



## Judicial Precedent:

# The Supreme Court & The Court of Appeal

**By the end of this unit you should be able to explain [AO1]**

- How the Supreme Court can avoid precedent by using the Practice statement
- How the Court of Appeal can avoid precedent by using *Young*
- The general approach to precedent by both of the superior courts

**You should also be able to evaluate [AO2]:**

- Whether the lower courts should have more power to avoid the precedent of the higher courts (the 'Denning' argument)
- The advantages and disadvantages of the system of precedent.

### Homework

Remember that homework is an important tool which is used to assess your progress in AS law, as there is no coursework.. You should ensure that they are complete and are handed in on time [this means prior to the lesson if done electronically. Please remember that it will be due in for the **last lesson of each week**.

- ✓ Complete the short task sheet you have been given, which covers a range of the areas taught so far this term.

### End of unit Assessment:

As you will be aware, at the end of the unit you will have a week to revise for a DRAG test after we have completed the next unit. You will also complete a past question on precedent, which will be planned in class time before completing it.

### Independent Study:

This week's task is to produce an illustrated **flow chart**. It doesn't mean pictures (though you can include them if you want!), it means you need to add a couple of sentences explaining what each stage means (what happens).

You are going to find out how a **bill** becomes an **act** in our system.

You will need to define what a bill is to begin with!



# The Supreme Court



Ok, so let's start with a very simple recap:

The general rule of precedent which is followed by the Supreme Court is...	
As long as...	
It is also bound by...	
But only on matters of...	
And it may also be bound by...	
But only on matters of...	
And it, in turn binds...	

## So what's the problem?

The main issue here is **how far the Supreme Court should be bound by its own previous decisions**. Remember: everyone makes mistakes, but if the Supreme Court make an error, it can have huge repercussions!

However, against that we need to look at need for certainty and consistency in the law. If the Supreme Court can just change their mind whenever they want, we will lose this certainty and no-one will know what the law is!

## Bit of History now...

Traditionally, the House of Lords (SC) considered itself **absolutely** bound by its own previous decisions.

*London Street Tramways v London County Council 1898*

"certainty in the law is more important than individual hardship which may result through precedent"

This approach lasted until 1966. Now it might not sound too bad, after all it is straightforward and easy to apply. However, how bad does the individual hardship have to be? Take a look at the next case:

*DPP v Smith 1961*

**Facts:**

V attempted to stop D driving off with stolen goods by jumping on the bonnet of the car. D tried to shake him off. V fell into the path of traffic and died.

**Ratio:**

D appealed arguing that he did not intend the death, and the test should be subjective rather than objective

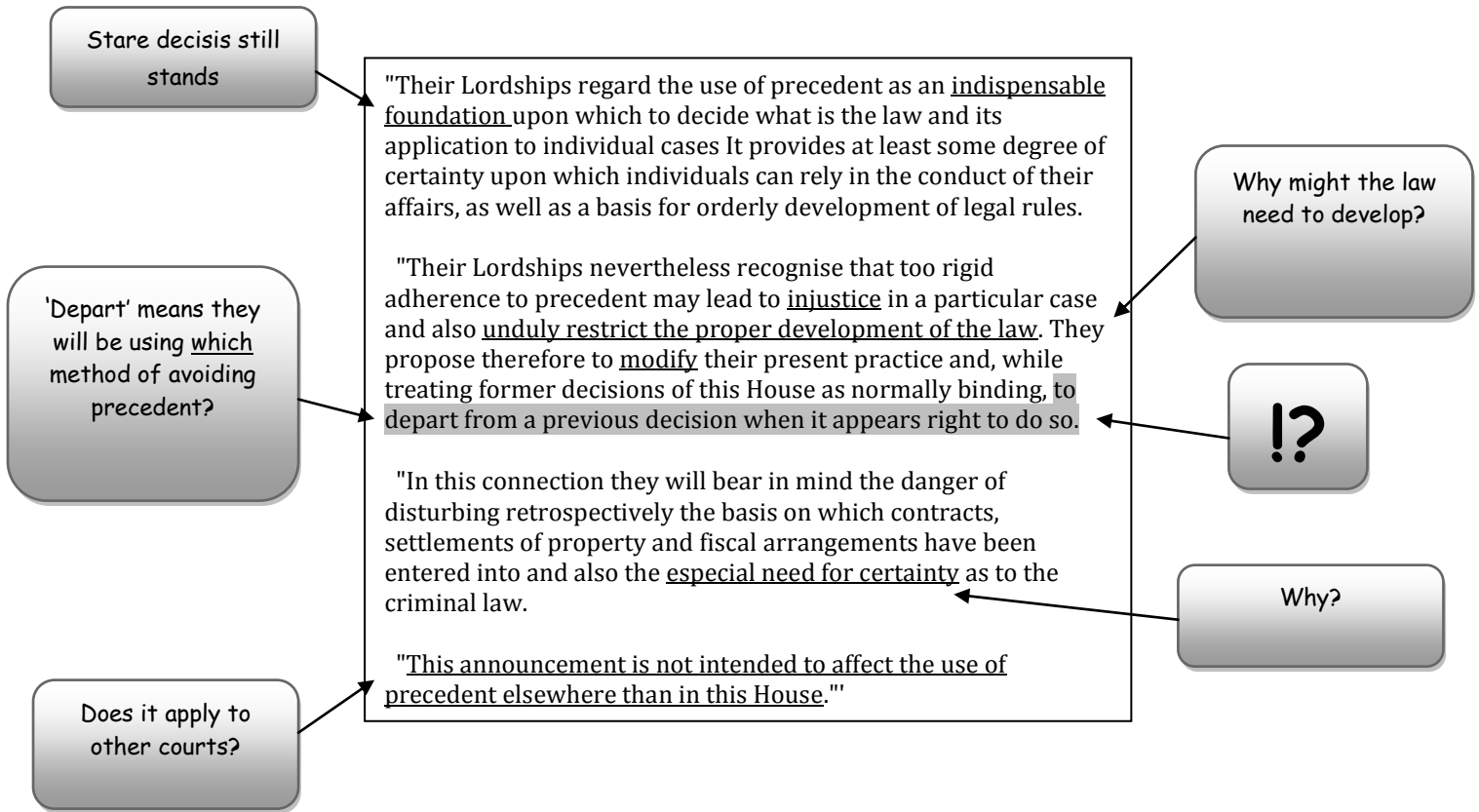


So, the House of Lords refuse to change their minds which means that the only people who can change the law are \_\_\_\_\_, who do this through the Criminal Justice Act 1967 s.8.

The solution:

# The Practice Statement,

...which was issued in 1966 by the Lord Chancellor, Lord Gardiner.



**So, in summary:**

Generally, the House of Lords will consider itself \_\_\_\_\_ however, \_\_\_\_\_  
\_\_\_\_\_ they may \_\_\_\_\_ their own previous decision, being even  
more cautious if it is a matter of \_\_\_\_\_. This power is \_\_\_\_\_.

Bound      criminal law      overrule      where it appears right to do so      discretionary

## Use of the Practice Statement

The HL proved very reluctant to use this power. They used it for the first time in *Conway v Rimmer 1968*, although the majority of the court chose to distinguish instead.

In addition, in the cases of *Knulier v DPP* and *Jones v Secretary of State for Social Services*, the House of Lords refused to overrule the earlier cases even though they said they were 'wrong' as:

“in the general interest of certainty in the law we must be sure that there is some very good reason before we act.”

### So when have they used it in the civil law?

The first proper use of the statement was in:

*BRB v Herrington (1972)* overruling *Addie v Dumbreck (1920)*

Area of the law:	Is a duty of care owed to a child trespasser?
Original decision:	
New decision:	
Reason for overruling:	

### Other uses of the statement...

*Miliangos v George Frank 1976* overruling *Havana Railways 1968*

Area of the law:	
Original decision:	
New decision:	
Reason for overruling:	The economic situation has changed, and the British Pound no longer has the power it had.

*Murphy v Brentwood DC 1990* overruling *Anns v Merton BC 1977*

Area of the law:	Does the local council owe a duty of care if it approves plans for a building which later proves to be faulty?
Original decision:	
New decision:	
Reason for overruling:	

*Pepper v Hart 1993* overruling *Davis v Johnson 1979*

Area of the law:	Can judges refer to Hansard to help them work out the meaning of an Act of Parliament?
Original decision:	
New decision:	
Reason for overruling:	

*A v Hoare 2008* overruling *Stubbings v Webb 1993*

Area of the law:	Can you make a claim for damages against your rapist when the six year limitation has expired?
Original decision:	
New decision:	
Reason for overruling:	

**And what about the Criminal law?**

Well, they proved even more reluctant to change things here. Remember that the Practice Statement says that there should be an “*especial need for certainty*” in the criminal law.

First proper use:

*R v Shivpuri 1986* overruling *Anderton v Ryan 1985*

Area of the law:	
Original decision:	
New decision:	
Reason for overruling:	

AO2 Thinking: Does it matter that the decisions were less than a year apart?

*“I am undeterred by the consideration that the decision in Anderton v Ryan was so recent. The practice statement is an effective abandonment of our pretension to infallibility. If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better.”*

... or in normal words:

*R v Howe 1987* overruling *DPP for Northern Ireland v Lynch 1975*

Area of the law:	Can duress be a defence to murder?
Original decision:	
New decision:	
Reason for overruling:	

*R v R (marital rape)* overruling *R v Miller 1954*

Area of the law:	
Original decision:	
New decision:	
Reason for overruling:	Social standards and approaches to marriage have changed.

*R v G&R 2003* overruling *R v Caldwell 1982*

Area of the law:	Is the mens rea for criminal damage objective or subjective?
Original decision:	
New decision:	
Reason for overruling:	

So, in summary:

When will the court use the Practice Statement now?

**But:** there are still some areas that they refuse to change the law, and say that it is up to Parliament.

*C v DPP 1995* ... D was a 12 year old boy who was charged with interfering with a motorcycle.

At the time there was something called *doli incapax* which came into effect if D was between 10 and 14. The HL refused to reduce the age of criminal responsibility... and so it was left to Parliament to alter it under the s.34 Crime and Disorder Act 1998



## So, have you understood?

To check your understanding, we are going to plan a past question on this topic. This paper has at least one source to help you (which you **must** use!). So here is a typical past question:

### Source A

Their Lordships ... recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law ... they propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from previous decisions when it is right to do so.

In this connection they will bear in mind ... the especial need for certainty in the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House.

Extract adapted from: *'The House of Lords Practice Statement 1966'*

### Source B

*R v R and G* (2003) UKHL 50

Two young boys set fire to some newspapers in a shop yard. After they left, the fire spread to the shop itself and to other shops. They were charged with arson under the Criminal Damage Act 1971. The court had to decide the meaning of the word 'reckless' in the Act. Prior to the passing of the Act there had been a report by the Law Commission. However, in *Metropolitan Police Commissioner v Caldwell* (1981), the House of Lords had refused to look at the report but instead gave an objective meaning of recklessness (i.e. that a defendant would be guilty if an ordinary adult would have realised the risk). In *R v R and G* the court consulted the report and using the Practice Statement overruled *Caldwell*.

Extract adapted from: *Key Cases English Legal System*, Martin & Turner, Hodder.

(a) Source A and Source B both refer to the **Practice Statement**.

Describe the use of the Practice Statement using the Sources and other cases. [15]

Introduction:				
Main	Heading	Means	Origin	Explanation
Conclusion				

# Court of Appeal & Precedent

Again, we're going to start with a little recap!



The CA is bound by \_\_\_\_\_ and the \_\_\_\_\_, as well as the \_\_\_\_\_.

There are two divisions in the CA: the \_\_\_\_\_ and the \_\_\_\_\_.

Each division only binds \_\_\_\_\_.

Generally, the CA considers itself bound by \_\_\_\_\_.

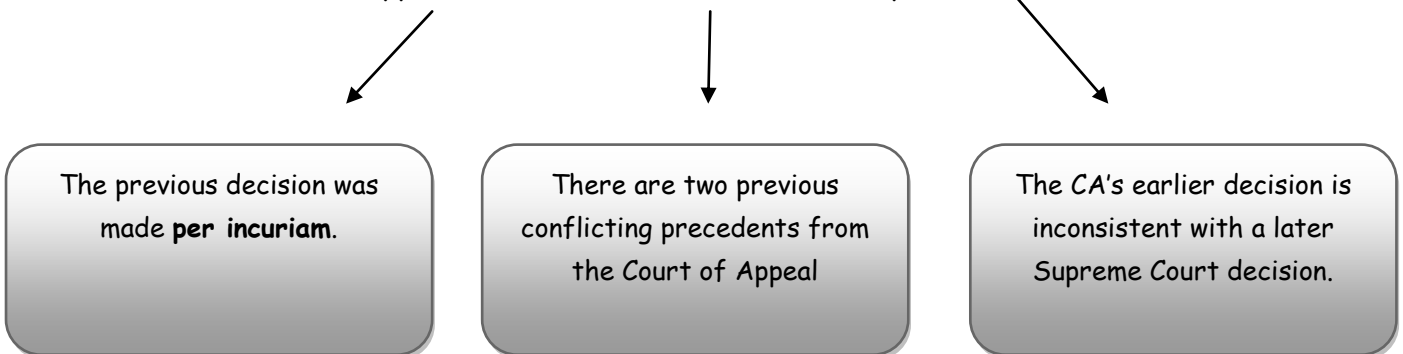
It can, of course, \_\_\_\_\_, \_\_\_\_\_ or \_\_\_\_\_ the decision of a lower court. However, it cannot use the \_\_\_\_\_ to overrule the Supreme Court.

Distinguish  
Civil  
Practice Statement  
Itself  
Supreme Court  
ECJ  
Reverse  
Its own previous decisions  
Overrule  
Criminal  
ECtHR

## *Young v Bristol Aeroplane 1944*

This works in a similar way to the Practice Statement, and allows the Court of Appeal to ignore its own previous decisions in some **very limited** circumstances.

The Court of Appeal does not have to follow its own previous decision where...



## 1. Per Incuriam

### *Williams v Fawcett 1986*

D had been sent to prison for breach of a non-molestation order, but the paperwork did not specify what the breaches were.

*"... this court is justified in refusing to follow one of its own previous decisions not only where that decision is given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on it, but also, in rare and exceptional cases, if it is satisfied that the decision involved a manifest slip or error."*

Lord Donaldson MR



## 2. There are two previous decisions from the Court of Appeal

**Simple:** the court has to pick one!. This can occur because the Court can be sitting in a range of cases at the same time so different courts come to different conclusions on the same point! The later case normally wins.

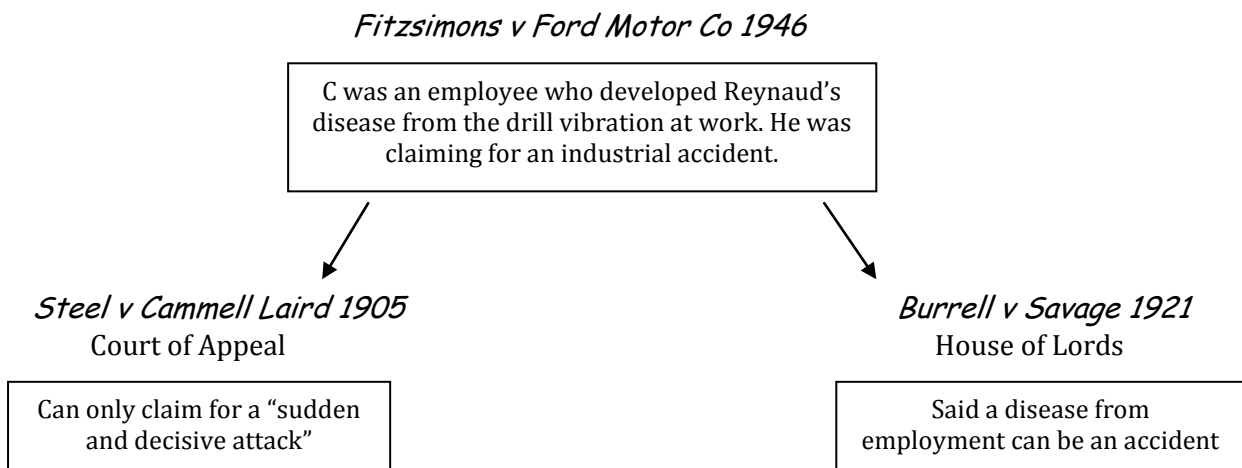
### *Starmark Enterprises v CDL Enterprises 2001*

This concerns a rent review clause (how exciting!). The Court decided that the later decision was wrong, and followed the earlier decision instead.

If it is a criminal case, they should pick the one which is the most advantageous to the defendant.

## 3. There is a later, conflicting, decision from the Supreme Court

Well, this is just logical! Under precedent they should apply the Supreme Court decision anyway! It can happen if there has been a leapfrog appeal (one of the cases literally 'misses out' the CA)



**Extra rule:** The Court of Appeal has a little more flexibility in criminal cases, where they can also overrule their own previous decision if the earlier law was "**misapplied or misunderstood**".



### *R v Gould 1968*

D had pled guilty to bigamy, and then tried to withdraw it because he argued that he genuinely didn't realise he was still legally married. The court refused, because there was a previous case which said it didn't matter.

Court of Appeal quashed his conviction, despite the previous case as he genuinely thought he was divorced (he had been granted a decree nisi, not absolute!)

## A couple of other issues affecting precedent in the Court of Appeal

### European Court of Human Rights

If there is a decision by the European Court of Human Rights the the court should 'take account of them' and the Court of Appeal can follow them instead of the Supreme Court.

#### *Re Medicaments 2001*

The court refused to follow the earlier HL decision, and instead applied the ECtHR test for objectivity of court members.

One of members of the court deciding the case had previously applied for a job with the defendants.

### The divisions don't bind each other

#### *Re: A (Conjoined Twins) 2000*

"Necessity is a defence to murder" but this was said in the civil division, so can only be \_\_\_\_\_ on the criminal division.

### European Court of Justice

As with all other courts in England and Wales, the Court of Appeal is bound by interpretations of EU law from the ECJ

### Privy Council

Recap time!

*Attorney-General for Jersey v Holley 2005*

followed in

*R v James, Karimi 2006*

rather than

*R v Morgan Smith 2000*

### Can they create precedent?

*Re: A (Conjoined Twins) 2000*

*Re: S (refusal of medical treatment) 1992*

# Court of Appeal Questions

These are from a past question. Each of them is worth **5 marks** and is marked for **A02** (application) only.

**(b) Consider each of the following situations and explain whether or not the Court of Appeal can depart from the previous decision.**

(i) A case concerning a death resulting from medical negligence was heard by the Court of Appeal (Civil Division). A year later, a similar issue is being heard by the Court of Appeal (Criminal Division).

---

---

---

---

---

---

---

(ii) A case concerning breach of contract was decided by the Court of Appeal (Civil Division). Days later a similar issue is heard by the same court but the judges now feel that the decision should be different. **[5 marks]**

---

---

---

---

---

---

---

(iii) A case concerning murder was decided by the House of Lords. The Court of Appeal (Criminal Division) believes the decision of the House of Lords is out of date. **[5 marks]**

---

---

---

---

---

---

---

# Should the Court of Appeal Have more powers?

This is also known as the *Denning debate*.



**Remember:** the CA is bound by the SC, because it is the ultimate appellate court for England and Wales

However, in reality, the Court of Appeal is the final appeal court for many more people than the Supreme Court, so there is an argument that they should have more powers... and at least be on equal terms with the Supreme Court in terms of avoiding precedent.

This is the argument which Lord Denning tried to advance for a number of years in the Court of Appeal. He was the Master of the Rolls, which meant he was head of the Civil Division... and a bit of a maverick at times!

## What was his argument?

- Argument One: By introducing the Practice Statement, the House of Lords was bringing in a whole new, more flexible, way of dealing with precedent.
- Argument Two: The Court of Appeal created the *Young* criteria, so they can change them (it's only updating the law after all!)
- Argument Three: If the House of Lords is making decisions which are *per incuriam*, why on earth should the Court of Appeal follow something that they know to be wrong in law?
- Argument Four: It is the final appeal court for many, so in fairness should have the same powers as the House of Lords/Supreme Court.

## So how did this argument proceed?

Well, it takes the form of a number of cases, where Denning tried to impose this view, and the House of Lords consistently knocked him back! A lot of cases will seem familiar from the Practice Statement.

Case	Denning & CA	House of Lords response
<i>Conway v Rimmer</i> 1967	Denning refuses to follow the earlier decision of the House of Lords	Made it clear that Denning could not refuse to follow precedent.  ... but they used the Practice Statement to change their own minds!
<i>Broome v Cassell</i> 1971	The Court ignored the earlier precedent of <i>Rookes v Barnard</i> from the HL as it was <i>per incuriam</i> .	"[I]t is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way...  The fact is, ... that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers."  Overturns the CA decision.
<i>Schorsch Meier GmbH v Henning &amp; Miliangos v George Frank</i> 1976		Only <i>Miliangos</i> went on appeal to the House of Lords, who used the Practice Statement to overrule its own previous decision  "It is not for any inferior court—be it a county court or a division of the Court of Appeal presided over by Lord Denning—to review decisions of this House. Such a review can only be undertaken by this House itself under the declaration of 1966."

The last round: *Davis v Johnson 1979*



### Denning's argument in the Court of Appeal:

'On principle, it seems to me that, while this court should regard itself as normally bound by a previous decision of the court, nevertheless it should be at liberty to depart from it, if it is convinced that the previous decision was wrong. What is the argument to the contrary?

It is said that, if an error has been made, this court has no option but to continue the error and leave it to be corrected by the House of Lords. The answer is this: the House of Lords may never have an opportunity to correct the error; and thus it may be perpetuated indefinitely, perhaps forever. That often happened in the old days when there was no legal aid. A poor person had to accept the decision of this court because he had not the means to take it to the House of Lords ...

Apart from monetary considerations, there have been many incidents where cases have been settled pending an appeal to the House of Lords; or, for one reason or another, not taken there, especially with claims against insurance companies or big employers. When such a body has obtained a decision of this court in its favour, it will buy off an appeal to the House of Lords by paying ample compensation to the appellant. By so doing, it will have a legal precedent on its side which it can use with effect in later cases ... By such means an erroneous decision on a point of law can again be perpetuated forever. Even if all those objections are put on one side and there is an appeal to the House of Lords, it usually takes twelve months or more for the House to reach its decision. What then is the position of the lower courts meanwhile?

They are in a dilemma. Either they have to apply the erroneous decision of the Court of Appeal, or they have to adjourn all fresh cases to await the decision of the House of Lords. That has often happened. So justice is delayed, and often denied, by the lapse of time before the error is corrected ...

To my mind, this court should apply similar guidelines to those adopted by the House of Lords in 1966. Whenever it appears to this court that a previous decision was wrong, we should be at liberty to depart from it if we think it right to do so. Normally, in nearly every case of course, we should adhere to it. But in an exceptional case we are at liberty to depart from it.'

#### Questions

1. Why did Lord Denning say that the Court of Appeal should be at liberty to depart from a previous decision if it is convinced that the previous decision was wrong?
2. What reasons does Lord Denning give for an appeal not going to the House of Lords?

### The response from the House of Lords *Davis v Johnson 1979*

The case of *Davis v Johnson* was appealed to the House of Lords and this is what Lord Diplock had to say about Denning's wish to have more freedom to avoid the precedent of the House of Lords:

"In an appellate court of last resort a balance must be struck between the need on the one side for legal certainty resulting from the binding effect of previous decisions, and on the other side the avoidance of undue restrictions on the proper development of the law.

In the case of an intermediate appellate court, however, the second [point] can be taken care of by appeal to a superior appellate court...

In my opinion, this House should take this occasion to re-affirm expressly unequivocally and unanimously that the rule laid down in the *Bristol Aeroplane* case to *stare decisis* is still binding on the Court of Appeal."

#### Questions

1. Diplock says that there is a need for balance between certainty and allowing the law to develop. How does the House of Lords achieve this balance?
2. For what reason does Diplock say that the Court of Appeal does not need to be able to develop the law?

Consolidation:

## Judicial precedent Problem Questions:

In each situation, you need to explain **what** the first court should do and **why**.

1. A case is decided in the Crown Court. A similar case reaches the Court of Appeal 1 year later.
2. A case involving the civil law of negligence is decided in the Court of Appeal. One week later, another negligence case reaches the Court of Appeal but it has slightly different facts.
3. A case decided in the House of Lords in 1993. A similar case reaches the Court of Appeal in 2003
4. A case decided in the House of Lords in 1993. A similar case reaches the House of Lords in 2003
5. The Court of Appeal sets a precedent in a criminal case. Six months later, it wishes to change the precedent in a similar case
6. The House of Lords sets a precedent in 1954. A similar case reaches the House of Lords in 1965
7. The House of Lords sets a precedent in 1954. A similar case reaches the House of Lords in 1969
8. The divisional High Court decides a case in 2005. The High Court ordinary hears a similar case in 2006
9. The Supreme Court makes an *obiter dictum* relating to the criminal offence of attempted murder. The Court of Appeal hears an attempted murder case 3 weeks later.
10. The Privy Council sets a new precedent in an Australian case. A similar case reaches the House of Lords 1 year later.

# Evaluation & Assessment of Precedent

In this paper, you will have to write an evaluation of one specific area of law.  
The notes we complete on this page should help you with this.

**Task One:** Are these **advantages** or **disadvantages** of the current system of precedent?

There are no rules governing when persuasive precedent is used.

Can update the law to reflect changing social standards

Judges can use analogy to help them with new situations

Practical response to the actual facts of the case

Too much distinguishing or use of Practice Statement damages certainty

It leads to an orderly and natural development of the law.

Respects the separation of powers

The law can develop naturally

There can be a lot of detail in the explanation which can help with application

Bad decisions are perpetuated since lower courts must follow higher courts

Distinguishing can be done on irrelevant grounds

The Court of Appeal can follow the Privy Council

Too many ways to avoid Precedent

Flexibility

Difficult to distinguish between ratio and obiter

Very few cases get to the Lords which is the only court which can overrule one of it's own previous decisions.

Restricts the development of the law

Provides certainty and consistency in law.

Can be inconsistent

retrospectivity

Saves time

Judges have clear cases and rules to follow.

There are so many cases that it is hard for judges to find relevant cases and the ratio may not be clear.

**Task Two:** Developing your discussion

It's important that you get used to developing an argument, rather than just listing points (this is something which the chief examiner has commented on a lot!

Take five of the points from above, and develop a discussion for each. Remember that you will need evidence, and a contrary point for each! **Point** → **because** → **and** → **however...**

[you can alter the order!]

<b>Point:</b>	
<b>Point:</b>	
<b>Point:</b>	
<b>Point:</b>	
<b>Point:</b>	