

Law Assignment 2.2

When a judge is deciding the outcome for a case, she must follow any decisions that a past judge in a higher court than itself had made, in a case with similar facts. The decisions of who binds each court are known as judicial precedence, otherwise known as *stare decisis*. Not only are courts bound by ones higher than themselves, but sometimes by their own previous decisions.

The term Ratio decidendi means the reason for the decision. This is the legal principle on which a principle is based and it must be done. This means that it is a binding precedent and other judges must follow it. Obiter dicta are different though. It just means 'by the way', although they are spoken by the judge they were not the basis on which the decision was made. They are not binding but just persuasive precedent for future judges to consider in future cases. An example of where they can be used is in the case **High Trees**. In this case a company renting out flats let the rent half in price as it was during the war so most of the flats were empty. When the war was over and the flats were full the rent was declared to be put back up to the original price but it was argued that the cheaper price had been permanently agreed till the end of their lease. The judge ruled that the price was to go back to the original value as the flats were full. That was the Ratio decidendi ruling that the price was to stay up. The judge also added an obiter dicta that if they had wanted the price to go back up when the flats were empty then this would have not been allowed. That would not have had to be followed by future judges but there to assist them with their decision.

All of the courts are bound by different courts. The highest court is the European Court of Justice; this court binds all of the courts below it but does not bind itself. The House of Lords is the highest appeal court except for the European Court of Justice. All English courts are bound by it and although it used to bind itself, from 1966 it has only dealt with cases already seen. The next court is the court of appeal. This court binds all those below it and also binds itself. The divisional court of the high court is the same as the court of appeal. The ordinary high court is bound by the courts above it in the Hierarchy of the courts. The next court is the crown court. It is bound by the courts above it but its own decisions are only seen as persuasive, they are not of binding precedents. The lowest courts are the magistrates and the county court; they see approximately 1 million cases a year. They are bound by decisions that higher courts make but they can not make any rules.

Judicial precedents has many different advantages and disadvantages. The main advantage is the certainty. It can be assumed that cases similar to each other are treated alike. The main disadvantage is also certainty, if similar cases are treated exactly the same then the system can become very rigid. It also means that bad laws and decisions could last for a long time before they are changed. Another disadvantage is how undemocratic it is. We vote for whom we want to run our country but then it is judges who we have not chosen who make the laws that can run our life.

Judges can be creative in many ways. As they get to choose which precedent that their new case will be based on, they can easily avoid awkward precedents. This can be done by choosing ones which also fit but just mentioning the awkward ones so the impression is given that the ones stated are the only ones that could have been chosen. When a judge is presented with a new case she can either follow a previous precedent or she could find a loop hole by distinguishing differences. High courts are also able to overrule old laws by changing them to match modern day way of thinking, or they can reverse them, which is when the decision of a lower court is immediately changed.

The 'declaration theory' was introduced by William Blackstone. He stated that judges do not make law, but merely, by the rules of precedent, discover and declare the law that has always been. This can mostly be agreed with but it is not wholly true. Judges do more than just state the law, they change it and add new laws especially in cases which are of a completely area of the modern times. You can see clearly how judges do change the law in the case of **R v R**. In 1991 in the House of Lords case a man had been accused of raping his wife. It was claimed in his defence that a husband was not able to be punished for raping his wife due to a statement made in 1736 that 'a husband cannot be guilty of rape...upon his lawful wife'. The House of Lords went on to overturn this rule completely as it was said to 'no longer represent the position of a wife in present-day society'.