

Comparative Common Law – Judge Made Law (Part two)

It is conceivable that all legal systems follow judicial precedents "for it is a natural practice of the human mind, whether legal or non-legal, to accept the same pattern in similar or analogous cases" (2) : a rational law demands that like cases be treated alike. So by no means is reliance on judicial precedents a unique feature of English law or other common law systems. What is unique is that English precedents are capable of possessing the quality of a proper source of law and can bind future judges suitably positioned in the judicial hierarchy unless overruled or distinguished.¹

Class Summary

This class considers the different ways in which judges make law via overruling, reversing and distinguishing precedent. Within the common law tradition judges have to adhere to the doctrine of stare decisis and ratio decidendi. Judges are also free to make reference to the obiter dictum of a previous case when deciding the case currently before them. The task of determining the ratio in a particular case is not that straight forward as it is infused throughout the whole of the judgment and it is upon the barrister and or judge to then determine it. Being able to determine the ratio decidendi of a case takes years of experience. The ideology of the judge also comes to play in determining when and what precedent should be followed. Normally, the judicial ideology can fall into two camps, the formalists and the realists. Formalists respect the doctrine of precedent where in contrast realists do not consider themselves to be bound by the doctrine of precedent and therefore allow their own background and particular values to play a role in the decision making process. It is a generally accepted principle that like cases should be treated alike and there is an obligation upon the judge to follow precedent and that the judge is under a duty to following binding ones but not persuasive ones. The beauty of stare decisis is that it creates certainty in the law.

The principles of English law are derived from observing the development of law in a particular area. It is through the cases themselves and their decisions that case law precedent comes to life. Establishing the principle in a case is particularly important. Establishing/determining what the precedent should be in a particular case is more than simply an act of comparison or interpretation it is also about the arguments of the particular case.²

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¹ <https://www.law.kuleuven.be/apps/jura/public/art/21>



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² Learning Legal Rules, James A. Holland & Julian S. Webb, 5th Edition, Oxford University Press, 2003, pp.122-181

Required Reading

Please read the following cases as they illustrate the different ways in which precedent can be used:

1. **R v R [1991] 3 WLR 767**
2. **British Railways Board v Herrington [1972] AC 877**
3. **Gillick v West Norfolk & Wisbeck Area Health Authority [1986] AC 112**
4. **R v Howe & Bannister [1987] 2 WLR 568**

Self Check Questions

1. In the case of R v R the previous precedent was overturned, what was the reasoning of the judges in the case for this?
2. The case of British Railways Board v Herrington established the a duty of care was owed to trespassers, what was the justification for creating a new area of law and how did the judges find a legal basis for their decision?
3. What is the Gillick competence test? Please list.
4. What was the significance of the obiter decision in R v Howe & Bannister? Why did the court choose to take this approach?

Definitions/Key Terminology

Please familiarise yourself with the key concepts and terminology listed below:

- Per incuriam
- Overruling
- Reversing
- Distinguishing
- Ratio decidendi
- Obiter dictum
- Stare decisis