THE LAW OF PRECEDENT

R. Terence Kalina

Rathje & Woodward, LLC
A Professional Corporation
Attorneys-At-Law
300 E. Roosevelt Road
Wheaton, Illinois 60187
U.S.A.
(630) 668-8500 (Telephone)
(630) 668-9219 (Facsimile)

www.rathjewoodward.com (Website)

rtkalina@rathjewoodward.com (Email)

Presented To

25th Annual John Marshall Law School
Legal Study Trip to the Czech Republic
October 11-23, 2017
Prague & Brno, Czech Republic

The author wishes to thank Ms. Sandra L. Engberg for her invaluable assistance in the preparation of this outline.

INTRODUCTION

This outline will provide an overview of the law of precedent (the principle of "stare decisis"). It will discuss the origins of the law, its scope and application.

I. ORIGINS OF LAW OF PRECEDENT

A. Definition – The legal principle called "precedent" comes from the Latin phrase "stare decisis" which literally means to "stand on the decisions". It is a doctrine that states when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same. Black's Law Dictionary, 4th edition, 1968.

B. Lawyers and Law Books – the policy of following precedent is a common law principle originating in England. Law in medieval England was created by the society to fulfill its needs. It began as "custom". Ways of behaving which, because they are necessary for its survival, a group imposes on its members by "moral pressure" and so it becomes internalized as duties. H.L.A. Hart. The Concept of Law.

1. The Magna Carta was custom, which the king might not touch because it was older than monarchy. It existed before the days of writing. Alan Harding, A Social History of English Law. P. 216 (1966).

2. It is this customary law, which English judges turned into precedent.

3. The system of precedent was only beginning to coalesce in the Middle Ages.

4. Judicial decisions were seen as statements of the eternal principles of law (though under the appearance of "defining custom", judges could add to the stock of explicit principles as much as did statutes, which were regarded as merely judicial decisions of the Court of Parliament).

5. If custom was to be followed and interpreted by the courts, it followed that both the lawyers and layman needed to know this "judge made law" for consistency and certainty.

6. Sir Edward Cole established the idea of "case-law" by publishing his thirteen volume reports, now known as the English Reports. Harding, A Social History of English Law p. 200 (1966)

(a) Cole reported cases in the old courts of King's Bench, Common Pleas and Exchequer. By the end of the sixteenth century new courts had their reporters as well.

(b) By 1864 the modern collected edition consisted of 176 volumes and is simply called "The English Reports". Harding, A Social History of English Law p. 200 (1966).

7. Modern application of the law of precedent in England is faced with the historical fact that the English law has never been codified, so the certainty of binding precedent was the necessary substitute for the certainty of a civil code. Harding, A Social History of English Law p. 430 (1966).

II SCOPE AND APPLICATION OF PRECEDENT

A. The legal principle of precedent was always recognized in the United States. In Illinois, the principle was explained as follows:

> *The doctrine of stare decisis is the means by which the courts ensure that the law will not merely change erratically, but will develop in a principled and intelligent fashion. Stare Decisis permits society to presume that fundamental principles are established in the law rather than in the proclivities of individuals. The doctrine thereby contributes to the integrity of our constitutional system of government both in appearance and in fact. Stare decisis is not an inexorable command. However, a court will detour from the straight path of stare decisis only for articulable reasons, and only when the court must bring its decisions into agreement with experience and newly ascertained facts.*
>
> Chicago Bar Association v. Illinois State Board of Elections, 161 Ill. 2d 502, 641 N.E. 2d 525, 529 (1994).

B. On the Federal Law level the principle of stare decisis must be "balance" against the importance of having a case decided right. Citizens United v. Federal Election Commission. 558 U.S. 6 (2010) concurring opinion of Justice Roberts.

C. One of the most famous examples in American law of balancing the importance of following precedent against getting the decision right was Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

1. The issue was whether the "separate but equal" doctrine announced by the Supreme Court in the case of Plessy v. Fergon, 163 U.S. 537 (1896) and subsequent precedent should be followed.

2. The doctrine held the equality of treatment is accorded when the races are provided substantially equal facilities even though these facilities may be separate Brown, p. 488

3. Rather than stand on the cases, the court said, "We must consider public education the light of its full development and its present place in American life throughout the Nation. Brown, p. 495

4. The court held that separate education facilities are inherently unequal. Brown, p. 495

D. Even in smaller cases, the quest to get the decision right can lead the court to overturn precedent.

1. In Squire v. Economy Fire & Casualty Company, 69 Ill. 2d 167, 370 N.E. 2d 1077 (1977), the plaintiff was badly injured in an automobile crash. The issue was whether the plaintiff having insured two autos under one policy could collect the uninsured policy coverage on both cars. So instead of receiving only $10,000, she would receive $20,000.

2. The trial court ignored a case directly on point in facts and law and awarded the plaintiff $20,000. Defendant Appealed and the award was reversed on the basis of the precedent.

3. Plaintiff asked for leave to appeal to the Illinois Supreme Court (which was surprisingly granted) and reversed the Appellate Court decision.

4. Extra – Judicial reasons for reversal.

III. THE LAW OF PRECEDENT IN THE CZECH REPUBLIC.

A. Precedent in the Czech Republic starts with answering the question whether it is a "source of law".

B. In the 1990's many judges maintained that case law was not binding and therefore did not matter. The work of the judge was thought of as primarily mechanical. Kuhn. Towards a Sophisticated Theory of Precedent? Prospective and Retrospective Overruling in the Czech Legal System. P. 4 Charles University Law School (2015).

C. Judges guided by the ideology of textualism were not obliged to give consideration to precedents, legal writings, the intention of the legislature, the nationally reconstructed purpose of the law, all of which constitute something which was not "law" in the ideology of bound judicial decision making and textual positivism. Kuhn, Towards a Sophisticated Theory of Precedent. p. 4 (2015).

1. Czech high courts started an on-line publication of their case law.

2. The law on courts and judges was amended in 2000 to create the grand chambers of the Supreme Court. The grand chambers are the only judicial body empowered to overrule previous precedents of the Supreme

Court. This strengthened the force of precedent and its weight in legal reasoning.

3. The duty of the high courts to send the issue to the grand chamber has been sanctioned by the Constitutional Court's case law. Kuhn, Towards a Sophisticated Theory of Precedent p. 6 (2015).

E. Fiction of case law in Czech jurisprudence.

1. Precedent determines meaning of law, but is never a source of law.

IV. FUTURE OF THE LAW OF PRECEDENT.

A. Is there any "common law" left or is everything statutory?

1. "Every dog has one bite"

2. "Last Clear Chance"

3. "Res ipsa loquitur".

4. "Nunc pro tunc"

B. Are the highest courts constrained by their own "precedent" or does the balancing act always give them a free hand.

C. Does precedent act as a limitation on judicial power and therefore promote the "rule of law".

1. Thomas More on giving the Devil the benefit of law.