

Precedent

H Devaraja Rao

“The doctrine of binding precedent has served as a shield for the uncertain and as an anchor for the convinced.”

-- Mr Justice Brian Walsh ¹

“It makes a mockery of judges who insist that if they were not imprisoned by the law they could justice.” --Mr Justice Douglas ²

Precedent or stare decisis,³ a much-cited weapon in the judicial arsenal, is often conservative. It favours status quo. It slows the pace of change within a legal system. In a world where things are constantly changing and where the pace of change seems ever to increase, the very advantage of precedent can thus be a disadvantage.

Though precedent is an indispensable foundation on which to decide what the law is, there may be times when a departure from precedent is in the interest of justice and the proper development of law.⁴

‘I see no reason’ said Jackson J, ‘Why I should be consciously wrong today because I was unconsciously wrong yesterday.’⁵ Lord Denning also said to the same effect: ‘The doctrine of precedents does not compel your Lordships to follow the path until you fall over the edge of the cliff.’⁶

The steps of the ladder are not there for comfortable relaxation. They are to provide a foothold for the next step upwards.⁷ Precedents should be stepping-stones and not halting-places;⁸ they are signposts, not the destination itself.

Though ‘enduring guide’ they are, precedents are not for eternity, and definitely not for an ‘undefined, ever expanding future.’ Nor are they too sacred to be touched. They can be departed from, overturned on a showing of a good cause, and even discarded as new ones supplant their authority. It is a fact of history that law evolves in

response to the changing ideals and particularly to the changing needs of the society.

An essay into the unsurveyed expanses of the law with neither a compass nor a guide, but only the pillars of precedent is a disheartening exercise.⁹

‘Law is not an antique, to be taken down, dusted, admired, and put back on the shelf; rather it is like an old but still vigorous tree firmly rooted in history, but still putting out new shoots, taking new grafts, and from time to time dropping deadwood.’

Courts are instruments of change—social and economic. Only pragmatism brings about changes, not strict conceptualism. Orthodox judges and ‘strict constructionists’ will have to re-look at their concept of precedent and change themselves to get with changing times.

A doctor may have to rewrite a prescription if new symptoms dictate a different treatment.¹⁰

Endnotes

¹In his Foreword to *Irish Law of Torts*, (Oxford) 1981

²While commenting on a recent book.

³To stand by decided matters; *stare decisis et non quieta movere*=to stand by precedent and not to disturb settled points. L B Curzon, *A Dictionary of Law*

⁴per Lord Morris in *Conway v. Rimmer* (1968) AC 910, quoted in *Maxwell on The Interpretation of Statutes*, Twelfth Edition, 1976, p182

⁵in his dissenting opinion in *Massachusetts v. United States* (1947) 333 U S 611

⁶*Ostime v. Australian Mutual Provident Society*, (1960) A C 459

⁷Thomas Huxley

⁸per Lord Macmillan in *Birch v. Brown* [1931] AC 630

⁹Justice Shah, quoted in O P Malhotra’s *The Law of Industrial Disputes*, fourth edn., volume 1, xxii

¹⁰*A Second Miscellany-at-Law*, 1973, p251

Email: plainlegalwriting@gmail.com