Doctrine of precedent

Courts make laws through the development of principles established in past decisions. These principles are called precedents. The doctrine of precedent allows courts to use past decisions, or precedents, in order to treat cases with similar circumstances and like facts in a similar fashion.

The doctrine of precedent can be created in one of the following ways:

(a) Novel case exists: Where there is no pre-existing statute or common law principle relevant to the case at hand, the judge will make a decision. (This decision is referred to variously as: a precedent, a court-made law or judge-made law.)

(b) Developing precedent: Where no statute law exists and the common law principle is out of date, i.e. no longer good law, the court will establish a new precedent for the case at hand.

(c) Statute law exists: Words or sections of the Statute are unclear or uncertain and the court has to interpret them and apply them to the case at hand. The court interpretation becomes precedent that is applicable only to those words, sections or parts of that particular Act.

As an aside ... The doctrine of precedent can be created through statutory interpretation. This occurs when the courts interpret legislation made by Parliament and the interpretation becomes a precedent. In other words, judges give meaning to Acts by applying laws to actual cases.

When a case is brought to court, the judge must first consider any relevant Acts of Parliament that may be applied to the case. If there are no relevant Acts, the Judge may then begin considering any past decisions of courts, i.e. precedents, in cases where there are like facts and similar circumstances. Then, he/she must decide whether these precedents are binding or persuasive upon the court where the case is being heard.

Whether a precedent is binding or persuasive is dependent upon: the position of the court in the hierarchy; whether the past decision was from a court in the same hierarchy; and whether the cases are factually similar.

Copied under Part B, sourced from Callie Harvey, 2005, Cornerstones of Australian Law, p. 61, Tilde University Press.