follow, this was seen in *R v Mohammed 2005* when the Court of Appeal decided to follow the committee's decision from *A-G Jersey v Holley 2005* instead of a House of Lords decision.

A final example would be statements made *obiter dicta*. Though these statements may not have applied directly to the case the judgement concerned the *obiter dicta* statements could prove useful precedent. This can be seen in *R v Gotts 1992* which concerned duress as a defence to attempted murder. In a previous House of Lords case, *R v Howe 1987*, which decided that duress could not be a defence to murder. An *obiter dicta* statement said that duress should not be a defence to attempted murder and so the Court of Appeal based their decision on this.

Overall, there are three types of precedent. These are original precedent, binding precedent, and persuasive precedent. Each type of precedent has a separate set of rules but all add to the general concept of *stare decisis*. Judicial precedent helps create certainty and fairness within the law.

(ii) Discuss whether or not the powers of the Court of Appeal within the doctrine of precedent, should be extended. [12 marks]

For decades now, people have argued that the Court of Appeal should have more powers when it comes to judicial precedent. On one hand most of the judges in the Court of Appeal have the same experience and knowledge of judges in the House of Lords and so why shouldn't they receive similar powers. On the other hand the Court of Appeal is still below it in the hierarchy and if exceptions are made for one court then they should be made for all lower courts.

The hierarchy exists for a reason

There is a hierarchy to the courts, just as there is hierarchy in any other system. There has to be a leader to every system and the courts system should not be any different. The idea of precedent is to create stability and certainty in law. If the Court of Appeal have extended powers it will remove this certainty and stability. It will also lead to judicial law making, which is already an issue. There is no need to make that issue more prominent.

Experience and Expertise

As places in the House of Lords can't accommodate for every capable judge the majority of those who aren't there sit in the Court of Appeal. With that in mind the powers of the Court of Appeal should be extended because the judges that sit in there have just as much as many years experience in the field and expertise on decision making than the judges that sit in the House of Lords and so they should be granted the same powers.

Links to law making

The Court of Appeal sits underneath the House of Lords and the European Court of Justice both of which courts are closely linked with law making and so their powers extended further than the Court of Appeal's. They have more power because they have more chance of applying the law correctly because they play such an active role in the creation of it.

Amount of cases heard

In comparison to how many cases are heard in the House of Lords, the Court of Appeal will hear a significantly large amount more. This goes to show that the majority of cases decided in the Court of Appeal have received an outcome that has no need for appeal. This proves the capability of the judges. If judges are extremely capable they should be granted extended powers which could in turn reduce the amount of appealed cases even further.

The Importance of Structure

There has to be leader in every system as was mentioned earlier. If extended powers are granted the Court of Appeal then every other court should be entitled to them. Each court can argue that they have experienced and capable judges. There has to be structure and a set of rules to the system otherwise it wouldn't work correctly. These judges already have the power to overrule lower courts, distinguish cases and reverse decision in many cases plus the exceptions in *Young v Bristol Aeroplane 1944*. Any more powers would, as was said earlier, risk uncertainty and unfairness in the law.

All in all the Court of Appeal's powers should remain as they are. The court is not at the top of the hierarchy or linked with law making like the House of Lords is. Though they have very experienced, knowledgeable and capable judges the other points cannot be avoided, the powers should remain as they are.