

Law of Precedent

One of the major considerations on how someone is tried in a court of law depends upon the previous convictions of similar cases. This law of precedent (stare decisis) was founded hundreds of years ago as part of our common law. The literal translation of stare decisis is "that like cases be decided alike." Precedents in law play a fundamental role in the judicial processes of Canada. From stealing a loaf of bread ranging to murder in the first degree, there are precedents for any type of case that has ever occurred in Canada, and even many cases from Britain (prior to 1949 and the abolishment of the JCPC). Unfortunately, the law of precedent does have its downfalls.

Despite the fall backs of stare decisis, the law of precedent still holds true and important in our modern society. Some of the shortcomings of stare decisis are the following: As time changes, precedents need to change in order to accommodate society's new values and laws. Furthermore, the introduction of "social facts" in court cases has clouded over many existing precedents with many new facts and ideas that render the basics of stare decisis much more complicated.

One of the more common drawbacks to the law of precedent is that over time, a law may be found as no longer applicable, or on the other hand, a new decision may be found in a trial which can also be undesirable. Keep in mind that the courts are not supposed to create new policies to deal with new problems, that is the role of the legislature. This drawback is prevalent in two forms: The first is the ruling of a court case, and the second is the sentencing or judicial decision of a case.

In order to examine the first form an example is given. A long time ago, sexual harassment at the work place was virtually unheard of or it was ignored altogether. The case probably would not even make it to court. Nowadays if a boss (traditionally a man) simply inquires about an employee's sexual status (traditionally the woman) is considered sexual harassment, and the boss would be found guilty of the charge. This is a classic example of the changing views of society. Sixty plus years ago, women seemingly meant nothing to the world. They were considered tools, possessions, and frequently were not referred to at all by the law. However, with the long battle for the realization of woman's rights, females have become respected by our society and our laws. Unfortunately, sexual harassment at the workplace is going too far. It used to be a threat of one's job in return for sexual favors to qualify as quid pro quo harassment. Yet in today's context, simply inquiring about an employee's sexual status is deemed as sexual harassment.

There are problems with old laws and precedents that may need to be rectified. Previous decisions by judges do not necessarily embody the law. Here is where a judge's duty is to apply the law, not another justice's determination of it. "The law and the opinion of the judge may not always be one and the same." For judges, it is important to correct any precedent that is now viewed as a mistake. Making sure that precedents are kept "in check" is a vital role of the courts.

The second case of changing precedent is that of court sentencing and decision making. This part of stare decisis troubles many people along with myself for a good reason, court cases are getting out of hand! Here offered is another example. Fifty years ago, a convicted serial killer would have been hung by the laws of capital punishment. Yet nowadays, the taking of a convicted killer's life is deemed as cruel and unusual punishment, even if he murdered the Prime Minister on national television. If that example is too drastic, here is another, more reasonable example. In the United States, court rulings dealing with personal injury or damages are becoming out of this world. Here are a couple of examples: A lady gets

8 million dollars for spilling hot coffee from McDonalds' on herself; O.J. Simpson is out a total of 33 million dollars for the wrongful deaths of Nicole Brown-Simpson and Ronald Goldman. These rulings are ludicrous! If one chooses to say that is the States and not Canada, how about the Brian Mulroney's attempt to sue Canada for 55 million dollars due to slanderous remarks that were allegedly made by his fellow politicians and Canadian citizens? How much further must society "progress" (and this term is used very loosely) before a life sentence of 25 years for a convicted killer is deemed as cruel and unusual? With such continuing changes in the precedents due to an ever developing society, it will not be long before our court system has gone too far with its rulings. Yet the only solution that seems likely is to put a "cap" on sentencing and judicial decisions. We currently do have such "caps" yet they seem to be stretching ever so consistently.

A recent and very big complication in the law of precedent is the notion of "social facts." Spawned from the United States, social facts, "which are general patterns of human behavior," only came into Canada in the 1970's. The use of social facts in a court case was greatly increased by the enactment of the Charter of Rights and Freedoms in 1982. A few problems have arisen in the judicial process and the application stare decisis due to social facts. When social facts are weighed against historical or adjudicative facts in a court case, conflicting solutions may occur. This means that when looking specifically at the historical facts, a judge may use a precedent to guide his or her ruling, however, once adding social facts to the case (by use of expert witnesses, statistics, etc.) the decision of that case may no longer be cut and dry. There may be certain circumstances or extraneous variables that have come to play a vital role in the decision of a trial. Therefore, the use of a precedent may be inappropriate. This is a problem because even though social facts may change the view of a case, stare decisis obliges a court to apply precedent to a case even though it is wrong. "Whether the present case resembles the plain case 'sufficiently' and in the 'relevant' aspects" is what judges need to decide with the twist of extrinsic evidence. With the addition of social facts to the judicial system, stare decisis is "no longer an article of faith."

Before too much criticism is allowed regarding the law of precedent, one must ask if there is a more feasible solution. As far as I can see, there is not. There are a myriad of important uses and applications for stare decisis. It uses "past experience to guide present conduct." It promotes the rule of law, not men. The law of precedent also minimizes judicial discretion and creativity. This is a major benefit that the Canadian judicial system has over that of the American's. As Americans see precedents as only a "cogent principle," the judges are much more free in their decision making. This can lead to a bias in the delivering of fair justice to the people. Stare decisis is also an instrument of stability that assures equality in the law. A vital aspect for civilized societies is the certainty and continuity of the law.

The law of precedent has managed to stay intact and active despite the changes and challenges of society over hundreds of years. Yet as there is no guarantee that what is law today will still be a valid law tomorrow. Despite this possibility, stare decisis has managed to maintain a firm foothold in our judicial system. After a brief view of the pros and cons of stare decisis, one will find that the law of precedents is not perfect, however it is the best solution to the problem of administering justice fairly in our society. "For a law with no certainty is no law at all."

