# Understanding Precedent

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| This article performs two functions: |
| 1. It explains in simple form the rules and function of precedent |
| 2. It describes the reasoning and policies that can provide justification for precedent. |

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1. The full names of the defendants are 'Dean and Canons of Windsor'.
2. The full name of the defendant is 'Commonwealth Bank of Australia'.

# Understanding Precedent



*Yet this inconstancy is such*
*That you too shall adore*
*I could not love thee near so much,*
*Loved I not honour more.*[1]

## Introduction

Precedent involves a court making a decision in a case by invoking a decision that was made in a preceding case. Lawyers refer to the preceding case as a precedent. Precedent is the reason that a common law rule, once made, is followed in subsequent cases. Precedent is also the reason what when interpreting law a court can interpret a provision by applying a precedent which has interpreted the provision on a previous occasion.

### Nature of Precedent

Literally, precedent is something that precedes or has gone before. This 'something' is a version of the law (when a court is making law) or a meaning of a provision (when a court is interpreting law). Precedent, however, not only presents a version, it is also a binding direction or persuasive suggestion to adopt that version.

Precedent has two dimensions. First, there is the part of an earlier case that a court must follow or consider when making its decision. It is the principle or rule of law on which the decision rests.[2] This rule is called the *ratio decidendi* (meaning literally the reason for the decision.) *Ratio decidendi* in a case is distinguished from *obiter dicta*, things said in passing that are not directly on the issue and hence not binding on subsequent courts.[3] Second, there is a rule that a later court is bound by the *ratio decidendi*. This rule is called *stare decisis* (meaning literally to stand by what has been decided).

1 Richard Lovelace28041947 *To Lucasta on Going off to War*

2 As Lord Campbell succinctly put it in *Attorney General v Dean and Canons of Windsor* (1860) 8 HLC 369, 392; 11 ER 472 the ratio is 'the rule propounded and acted upon in giving judgment.'

3 The plural of ratio decidendi is *rationes decidendi*. Often ratio decidendi is referred to just as ratio. The plural of obiter dictum is obiter dicta; often these are referred to just as obiter, dictum (less common) and dicta.

## Use of Precedent

Precedent operates in two spheres:

1. Making Common Law. There are two sets of propositions. First, courts make common law. For centuries courts have made common law in the course of deciding a case. That said, given that parliament is now the chief law-maker, courts exercise their law making power only occasionally. Second, precedent confers authority on common law. To state the relevant rule broadly, once a court has made a common law rule later courts will use and apply this rule in later cases where it is relevant. Lawyers refer to this as 'following' the precedent as enunciated in the previous case. In the simple case a court just follows the precedent. The formal name for this process is *stare decisis*, which means literally to stand by what has already been decided. In the alternative a court may follow the legal rule in the precedent, while at the same time they also refine and interpret the legal rule.
2. Interpreting Statute Law and Common Law. Courts use precedent for interpreting law – a court can interpret a provision in common law or statute law by applying a precedent that has interpreted the provision or a similar provision on a previous occasion.

This is the position in summary. Literally, precedent is something that precedes or has gone before. This 'something' is a version of the law (when a court is making law) or a meaning of a provision (when a court is interpreting law). Precedent, however, not only presents a version, it is also either a binding direction or persuasive suggestion to adopt that version. Precedent has two components, ratio decidendi and stare decisis, which will now be considered.

## Ratio Decidendi

Ratio decidendi means literally the reason for the decision. The background for understanding ratio decidendi is that parties may disagree about questions of law that takes three forms:

1. Whether and how a court should make a new common law rule.
2. Whether and how a court should amend an established common law rule.
3. How a court should interpret a rule of common law or statute.

The ratio decidendi is the rule that the court formulates to decide any of these three issues. This rule may be in positive or negative form:

1. Positive Form. Ratio decidendi is strongest and more visible when it is positive. This entails a court making a new common law rule in a certain form, amending an existing common law rule in a certain way or interpreting a rule in statute or common law by saying that one meaning not some other meaning is the correct legal meaning of an ambiguous provision. Thus the rule consists of the entire common law rule, the amendment to the common law rule or the interpretation.

2. Negative Form. In negative form the rule consists of a decision that there should not be a new common law rule, or a decision that the proposed amendment should not be made to the common law rule. The negative form is a weaker version of the ratio decidendi because parties can always try again using new arguments. (There is not a negative form of ratio decidendi when a court is interpreting law because it generally cannot refuse to interpret an ambiguous provision that is relevant to the case. That said, a litigant may argue that prior case was wrongly decided.)

Here now is the core proposition. The ratio decidendi is the rule of law on which a prior decision rests because it is the reason that the court decided the case one way rather than another. This rule resolves the legal issues between the parties. It is the part of an earlier case that a later court must either follow or consider when making its decision.

There may be statements of law, that is of legal rules, in a case that do not directly address and resolve the issues of law in the case. Statements of law of this kind are not the ratio decidendi since they are not the reason for the decision. Lawyer label these statements *obiter dicta*. This Latin phrase translates as which are things said aside or in passing. This distinction rests on the fact that the statement of law consisting of the ratio decidendi resolves the dispute between the parties over a legal issue, while a statement of law that is mere obiter dicta does not do so. This is why obiter dicta is not binding on subsequent courts but ratio decidendi is. That said, if the obiter dictum is well reasoned a later court may take some heed of it. Lawyers refer to obiter dicta of this kind as 'weighty'.

## Stare Decisis

Stare decisis means literally to stand by what has been decided.[4] It is a rule that requires a later court to follow or at least to consider the *ratio decidendi* (but not obiter dicta) of an earlier case when making its decision.

## Terminology

Now for some more terminology:
1. Ratio decidendi. The plural of *ratio decidendi* is *rationes decidendi* although the term is not often used. Also, the English form 'ratios' is acceptable. There is a contracted form – *ratio decidendi* is frequently referred to just as *ratio*,
2. Obiter Dicta. *Obiter dicta* is already plural. The singular is *obiter dictum*. There are contracted forms. *Obiter dictum* and *obiter dicta* are often just *obiter*,

4 In full this maxim is *stare decisis et non quieta movere*. This means to stand by what has been decided and not to move what has been set down or set in place.

or *dictum* or *dicta*. Here, because the terms are of Latin origin they are in italics, although they are of such common usage in law that they are frequently written without italics, that is, in Roman type.

## Outline

This text proceeds in two states:
1. It explains in turn the details constituting the twin foundations of precedent, ratio decidendi and stare decisis.
2. It draw precedent into a framework that is founded on this proposition – the only legitimate source of reasoning when forming law is policy. Consequently, if precedent is to be used in forming law, it is necessary to demonstrate how precedent can be conceived and used as a derivative of policy.

## Ratio Decidendi

*[It is] as well to create good precedents as to follow them*.[5]

### *Introduction*

In the course of deciding cases courts make law in two ways. Cases make common law; this law is sometimes referred to as rules, principles or doctrines. Cases also make law in a confined way when they interpret common law or statute law.

When a court makes this law it states the relevant rule in the judgment. This principle of law will decide the case one way of the other, that is, in favour of the plaintiff or the defendant. This principle is called the *ratio decidendi,* meaning literally the reason for the decision. It is so called because it is the reason that the decision was made one way rather than another. As Lord Campbell succinctly put it, the ratio is 'the rule propounded and acted upon in giving judgment.'[6] It will usually be obvious, in broad terms at least, what this rule is. In the best case (which arguably should be the common standard) the ratio is explicitly stated in the case by the court. In any event it can be identified by the fact that, since the rule was in issue, it will have been argued in the proceedings.

Thus, ratio decidendi is the legal rule in a case for which the case is a precedent. This rule may be a common law rule or a rule formulated for interpreting a provision in a statute or common law. Because of precedent, this legal rule from a former case can be used to decide a later case that is similar to the case in which the rule was formulated.

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5 Sir Francis Bacon
6 *Attorney General v Dean and Canons of Windsor* (1860) 8 HLC 369, 392; 11 ER 472

### *Making Common Law*

*In termes hadde he caas and doomes alle,*
*That from the tyme of kyng William were falle.*[7]

The purer form of common law comprises whole legal rules that courts make in the course of deciding a case. If a court is making a new common law rule (a rare event these days), the ratio will naturally be the common law rule so made. Understanding the process by which common law is made enables a lawyer to identify the ratio of a case that has made common law.

To make a common law rule in the most rational way a court would canvass in an exhaustive way various versions of the rule then choose the best. In practice, a court will often just make the new rule, with little contemplation of alternatives.

To make the common law rule the court does three things:
1. The court peruses the facts of the case and identifies the 'key' facts. The formal labels for the key facts are material facts, essential facts and relevant. These material facts constitute the facts that mark out the case for legal regulation. For example, if the court is making a new cause of action, it has to identify the wrong conduct that would justify the creation of a legal remedy, and possibly also the circumstances surrounding these facts. These material facts can be labelled Facts 1-n.
2. The court generalises each material fact to some degree to formulate the elements of the rule. These elements can be labelled Elements 1-n. Thus Fact 1 is generalised to form Element 1, Fact 2 is generalised to form Element 2 and so on. In short, Facts 1-n are generalised to form Elements 1-n. To illustrate generalisation, when a court first made the law of trespass to land, one of the material facts may have been that Black Adder had 'walked on' Baldrick's land. Perhaps then, and certainly later, the fact of walking was generalised to become 'entered' land. Afterwards it was generalised to become that the defendant had 'interfered with' the land.
3. The court has to determine the consequences of the rule. For a new criminal offence, the consequences in general terms are that the defendant is guilty and liable to punishment. Similarly, for a new civil wrong the general consequences are standard – the defendant is liable for a remedy in damages, and possibly some other established common law remedy as well.

Making a common law rule in this way can be illustrated by a diagram where the material facts, consisting of Material Facts 1-n, which are generalised to make Elements 1-n:

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7 Geoffrey Chaucer *The Canterbury Tales,* describing the Serjeant.

| **Material Facts** | → | **Legal Rule** |
|---|---|---|
| Material Fact 1 | | Element 1 |
| Material Fact 2 | | Element 2 |
| Material Fact n | | Element n |
| | | ↓ |
| | | **Consequences** |

*Figure 1 Material Facts and Elements*

While it is a matter of fundamental logic that common law is made in this way, there is no absolute guide as to how either of the two law making functions - determining which facts are material and generalising each fact to make an element of the new rule - are performed. So, it is always open in a later case for a party to dispute the way the former decision was made. They may argue that some properly material facts were overlooked or that some non material facts were selected as material. They may also argue that the generalisation of an element was too wide or too narrow.

When making a new common law rule a court logically should be guided only by policy because there is no other rational way to proceed.[8] These are the steps if a court want to proceed rationally:
1. The court identities and formulates the various versions of the rule that appear reasonable. One version of a rule can differ from another version in any of three ways that correspond to three processes in making the rule – they can differ in the choice of material facts, the degree to which a material fact is generalised and the formulation of consequences.
2. Once the court has formulated these versions, the court should try to predict the effect of each version and calculate their respective net benefits.
3. The court should identify the version that yields the highest net benefit. This is the version of the rule that it should bring into law.
These three steps have much to commend them from a logical perspective. In practice, though, typically a court will pay a lot of attention to policy considerations. Commonly a court will refer to prior cases when making a new rule. This can be justified when it involves arguing policy by analogy. An established rule applies in situation X and the situation before the court is similar to X. Consequently the court adapts the policy underlying the established rule to create a new rule.[9]

In the process described so far, the court is making a common law rule that fits the facts of the case, since the elements of the rule are formulated by

8 Christopher Enright *Legal Reasoning* 2nd ed (2015) www.legalskills.com.au, Chapter 10 Policy
9 Christopher Enright *Legal Reasoning* (2015) www.legalskills.com.au, Chapter 8 Analogy

generalising the material facts of the case. However, there are two other possibilities – the court makes a new rule but it does not fit the facts of the case or the court declines to make a new rule. These three outcomes, two positive and one negative, can be summarised as follows:

1. New Rule Fitting the Facts. The court makes a new rule that fits the facts of the case. This rule fits the facts perfectly because each element of the rule is a generalisation of one of the facts. Because the court has made this new rule and it fits the facts, the rule will decide the case one way or the other. This becomes a strong precedent because it decides the case in a way that would not have happened if the court did not make the new common law rule. This is a positive precedent.
2. New Rule Not Fitting the Facts. The court makes a new rule, but this new rule does not fit the facts of the case. This is the case because not all of the elements consist of a generalisation of the facts of the case. Realistically, this happens when only one or two of elements of the new rule are not generalisations of fact of the case. In other words the court agrees with the broad proposition that there needs to be a new rule in the area, but this new rule is not capable of applying to the facts of the case in hand. This rule becomes a precedent that is not as strong as the case of a new rule that fit the facts, but still has some force. This is a positive precedent.

No New Rule. The court does not make any new rule at all. This decision is a precedent to the effect that the common law does not contemplate or embrace a new rule in any of the forms that are proposed. This is a negative precedent. Negative precedents, where no rule is made, tend to be weaker than positive precedents.

In these three cases the ratio decidendi is as follows:

Possibility 1. The ratio decidendi consists of the new rule, both elements and consequences, formulated by the court.

Possibility 2. The ratio decidendi consists of the new rule, both elements and consequences, formulated by the court.

Possibility 3. The ratio decidendi consists of the statement by the court that there is not sufficient justification for the new rule that was proposed to the court.

### *Interpreting Law*

Another form of common law is the interpretation that a court gives to a common law or statutory rule. From a simple functional perspective the process has three major steps.[10] To explain this process, assume that a court is interpreting Provision X in Rule Y. In short form, this is the process:

10. For a more detailed model for interpreting a statute see Enright (2015)

1. Meanings. The court identifies all of the meanings of the ambiguous provision, to wit, Provision X in Rule Y. It is useful to label these meanings as Meanings 1-n.
2. Reasons. The court identifies and weighs the reasons for and against each meaning.
3. Decision. The court uses these reasons to determine which of these meanings should the legally correct meaning of the provision, or chooses two or more as the correct legal meanings. So if the ambiguous Provision X in Rule Y, has four meanings, Meanings 1-4 the court may, for example, decide that Meaning 2 is legally correct. If it does so, the ratio of the case to be deployed in future encounters with Provision X in Rule Y is that Meaning 2 is the legally correct meaning of Provision X.

## *Problems with Ratio*

A lawyer may encounter problems with ratio decidendi. There are four identifiable cases. These concern difficulty in finding the ratio, the ratio being confronted by new facts, a need to reappraise a common law rule and ambiguity in a rule.

### Difficulty in Finding the Ratio

In principle it should be a simple matter to discern the ratio decidendi for two reasons. First, it is clear in principle what the ratio is. When a court is making common law it is the new rule of law that the court devises. The court devises the rule by generalising each material fact to some degree to form the elements of the rule (which is a good clue to finding the ratio when it is not clearly stated). When a court is interpreting law the ratio is the ruling that one meaning of the ambiguous provision that gave rise to the case is the legally correct meaning. Second, the court should state the rule clearly and emphatically in its judgment.

In practice, however, a court may not state the ratio clearly. For example, the court may have articulated its reason by referring to the facts and indicating that these give rise to a cause of action. At the same time it does not articulate the elements of the rule.

This, it must be stressed is not a difficulty with the concept of ratio decidendi but constitutes ambiguity in the case. Simply, if the court fails to enunciate clearly what the ratio is, even though it should do so, a later court has to finish the job. By not clearly stating the ratio the court has passed the baton on to the next court that has to grapple with the issue. This later court can only do its best to divine what the ratio should be. To the extent that it cannot divine the intention of the original court it has to exercise its own judgment.

## Confronting New Facts

In a later case a court may face a set of facts similar in some ways to those that faced the court that formulated the ratio, but with some potentially significant differences. Common law jurisprudence accepts that the later court has the right and duty to reconsider the initial formulation of the ratio. The novel component of the facts begets a reappraisal of the original rule so it is always salutary and acceptable to reconsider a newly established rule in the light of novel facts. Alternatively, the court may decide to change the rule. In this reappraisal the later court may make any of three decisions:

1. It may decide after proper consideration to let the rule stand as it was initially formulated.
2. It can change the rule by modifying an element of the rule, deleting an element from the rule or adding an element to the rule. To do this the later court revisits the decision making involved when the rule was first formulated. In that process the earlier court had to distinguish the material facts of the case from those that are not material. The point to this is that a court creates each element of the rule by generalising some material fact. Therefore, to add an element the later court finds that some additional fact (whether present in the case or not) is a material fact.[11] It then generalises this fact to create the new element. By similar reasoning, to delete an element the later court finds that some fact that the original court said was material is not in truth material.
3. It can narrow or enlarge the scope of an existing element. As already stated, each element is formulated by generalising a material fact to some degree. Therefore, to enlarge the scope of an element the court generalised the material fact to a wider degree than was done when the rule was previously formulated. By similar reasoning, to narrow the scope of an element the court generalises it to a lesser degree than it was when the rule was previously formulated.

In short, to narrow or extend the scope or a rule a later court revisits the decisions made by an earlier court when it formulated the ratio. The original court identified the material facts and generalised each of them to some degree to form the elements of the new rule. Since there is no strict logic to guide a court when it makes these decisions, it is at least tacitly accepted that a later court can reconsider these decisions in the light of facts that differ from the original facts.

This scope for revision of a rule is like jiggling the tea bag to strengthen the brew. It makes common law flexible and adaptable. Typically change that is made this way is done in small increments. This allows experience with the rule

11 If the material fact was not present there is a weakening of the authority of the precedent.

and the concomitant observation of how well or badly the rule works to guide the court. It is the legal version of evolutionary adaptation.

### Reappraising a Rule

From time to time a court will reappraise a common law rule on the basis that it is no longer suitable to current circumstances. In consequence the court will amend or abolish the rule. In one case the High Court of Australia abolished the common law rule that said that one spouse in a marriage could not be guilty of rape on the other spouse.[12] Another example concerned the rule at common law that a person could recover money paid under a mistake of fact but not under a mistake of law. In 1992 the High Court of Australia modified this rule to allow a person to recover money paid under a mistake of law where they had paid money to a person who was not legally entitled to receive it.[13]

### Ambiguity in a Rule

It is always possible that part of an element or part of the consequences is ambiguous. In this case the later court has to resolve the ambiguity by interpretation.

## *Obiter Dictum*

*A mouse is not a snail.*[14]

Ratio decidendi is the rule of law on which the case was decided. Any other statement of law in the case is classified as obiter dictum. As will be stated below, the relevance of the distinction concerns a later court following an earlier court. A later court is bound, if at all, by the ratio of the case, but not by any obiter dictum. That said, a carefully reasoned obiter dictum may carry weight as a persuasive even if not determinative statement of law.[15]

## *Prediction*

A precedent is a past case that states a rule of law that is the ratio of the case. But when the same issue, a similar issue or a related issue arises in another case and a court will use this established rule (the ratio of the earlier case) to resolve the issue, then lawyers try to predict the outcome.

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12 *R v L* (1991) 174 CLR 379

13 *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353

14 *Donoghue v Stevenson* [1932] AC 562, 578 per Lord Buckmaster, dissenting.

15 A famous example is *Hedley Byrne v Heller* [1964] AC 465. The report of this case took up 60 pages of the law report. Some 50 pages was consumed with an obiter statement to the effect that in some circumstances (which were stated) a person could sue another for negligent advice leading to purely financial loss. Since this was a decision of the house of Lords, the highest court in the British hierarchy, the message was clear – when the right case comes along, this is how we will decide it.

Ratio, therefore, is both past and future. Ratio operates retrospectively to resolve the case in which the ratio is formulated. Finding the ratio, therefore, is legal archaeology, digging up and examining cases from yesterday and before. Ratio operates prospectively because it is used as a projection of how future cases will be decided. It is gazing into a crystal ball as part of a process of predicting the future, namely shedding light on how a court will respond to an issue when it next comes before it.

Now if the world were simple, a rule in a decided case would be a perfect prediction for how a court will decide a future case. But the part of the world inhabited by precedent is not simple. Precedent is certainly a guide to future cases, but it is not always a perfect predictor of the ratio in a future case because precedent incorporates a substantial amount of flexibility. So, while ratio is initially approached as determining what judges in the earlier case actually meant, the real issue is what a later court will say when the rule which is the ratio is next considered. Certainly in making this prediction as to future judicial performance past cases are at least guide, but they may not always be determinative.

There is a further consequence. Given the inherent uncertainty of precedent, strictly we cannot refer to a rule of common law that is absolutely right or wrong. Instead we need to refer to and measure, if at all possible, its predictive validity. This is its capacity to predict or determine how a future decision will be made on the same or a similar point of law.

## Stare Decisis

*The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of a cliff.*[16]

### *Introduction*

Faced with a new situation of fact, judges had to formulate a rule, that is, a *ratio*, to cover the case. Once a rule has been established in this way, it is likely to be followed and applied in later cases because of the doctrine of *stare decisis*,[17] meaning to stand by what has been decided. A court may follow the rule in a prior decision for either of two reasons. It is bound to do so or the rule is the best rule available.

16 *Ostime v Australian Mutual Provident Society* [1969] AC 459, 489 per Lord Denning

17 In full this is a maxim *stare decisis et non quieta movere*. This means to stand by what has been decided and not to move what has been set down or set in place.

## *Rules of Stare Decisis*

### Introduction

Stare decisis operates against a background comprised of the hierarchy of courts. Under this system a dissatisfied litigant can appeal from one court to a court that is higher in the hierarchy. Stare decisis operates against a background – that in most jurisdictions courts are arranged in a hierarchy so that a litigant who loses a case at one level in the hierarchy may appeal to a court at the next level. Typically this hierarchy has three levels – a court of first instance, an appellate court and a final court of appeal.

### Hierarchy of Courts

In most jurisdictions courts are arranged in a hierarchy so that a litigant who loses a case at one level in the hierarchy may appeal to a court at the next level. Typically this hierarchy has three levels – a court of first instance, an intermediate appellate court and a final appellate court. These can be set out in a table:

| Court | Names |
|---|---|
| *Final Appellate Court* | Supreme Court,[18] House of Lords,[19] Privy Council,[20] High Court of Australia[21] |
| *Intermediate Appellate Court* | Appellate Court,[22] Court of Appeal,[23] Court of Criminal Appeal,[24] Full Bench[25] |
| *Courts of First Instance* | Supreme Court,[26] High Court of Justice,[27] Federal Court[28] |

*Figure 2 Hierarchy of Courts*

18 This is the final appellate court in the United States and India
19 This is the final appellate court in the United Kingdom.
20 This is the final appellate court in the United Kingdom for British colonies and some former colonies.
21 This is the final appellate court in Australia.
22 This is the name of the appellate court in Illinois.
23 This label is used in many jurisdictions including the United Kingdom, New South Wales, Queensland and Victoria.
24 Sometimes the Appellate Court or Court of Appeal handles criminal cases. Where it does not do so, there may be a separate Court of Criminal Appeal.
25 In Australia, for example, it is common for an appellate court to be constituted by a full bench of the court of first instance. Several judges, often three, but it can be five and occasionally seven are selected to constitute the full bench for the purpose of exercising jurisdiction of the court to hear appeals from itself. Constituted this way, the court is said to sit *in banco*, that is, on a bench (to accommodate the several judges).
26 This is the name of the major courts of first instance including all of the Australian states.
27 This is the name of the major court of first instance in the United Kingdom.
28 Australia and the United States, both federations, have a federal court which hears disputes involving laws passed by the central government in the federation, the United States government and the Commonwealth (of Australia) government.

This table shows the levels and some of the names given to these courts in various jurisdictions.

## Stare Decisis

The doctrine of *stare decisis* is encapsulated in three propositions. The following table sets these out in broad terms:

| *Proposition 1: Courts Own Prior Decisions* |
|---|
| Courts normally follow their own prior decisions. They can, however, depart from them for good reason. |
| |
| *Proposition 2: Courts at Different Levels of the Hierarchy* |
| Proposition 2.1. Courts must follow decisions of higher courts, that is, courts above them in the hierarchy. There can, however, easily be a dispute as to what is the correct ratio decidendi of a case. |
| Proposition 2.2 Higher courts can overrule decisions of lower courts, that is courts beneath then in the hierarchy. Proposition 2.2 is the converse of Proposition 2.1. |
| |
| *Proposition 3: Non Binding Precedents* |
| Courts are not bound by decisions of two types of courts:<br>1. Major common law courts outside their jurisdiction<br>2. Courts beneath them in the hierarchy.<br>Even though courts are not technically bound by decisions of these courts, they attach some persuasive value to their decision. Generally, the better the reasoning in the decision the more value the court will attach to it. |
| *Figure 3 Rules of Stare Decisis* |

This requirement of a court to follow or to consider an earlier decision strictly applies only to the ratio decidendi and not to obiter dictum. This is the point to the distinction between ratio decidendi and obiter dictum. Stare decisis requires a court to treat only ratio and not obiter as precedent. That said, while a court is not bound by obiter dicta in a prior decision it can still follow it because it believes the obiter dicta is a good version of the law.

# *Common Law*

## Introduction

Stare decisis is utilised in three functions with common law. These consist of preserving common law, amending common law and interpreting common law.

## Preserving Common Law

Once a court has made a common law rule the rules of stare decisis, which are part of precedent, give it binding force. Precedent does for a common law rule what supremacy of parliament does for statutes. Precedent says that once a rule has been laid down it must be followed. Precedent is thus the preservative that makes common law permanent. It provides a core of consistency and constancy

to judge made law. In doing so it also keeps in place the policy which underlies the rule.

While precedent operates to turn decisions of courts into rules of common law, its function here is almost taken for granted because litigants generally do not challenge the existence of a rule. Typically questions of law will arise over interpretation of common law and statutes so it is in these two spheres where precedent is actively used as a source of reasoning. Except in those rare (but now unknown) circumstances when a party asks a court to abolish an established common law rule, precedent stands quietly behind common law rules ensuring that they are used and applied without question. Thus, for example, when a plaintiff sues for trespass to land there is usually no reference to precedent to establish the tort. Its existence and continuance is taken for granted. Parties will, however, produce and argue from precedents if a question arises as to how aspects of the tort of trespass to land should be modified or interpreted.

### Amending and Interpreting Common Law

Courts will sometimes amend a common law rule. They will also interpret a common law rule when it is ambiguous. In principle when performing these tasks a court is bound by the rules of stare decisis. However, the strictures of precedent are weakened by the amorphous and fluid nature of common law. A major aspect of this is that common law is riddled with an ambiguity that easily allows a court to make a legitimate or apparently legitimate claim that is has some leeway of choice. This ambiguity consists of two or more versions of a rule. In consequence, despite the authority that a judge has, they nearly always have some degree of choice.'

Faced with two or more versions of a rule, a court has to make a choice. It may choose any one of the proffered versions. It may also sometimes plausibly argue that none of the versions is correct and decide on another version, which it then proceeds to formulate.

### *Statute Law*

Precedent is used as a major source of argument for interpreting statute law. We can usefully distinguish two cases where precedent is used for interpreting law.

First, there is the situation where a precedent is binding on a court. This happens when two things occur. The decision is made by a court higher up in the hierarchy. And the decision is squarely and directly on the issue now before the court because it involves the same provision and the same ambiguity. Unlike common law, statute law has a fixed and definitive text. Hence it is generally easy for a precedent to be 'spot on' in resolving an issue of interpretation. Thus,

in these cases the precedent will very likely carry the day. This is how precedent can give interpretation of statute law a degree of certainty.

Second, there is the case where precedent is not binding. Here precedent constitutes an argument that the court can accept or reject as it chooses.

To illustrate this, assume that the word 'possession' appears in a statute making it an offence to possess prohibited drugs. If there is some dispute about the meaning of 'possession' counsel arguing the case are likely to cite precedents. Some of these precedents may come from the use of the concept of possession in other areas of law such as bailment or the tort of trespass to goods. Almost inevitably these precedents will enlighten the court. But the court is at least sometimes able to say that there are special or different considerations arising from the statute containing the term 'possession' which could cause it to adopt a different meaning from the meaning given to possession in these other areas of law.

Because precedent is used so much as a major source of argument for interpreting cases there are research tools for lawyers (called statutory annotations) to help them find the cases. Annotations alphabetically list all statutes in a jurisdiction, indicate which provisions have been interpreted or considered in cases, state how the provisions were interpreted and give the names and citations of the cases.

There is a special point to note for Australian law about precedents involving the interpretation of a statute. Each Australian jurisdiction has enacted rules that direct courts as to how they should interpret a statute. These statutory provisions have altered the operation of precedent as source for interpreting a statute. There is discussion of this in the Appendix.

There is something of interest in the United States regarding the overruling statutory precedents. There is a strand of thought that argues for a strong presumption against overruling statutory precedents. There are two justifications for this approach. First, this proposed presumption puts a high value on stability and continuity. Second, there is a question of constitutional propriety – it is the legislature's function to correct poor interpretation and it is generally not for the courts to do so. In practice, however, Congress does not often enact a statute to overrule a precedent.

## Precedent as Policy

Discussion of precedent as policy sometimes involves referring to an existing rule and proposed new rule to displace the existing rule. For convenience this

text refers to an existing rule as Rule 1 and labels as Rule 2any proposed new rule that would displace Rule 1.

On the surface, precedent is in sharp contrast to policy. Precedent is directed to a law or meaning. It directs or suggests that a court follow a prior case where a court has made or interpreted law. It should do this regardless of the effect that the law or meaning actually causes. Policy by contrast is directly concerned with the effect of a law or the effect of an interpretation of a law. A policy argument for a law or interpretation says that the law or interpretation is as good as the effect that it causes.

Despite this apparent difference, there is a major relationship. Logically conceived, precedent is derived from policy and so is not a fundamental type of reasoning in its own right. Precedent is not directly concerned with the effect of a law or interpretation because this has already been decided by the policy contained or encapsulated in the precedent. This will become apparent as we consider ratio decidendi and stare decisis and explain how both can be conceived as based squarely on policy.

Here is the key proposition. Policy is the rational means by which law should be made and interpreted. Given this, if there is place for precedent in this rational framework it is necessary to examine whether and how precedent can be conceived as based on policy.[29]

Essentially the justification for precedent is that it is able to preserve a rule that is made and based on sound policy. This, however, can be represented as three specific functions of precedent:
1. Precedent preserves the rule itself.
2. Precedent preserves the policy underlying the rule.
3. Precedent avoids these costs that would be entailed in changing the precedent (which of course entails changing the policy that underlies the precedent). The point is that there are various cost involved in changing from one rule to another. Label these ‘changeover costs’. Changeover costs are both instrumental and symbolic. The three instrumental costs are loss of certainty and predictability, the transaction costs of overruling the precedent and the cost of society making necessary changes to adjust to the introduction of Rule 2 and the absence of Rule 1. The symbolic cost is the lack of uniformity and consistency, which is detrimental to our sense of justice because like cases should be treated alike.

29 Christopher Enright *Legal Reasoning* (2015) Sinch Chapter 20 Identifying the Correct Meanings

These functions, however, are related. Preserving the rule preserves any policy it implements. Continuing in this manner avoids the costs of changing from one rule to another.

The question as to when it is rational to change a precedent. Australian courts have not considered this from a perspective based on simple reason, but if they chose to do so the relevant way to reason is as follows:
1. Label the current rule as Rule 1 and the proposed rule as Rule 2.
2. Predict as well as possible the net benefit that Rule 1 will cause and Rule 2 will cause.
3. Label the net benefit of Rule 1 as Net Benefit 1 and the net benefit of Rule 2 as Net Benefit 2.
4. There are various cost involved in changing from one rule to another. Label these Changeover Costs. Changeover costs are both instrumental and symbolic. The three instrumental costs are loss of certainty and predictability, the transaction costs of overruling the precedent and the cost of society making necessary changes to adjust to the introduction of Rule 2 and the absence of Rule 1. The symbolic cost is the lack of uniformity and consistency, which is detrimental to our sense of justice because like cases should be treated alike.

When a court has made these calculations as best it can, it then weighs the net benefit of Rule 1 against the net benefit of Rule 2 and the costs of changing from Rule 1 to Rule 2. For the change to be beneficial, two things must occur. The net benefit of Rule 1 must be greater than the net benefit of Rule 2, and the differences between the net benefits of Rule 1 and Rule 2 must exceed the changeover costs. In symbolic form, this entails that NB2 is greater than the sum of NB1 and CC, ie NB2 > (NB1 + CC). In plainer language, the benefit from the new rule, Rule 2 exceeds the benefit from Rule 1 by more than CC, which is the cost of changing from Rule 1 to Rule 2. This table sets out the formula used here:

| | | | | |
|---|---|---|---|---|
| Net Benefit 1 | – | Net Benefit 2 | > | Changeover Costs |

*Figure 4 Formula for Changing a Precedent*

What does this formula mean in practice? If there is a net gain in making the change a court should make the change. There is a further point. Despite the overwhelming logic of this rule, courts have not explicitly articulated it. Nevertheless, the specific considerations of net benefit of the two rules and the changeover costs are articulated in some of the cases.

## Justification for Precedent

*Je suis que je suis, mais je ne suis pas que je suis.*[30]

There has been debate as to the status of the rules of precedent:
1. One view, that is now widely rejected, was that precedent consists of a rule of law that finds its authority in precedent itself – the problem with this notion is that it is akin to a person lifting themself by tugging on their own bootstraps.[31] 2. Other views proposed are that precedent is based on convention, custom or tradition.

Analysis of precedent here starts with the premise that making and interpreting law constitute purposive action. Purposive action is taken to achieve an effect or purpose. In doing this, a rational human will want the best effect. In fact, policy is the reasoning process that determines in a particular situation which effect is best.

Given this, the only rational basis for adopting and maintaining a system of precedent is that it is soundly based on policy. Consequently, discussion here attempts to formulate the policy considerations that can justify precedent and to indicate what those policy considerations have to say about the content of the rules of precedent, particularly with regard to a decision by a court to follow or not follow a precedent.

Proceeding in this way, the essential justification for precedent is that it is able to preserve a rule that is based on sound policy. This broad charter for precedent, however, can be broken down into three specific functions:
1. Precedent preserves the rule.
2. Precedent preserves the policy underlying the rule.
3. Precedent avoids the costs that would be entailed in changing the rule.

These functions are in fact related:
* By preserving the rule one preserves any policy if fulfils.
* Preserving the rule avoids the costs of changing from one rule to another.

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30 This French conundrum is based on 'je suis' meaning both 'I am' and 'I follow.' It translates on one view as: 'I am what I am but I am not what I follow.'

31 As Jeremy Bentham put it: 'The deference that is due to the determination of former judgments is not due to their wisdom, but to their authority.' This was cited in Gerald Postema 'Bentham and Dworkin on Positivism and Adjudication' (1980) 5 Social Theory and Practice 347, 351.

## *Preserving Rules*

*A precedent embalms a principle.*[32]

### Introduction

Precedent says that once a rule has been laid down it must be followed. In this way precedent does for judge made law what supremacy of the legislature does for statutes because it asserts judicial sovereignty, supremacy, authority and independence. Precedent is thus the preservative that makes common law permanent. It provides a core of consistency and constancy to judge made law. In doing so it also keeps in place, as explained next, the policy that underlies the rule. This is one justification for precedent.

Precedent preserves three categories of rules found in and laid down by cases - common law rules, the interpretation of common law and the interpretation of statute law.

### Common Law Rules

Once a common law rule is made the rules of stare decisis, which are part of precedent, give it binding force. In other words, precedent operates to turn decisions of courts into rules of common law. Moreover, its function here is almost taken for granted because litigants generally do not challenge the existence of a rule. Typically questions of law will arise over interpretation of common law and statutes so it is in these two spheres where precedent is actively used as a source of reasoning. Except in those rare (but not unknown) circumstances when a party asks a court to abolish an established common law rule, precedent stands quietly behind common law rules ensuring that they are used and applied without question. Thus, when a plaintiff sues for trespass to land there is usually no reference to precedent to establish the tort. Its existence and continuance is taken for granted. Parties will, however, produce and argue from precedents if a question arises as to how aspects of the tort of trespass to land should be interpreted.

### Interpretation of Statute Law and Common Law

When statute law or common law is ambiguous a court has to interpret it. In these cases precedent, along with policy, is used as a major source of argument and authority. We can usefully distinguish two cases where precedent is used for interpreting law.

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32 Lord Stowell, Attorney General of the United Kingdom, allegedly said this in an opinion in 1788. Benjamin Disraeli also said it in the House of Common in his speech on the Expenditures of the Country, *Hansard* 22 February 1848.

First, there is the situation where a precedent is binding on a court. This happens when two things occur. A court higher that is up in the hierarchy made the decision. And the decision is 'spot on.' It squarely and directly resolves the issue now before the court because it involves the same provision and the same ambiguity.

In these cases precedent exerts its authority because it is generally followed. There is, however a difference between common law and statute law in this regard. Statute law has a fixed and definitive text. Hence it is generally easy for a precedent to be 'spot on' in resolving an issue of interpretation. Thus, in these cases the precedent will very likely carry the day. This is how precedent can give interpretation of statute law a degree of certainty. Common law, by contrast, is fluid. When a court formulates a rule it does not always do so in precisely the same way. This makes common law fuzzy and for this reason it is not as easy as it is with statute law to judge that a precedent is 'spot on.'

Second, there is the case where precedent is not binding. Here the precedent has no direct authority. It merely constitutes an argument that the court can accept or reject as it chooses.

### *Preserving Policy*

*Is the game worth the candle*?[33]

Stare decisis shores up and preserves not only the original rule, but the policy behind the rule. Precedent, as we have said, is a preservative. Essentially precedent packages and preserves the policy on which the original decision is based so that it can be deployed on subsequent occasions - as the popular saying puts it, when you are on a good thing stick to it. This is one justification for precedent.

At least this is the surface view and the ideal. It is possible that the decision which is the precedent does not achieve its intended policy objectives. In other words, the predicted effect and the actual effect of the rule that constitutes the precedent are not the same, either totally or partially.

So, it is necessary to refine the statement that stare decisis shores up and preserves the original policy decision. Decision makers tend to assume that the law or interpretation they enact or choose will bring about the policy results that they want. On this assumption, stare decisis is meant to preserve this policy and its operation. In reality, though, stare decisis preserves whatever effect the earlier decision causes, whether good, bad or a mixture. This effect, however,

33 This is a proverb.

also constitutes a form of policy in that it fits the policy framework, except that it was not the intended policy. But a policy is still is, and it is the policy that the precedent impounds. It can be construed as an imputed policy or a shadow policy. And to emphasise the position, this is the policy that precedent preserves.

There are two important consequences that flow from precedent being a preservative of policy. First, as a rule of law, a precedent is no better than the policy which it impounds. Second, in turn, the policy that a precedent impounds is generally no better than the analysis of the problem that preceded the making of the precedent.

### *Avoiding Costs*

Stare decisis brings the benefits of continuity. For any society 'it is vastly more advantageous that the law should be settled than that the decision of the courts should be brought into the same class as a restricted railroad ticket, good for this day and this train only.'[34] Without this continuity, each lawsuit is no better than a new plunge of the hand into a lucky dip. This is one justification for precedent.

Continuity involves the absence of change, so the benefits of continuity can be viewed as the avoidance of changeover costs. These involve three instrumental costs – predictability costs, transaction costs and adjustment costs - along with the symbolic cost flowing from loss of uniformity. In allowing only higher court to overrule a lower court stare decisis puts great store on continuity – it ups the value so to speak.[35] These costs have already been discussed in the explanation of net benefit. However, they are of such major importance here that the discussion merits restatement and the repetition that this necessarily entails.

In a similar vein, in the United States there is a strand of thought that argues for a super strong presumption against overruling statutory precedents. This also puts great value on continuity.

### Predictability Costs

Continuity brings desirable qualities to law,[36] namely stability, certainty and predictability, so any change to a precedent diminishes this sense of predictability or certainty.[37] Stare decisis enables law to keep faith with

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34 *Smith v Allwright* (1944) 321 US 649, 669

35 In a similar vein, in the United States there is a strand of thought that argues for a super strong presumption against overruling statutory precedents. This also puts great value on continuity.

36 *Kingston v Keprose* (1987) 11 NSWLR 404, 423

37 *Mirehouse v Rennell* (1833) 1 Cl & F 527, 546 per Parke J, *Archer v Howell* (1992) 7 WAR 33, Mason in Sheard (2003) p 9

established expectations. People know how to run their lives because they know what rules will govern them. Precedent enables people to make plans for the future with some confidence that the common law rules regulating them will stay the same, something that is most important in a developed economy.

### Transaction Costs

Continuity avoids transaction costs of a decision. Once resolved, an issue does not have to be argued and decided again. Thus there is economy of decision making because a court does not have to spend time considering whether to make a new rule.

### Adjustment Costs

Continuity avoids adjustment costs. Those affected by the present law stay with it and do not have to adjust to a new legal rule.

### Uniformity Costs

The symbolic aspect of continuity is that *stare decisis* brings 'uniformity' and 'consistency' to law.[38] By this means like cases are treated alike. Each person is treated in the same way. Hence we are all equal before the law is regarded as a highly desirable ingredient of justice, enshrined in the maxim that 'justice is blind.'

## Appendix: Using Precedent for Interpreting Statutes

For purposes here it is necessary to distinguish between two categories of precedent – a precedent that was made before the purpose and object rule was enacted for the jurisdiction and a precedent that was made after the purpose and object rule was enacted. In the period from 1981 to 1992 each of the Australian jurisdictions enacted two statutory rules telling court how they should interpret a statute. In short form one rule directed a court to interpret a statute in a way that best implemented the purpose (that is, the policy) underlying the statute. This text refers to this rule as the policy rule. The other rule authorised a court to consider material outside the text of the statute, (popularly called extrinsic material), in order to ascertain the purpose or policy underlying the statute. These rules obviously changed the way in which courts interpreted a statute.

This rule also, from a logical point of view, affected the binding nature of precedents that courts had created prior to the introduction of these rules into their legal system. The discussion below explains this by considering in turn

38 *Mirehouse v Rennell* (1833) 1 Cl & F 527, 546 per Parke J

precedent made after the policy rule was enacted in the relevant jurisdiction and precedent made before the enactment of the rule.[39]

### Precedent Made After the Policy Rule

Precedents formulated after the policy rule was enacted and had commenced operation are potentially binding. If the instant court has authority to disregard or overrule the precedent it should do so only on either or both of the following grounds:

1. The precedent does not correctly identify (and thus fails to utilise) the relevant part of the legislative policy, that is, the purpose or object of the legislation. The point is that a court has to identify the correct legislative policy and apply it to the interpretation of the statute. It is bound by the purpose and object rule to do this.
2. The precedent has not correctly identified the meaning of the ambiguous provision that would promote or best promote the purpose or object of the statute.

### Precedent Made Before the Policy Rule

Before the policy rule was enacted in each jurisdiction courts would interpret statutes by reference to an assortment, of the court's choosing, of the three major sources – policy (although often mutely), rules of interpretation and precedent. This has changed now, at least in principle. When interpreting a statute courts are bound by statutory provisions to interpret by reference to the purpose and object, or policy, of the statute in question. In other words, the basis on which a court must interpret a statute is now specifically and formally laid down by a statutory command in a rule that requires courts to interpret a statute by reference to its purpose or object.

This means that precedents formulated before the statutory purpose and object rule commenced are in a special position. They are no longer strictly binding since the earlier court that made the precedent was not bound by this statutory rule. Following enactment of the statutory rule, a precedent can be binding only if was made by reference to this rule. Using any other precedent would violate the statutory rule. For this reason, these precedents are not binding on courts. So, cases decided before the introduction of the object and purpose rule are not proper precedent. Hence they have no status as binding precedents, although most likely they will be illuminating and in some cases even persuasive. Yet despite the overwhelming and obvious logic behind this proposition, it does not

39. The discussion that follows is taken verbatim from Christopher Enright (2015 *A Method for Interpreting Statutes*, Sinch; Canterbury, pp 324-326.

seem generally to have taken off with the Australian lawyers. They appear oblivious to it.

## Special Case: Amendments to the Policy Rule

There is a special case that involves events that occur in the following time sequence:

1. The relevant purpose and object rule in a jurisdiction commences operation.
2. A court creates a precedent relying on the purpose and object rule.
3. The legislature amends the purpose and object rule.
4. A case involving interpretation of a statute comes before a court.

This raises a question: is the precedent binding? The answer depends on the nature of the amendment. The instant court has to judge whether the amendment to the purpose and object rule is such as to invalidate the earlier case as a strict precedent. The test is whether the amendment to the purpose and object rule is such that the earlier court might have come to a different decision had the amendment been in operation at the time the court decided the case.

## Dates of Commencement of the Policy Rules

To determine if a precedent is strictly binding it is necessary to know whether the precedent was made before or after the introduction by statute of the purpose and object rule in the jurisdiction in question. To assist with this inquiry the dates of commencement of the policy rules in the various jurisdictions are set out in the following table:

| Jurisdiction | Date of Commencement |
|---|---|
| Commonwealth | 12 June 1981 |
| Australian Capital Territory | 25 June 1982[40] |
| New South Wales | 1 September 1987 |
| Northern Territory | 30 March 1998 |
| Queensland | 1 July 1991 |
| South Australia | 20 March 1986 |
| Tasmania | 6 August 1992 |
| Victoria | 1 July 1984 |
| Western Australia | 1 July 1984 |

*Figure 5 Dates of Commencement of Policy Rules for Statutory Interpretation*

40. The provisions in ss136-144 of the *Legislation Act 2001* (ACT), which commenced on 12 September 2001, replaced s11A and s11B of the *Interpretation Act 1967* (ACT) which commenced on 25 June 1982.

### Review of Precedent

At some stage a court might be asked to review a precedent for the interpretation of a provision in a statute. In this event, the basis on which a court should review the precedent is how accurately it incorporates the policy by which the statute should be interpreted. If the precedent is wrong or faulty in some way then the court should fix it. If it is neither wrong nor faulty, the court should leave it alone.

## References

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