



**NEW FINAL APPELLATE COURTS  
IN THE COMMONWEALTH  
AND  
THE DOCTRINE OF PRECEDENT**

**The Honourable Mr. Justice Nelson**

**Commonwealth Meeting of Justices and Registrars of  
First/Regional Appellate Courts**

**Wellington, New Zealand: 20-24 February 2006**

**Canberra, Australia: 27 February-2 March 2006**

**NEW FINAL APPELLATE COURTS  
IN THE COMMONWEALTH AND  
THE DOCTRINE OF PRECEDENT**

---

All those participating in this conference share the common heritage of the common law of England and English legal institutions. There was a time when imperial law was imposed on our countries by a colonial legal system that had at its apex the Judicial Committee of the Privy Council.

However, the geographical jurisdiction of the Privy Council is now on the wane. If the contracting parties to the Agreement establishing the Caribbean Court of Justice were not included because of their agreement to make that court their final court, the Privy Council's jurisdiction would be as follows -

A. Appeals to Her Majesty in Council

1. The Bahamas (303,770)<sup>1</sup>
2. Belize (287,730)
3. Cook Islands and Niue (21,388; 2,145)
4. St. Vincent and the Grenadines (17,848)
5. Tuvalu (9,600)

B. Appeals from U.K. Colonies

1. Anguilla (13,477)
2. Bermuda (65,773)
3. British Virgin Islands (23,098)

---

<sup>1</sup> Population figures are included in brackets on the right of each territory for which the Judicial Committee is the court of final appeal.

4. Cayman Islands (45,436)
5. Falkland Islands (2,967)
6. Gibraltar (27,928)
7. Montserrat (9,439)
8. Pitcairn Islands (45)
9. St. Helena (7,502)
10. Turks and Caicos Islands (21,152)  
(The Sovereign Base Areas in Cyprus are not included)

C. Appeals to the Sultan of Brunei in civil cases.

D. Appeals from independent Commonwealth republics

1. Kiribati (as to certain constitutional rights only) (105,432)
2. Mauritius (1,240,827)

This list will remain hypothetical for the time being because, of the parties to the Agreement establishing the Caribbean Court of Justice, only Barbados and Guyana have completed the constitutional changes necessary to replace the Privy Council by the Caribbean Court of Justice.

The Caribbean Court of Justice was inaugurated on April 16, 2005. As the Right Honourable Dame Sian Elias, Chief Justice of New Zealand, reminded a special sitting of the new New Zealand Supreme Court on July 1, 2004:

*"... it is worth remembering that [these] are anxieties that have been present in every jurisdiction which has set up such appeal courts. When the High Court of Australia was set up in 1903 there were fears that the judges would not have enough to do. The Supreme Court of the United States in fact had nothing to do for the*

*best part of three years. It languished for its first ten years, existing on the fringe of American awareness. When Canada and Australia removed appeals to the Privy Council concerns were raised there, as they have been in New Zealand that overseas business would be lost because of lack of confidence in the local courts, and that the law would be disrupted and unsettled. Those fears were not realized in Canada or in Australia.. "*

I am sure in 2006 that those fears have not been translated into reality in New Zealand or even the Caribbean.

Several Commonwealth countries whose final court was formerly the Privy Council have abolished appeals to the Privy Council:

Canada

1. Criminal matters - 1933
2. Civil matters - 1949

Australia

1. Federal and constitutional matters - 1968
2. Common law and specified matters - 1975
3. State jurisdictions - 1986

New Zealand - 2004 subject to transitional provisions.

Although technically in Australia a final appeal to the Privy Council lies in constitutional matters between states if a certificate enabling this to be done is given by the High Court, the High Court has made it clear it would never grant such a certificate.

With the advent of new final appellate courts in New Zealand in 2004 and in the Caribbean in 2005 it is timely to examine the extent to which the doctrine of precedent applies or should apply.

### The meaning of precedent

"Precedent" in the common law can be used in two senses. In one sense judicial precedent is a convenient shorthand for the obligation of a court to follow the decision or ruling of a court higher than it in the hierarchy of a legal system, unless it can distinguish the earlier case.

In another sense a superior court must follow its own earlier decision and must not depart from it unless it can distinguish the earlier case. This aspect of precedent is sometimes referred to as stare decisis.

### A divergent or unitary common law?

The Privy Council is a supranational English Court with scattered jurisdictions. It is the single unifying factor between these far flung jurisdictions. For that reason from time to time the Privy Council has operated and enforced the concept of an universal common law, the fons et origo of which was English Law.

In the New South Wales case of Trimble v Hill (1879) 5 App. Cas. 342 the issue concerned the interpretation of a proviso in the statute which incorporated an imperial statute by repetition. Since there was an authoritative decision of the English Court of Appeal on the proviso in the English statute, "*colonial courts should also govern themselves by it, until the House of Lords decided otherwise.*"

The suggestion that colonial courts were bound by a decision of the Court of Appeal in England and, presumably by the Privy Council itself, seems to be based on the idea that the law of the colonies was whatever the law of England was at the relevant time, as regards common law or statute.

The Privy Council modified its position in **Robins v National Trust Co. Ltd.** [1927] AC 515, where Viscount Dunedin said:

*"...when an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it."*

Two cases, one from New Zealand and the other from Hong Kong, demonstrate that the concept of a unitary common law still survives. In **Hart v O'Connor** [1985] AC 1000 the Privy Council held that the validity of a contract entered in to by a lunatic who is ostensibly sane has to be judged by the same standards as a contract by a person of sound mind. Such a contract is not voidable by the lunatic or his representatives by reason of unfairness unless such unfairness amounts to equitable fraud.

The Privy Council reversed both the High Court and Court of Appeal of New Zealand and overruled a line of New Zealand cases ending with **Archer v Cutler** [1980] 1 NZLR 386. There was, Lord Scarman said, no good reason for the law of New Zealand to differ from the law of England or the law of Australia or other common law countries.

In **Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd** [1986] 1 AC 80 the Privy Council held that a customer owed no duty to his bank to take reasonable precautions to prevent forged cheques being presented to the bank or to check his bank statements and notify the bank of unauthorized debits.

The Privy Council held that once the applicable law was English law the Judicial Committee would follow a House of Lords decision which covered the point in issue.

Lord Scarman said: "*The Judicial Committee is not the final judicial authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity.*"

The effect of the *Tai Hing* case was to expand the principle in *de Lasala v de Lasala*, [1980] AC 546 which enunciated the proposition that where common law territories re-enacted English legislation there should be uniform interpretation of the common legislative provisions in accordance with English law.

Their Lordships appeared to concede that the principle did not apply if custom, statute or other reasons peculiar to the jurisdiction militated against its application. Yet the Privy Council did not consider whether the intention and purpose of the local legislature in re-enacting an English statute were relevant.

However, the idea of a universal common law is already enshrined in the laws of some Caribbean countries. For example, section 12 of the Trinidad and Tobago Supreme Court of Judicature Act Chap. 4:01 states:

"12. Subject to the provisions of any written law in operation on 1<sup>st</sup> March 1848, and to any written law passed after that date, the Common Law, Doctrines of Equity, and Statutes of general application of the Parliament of the United Kingdom that were in force in England on that date shall be deemed to have been enacted and to have been in force in Trinidad as from that date and in Tobago as from 1<sup>st</sup> January 1889.

By provisions such as section 12, English common law is introduced in to the law of a Commonwealth country. If one adheres to the view that the courts merely declare the common law to be what it is and always was, such a reception provision introduces the common law as it is declared from time to time by the House of Lords.

In **Johnson v R** (1966) 10 WIR 402, Wooding CJ said at p. 415B:

*"In view of the provisions of s. 3 of the Offences against the Person Ordinance and of s. 12 of the Supreme Court of Judicature Act which incorporates as part of our law the common law of England, and since any decision of the House of Lords must be regarded as the prevailing law and, in so far as it interprets it, the common law of England, we must, whatever our own view, accept its judgment in Smith as declaratory of the law here. Nevertheless, because of the advice we propose giving, we ought, we think, to say that the judgment not only evoked a protest from and was firmly repudiated by every member of the Bench of the High Court of Australia, but it has also run into a hurricane of criticism in England itself".*

In **Jamaica Carpet Mills Ltd. v First Valley Bank** (1986) 45 WIR 278 the Court of Appeal of Jamaica was faced with two conflicting decisions, one from the House of Lords and the other from the Privy Council. The Privy Council held that where a decision of the Privy Council conflicted with a later decision of the House of Lords in which the error of the earlier decision is expressly stated, a court which is bound by Privy Council decisions may follow the decision of the House of Lords.

In **Breuer v Wright** [1982] 2 NZLR 77 the New Zealand Court of Appeal said:

*"...we do not think that it can be doubted that subject only to the exceptional need to take account of the local development of some aspect of law which otherwise is common to sister Commonwealth countries, a decision of the Privy Council given in respect of an appeal from the one would be binding upon the Courts of others".*

Thus Privy Council decisions were also treated as binding across jurisdictions. However, despite this acceptance not only of an universal common law but also of

an universal English law, the Privy Council has also embraced the concept of a divergent common law.

In *Australian Consolidated Press Ltd. v Uren* [1969] AC 590 (P.C) the High Court of Australia had taken a different view of the categories of punitive damages laid down by the House of Lords in *Rookes v Barnard* [1964] A.C. 1129. Lord Diplock in the Privy Council saw no reason to reconsider the principles in *Rookes v Barnard* since it was acceptable that English judicial policy in this area should differ from policy elsewhere. The Privy Council actually upheld the High Court of Australia although the Australian court declined to follow *Rookes v Barnard* (supra).

The new final appellate courts will not be a supranational Privy Council overseeing the courts of a wide geographical area. The removal of the Privy Council as the final court will considerably undermine the unitary concept of the common law. The difficulty is that in some territories the reception statute expressly states that the common law of England is incorporated into the law of those territories, which in the absence of local circumstances would be the law as declared by the House of Lords.

In my view the immediate effect of the abolition of the Privy Council should be to make available to each jurisdiction the judicial precedents of all other common law countries for their highly persuasive effect. Final appellate courts in the Commonwealth will pay the highest respect to relevant decisions of other final courts and will only depart from them for compelling reasons, which might include local circumstances and policy peculiar to that jurisdiction. Final appellate courts will also accept their role as the ultimate authority on the law of their jurisdiction: see *Viro v The Queen* (1978) 141 CLR 88. However, final appellate courts would be conscious that the common law may diverge within the Commonwealth for good reason. By this approach it is possible to marry the divergent view of the common law with the unitary concept of the common law. With regard to common legislation a final appellate court would eschew the approach in *de Lasala v de Lasala* (supra) where local considerations might indicate a different interpretation in a particular jurisdiction.

Final appellate courts ought not to consider themselves bound by their earlier decisions in the same way that the Privy Council did not consider itself bound by its previous decisions: see **A-G of St. Christopher, Nevis and Anguilla v Reynolds** (1979) 43 WIR 108, 123; **Lewis v Attorney-General of Jamaica** [2001] 2 AC 50, 75.<sup>2</sup>

Indeed the Privy Council in **Read v Bishop of Lincoln** [1892] AC 644, an ecclesiastical appeal, stated that it was not bound by its previous decisions. Lord Halsbury LC said at p. 60 J:

*"Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the Law."*

The High Court of Australia did not consider itself bound by its own previous decisions, and considered it was duty bound to overturn its previous decisions if later found to be erroneous. Isaacs J in **Australian Agricultural Company v Federated Engine Drivers etc.** (1913) 17 CLR 261 said:

*"The oath of a Justice of this Court is "to do right to all manner of people according to law." Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than it should be ultimately right."*

---

<sup>2</sup> In **Lewis v AG** (supra) at page 75 Lord Slynn, speaking for the majority, said: "The need for legal certainty demands that they should be very reluctant to depart from recent fully-reasoned decisions unless there are strong grounds to do so."

In Canada in Reference re Farm Products Marketing Act (Ontario) (1957) 7 DLR (2d.) 257 Rand J said in the Supreme Court of Canada:

" The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it... and that incident of judicial power must now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us".

### Final appellate courts and House of Lords decisions

My principal reason for raising this point is the provision in some Caribbean territories that the common law of England was received as from a particular date. In Thompson v R [1998] AC 811 the Privy Council held that in St. Vincent sections 76 and 78 of the Police and Criminal Evidence Act 1984 of the UK applied in that jurisdiction but not Code C thereof which was added after the cut-off point (1989) for the reception of English statutes. Thompson dealt with the admissibility of confessions and the applicability of the provisions governing admissibility in the English Act.

Some of the states of the United States of America after the Declaration of Independence in 1776 enacted provisions adopting "*the common law of England*". However, this phrase was eventually interpreted to mean in Virginia that the state had adopted the common law, but not English decisions: see the Virginia case of Marks v Morris 14 Va. 463 (1809) decided by the Virginia Chancellor Creed Taylor.

On the other hand in 1796 the state of Vermont passed "*An Act adopting the common law of England*" which explained a reception provision as an effort "*at once to provide a system of maxims and precedents*" to guide the state's courts. The Chief Justice of Vermont, Nathaniel Chipman interpreted this to mean that Vermont had received "*so much of the common law of England as is not repugnant*

to the Constitution, or to any act of the Legislature of this State".

During the immediate years after Independence Delaware, Kentucky, New Hampshire, New Jersey and Pennsylvania went as far as to prohibit the citation of English decisions made after Independence in judicial proceedings: see Francis Aumann (1938) 4 Ohio State Law Journal 331, 332.

As indicated above, Wooding CJ considered in *Johnson v R* that the Court of Appeal of Trinidad and Tobago as an intermediate court was bound by the common law as declared by the House of Lords. Wooding CJ expressly referred to section 12 of the Supreme Court of Judicature Act of Trinidad and Tobago.

The Supreme Court of Canada continued for a number of years after its final break with the Privy Council to regard House of Lords cases as binding. Eventually in 1959 in *Fleming v Atkinson* (1959) 18 DLR (2d) 8 the Supreme Court of Canada declined to follow the House of Lords. See also *Ares v Venner* [1970] SCR 608.

The Caribbean Court of Justice as a final appellate court may have to construe such reception clauses afresh and declare a reception date for the common law of England. After the chosen date the phrase "*common law of England*" would mean the common law of England as it has developed in the Caribbean region. The latter proposition would accord with the divergent view of the common law mentioned by Lord Diplock in *Cassell & Co. Ltd. v Broome* (supra).

### Final appellate courts and Privy Council decisions

In 1970 Guyana abolished all civil and criminal appeals to Her Majesty in Council<sup>3</sup>. Within a week of abolition in *Persaud v Plantation Versailles & Schoon Ord Ltd.* (1970) 17 WIR 107, 132 Crane J.A. said:

*"It is my considered opinion that consequent on the removal of the Privy Council as our final court of appeal, the doctrine of stare decisis, in so far as that court is concerned, is a dead letter with us; its former judgments are now only of persuasive authority. Of course, we shall regard them as we have always done in the highest esteem; we shall continue to cite, apply and to follow them and, when we do so, they will thereafter speak with our authority... It seems to me that it is only the natural consequence of its abolition as the final court of appeal for Guyana that the Privy Council should lose its place as a binding force in the hierarchy of authority. Ipsa jure, its pronouncements have ceased to be authoritative".*

This virtual unilateral declaration of independence by Guyana courts was echoed in *Viro v R* (1978) 141 CLR 88. Gibbs J pronounced that the High Court of Australia was no longer bound by the decisions of the Privy Council, which no longer occupied a position above it in the judicial hierarchy. He further stated:

*"Part of the strength of the common law is its capacity to evolve gradually so as to meet the changing needs of society. It is for this court to assess the needs of Australian society and to expound and develop the law for Australia in the light of that assessment."*

In the same case Barwick CJ made his agreement with the view of Gibbs J clear:

*"I am of the opinion that this court is no longer bound by decisions of the Privy Council whether or not they were given before or after the date*

---

<sup>3</sup> Appeals to the Privy Council in constitutional matters were abolished in 1973, thus finally severing ties with the Privy Council.

when the Privy Council (Appeals from the High Court) Act 1975 became effective<sup>4</sup>.”

On the other hand the Supreme Court of Canada even after 1949 regarded itself as bound by pre-1949 Privy Council cases. It regarded itself as a mere successor court. Ultimately, as indicated earlier, in the **Farm Products** case Rand J asserted the right of the court to review previous decisions where necessary.

It is submitted the Caribbean Court of Justice might well follow the example of the final appellate courts of Australia and Canada and the example of the Guyana Court of Appeal when it was a final court of appeal. However, once the court has asserted its independence and its right to overrule its own decisions, the question would arise as to the circumstances in which it would do so. In **Geelong Harbour Trust Commissioners v Gibbs Bright & Co.** [1974] AC 810 the Privy Council recognized that in order to retain the confidence of the nation the Australian High Court had to exercise its power to overrule its own decisions so as to be in accord and in harmony with the consensus of opinion of the public, the legislature and the judiciary as to the proper balance between the roles of the legislature and the judiciary as lawmakers. The High Court of Australia was best qualified to assess the national attitude on such matters.

### **Final appellate courts - overruling past decisions**

Final appellate courts in the Commonwealth consider themselves free to depart from their previous decisions. The House of Lords in its **Practice Statement (Judicial Precedent)** [1966] 1 WLR 1234 signalled its intention to modify its practice since 1898 and to depart from a previous decision when it appeared right to do so.

The **Practice Statement** recognized judicial precedent as the bedrock of the common law. It provided certainty and so a basis for the citizen to order his or her affairs. It also promoted the orderly development of

---

<sup>4</sup> See also **Barns v Barns** (2003) 214 CLR 169, 204

legal rules. Yet without the ability to distinguish cases and the existence of recognized exceptions to the rule of *stare decisis* the common law would be inflexible and productive of injustice.

Final appellate courts, as the House of Lords confirmed in its *Practice Statement*, will generally treat their former decisions as normally binding. They would exercise their power to overrule a previous decision with "great caution" and in clear cases.

One established basis for overruling is where the earlier decision is "manifestly wrong", *plainly wrong* or contains "a fundamental error" expressions which Stephen J considered as "merely pejorative". In *Queensland v Commonwealth* (1977) 139 CLR 585 at p. 599 Gibbs J envisioned that this exception would cover a judgment given *per incuriam* and in conflict with another decision of the court or with some well-established principle. It must not be a question of statutory construction where more than one rational interpretation of the law is possible: see *Jones v Commonwealth* (1987) 61 ALJR 348 at 349.

Barwick CJ in *Queensland v Commonwealth* (also called *The Second Territory Senators case*) (supra) envisaged that there were two aspects of overruling: an actual error in the previous decision and the appropriateness of preserving that earlier decision despite its being erroneous. In *Fitzleet Estates Ltd v Cherry* [1977] 3 All E.R. 996, 999 Lord Wilberforce emphasized: "*It requires much more than doubts as to the correctness of such opinion to justify departing from it*".

A change in the composition of the bench is not of itself a good reason to review an earlier decision: see *Queensland v Commonwealth* (supra); but see *Roodal v State* [2005] 1 AC 328 and *Matthew v Trinidad and Tobago* [2005] 1 AC 433.

In *Margaret John v Commissioner of Taxation* (1989) 63 ALJR 166 the High Court of Australia overruled a previous decision of 1974<sup>5</sup>.

---

<sup>5</sup> *Curran v Federal Commissioner of Taxation* (1974) 131 CLR 409.

The court relied on four matters enumerated by Gibbs CJ in *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 as justifying a departure from earlier decisions:

- (1) The earlier decision did not rest on a principle carefully worked out in a significant succession of cases.
- (2) There was a difference between the reasons of the judges constituting the majority in one of the earlier decisions.
- (3) The earlier decision had achieved no useful result, but on the contrary had led to considerable inconvenience.
- (4) The earlier decision had not been acted on in a manner which militated against reconsideration: see para. 49.

Dr. Horrigan in an article in the Australian Law Journal<sup>6</sup> has produced a useful analysis of the principles of overruling, under three broad headings. I respectfully adopt his analysis with the proviso that it may not be exhaustive.

(A) Nature of decision

1. Considerations as to the composition of the court - the panel, lack of unanimity in the result - are generally not sufficient to justify overruling.<sup>7</sup>
2. It is relevant to consider whether the earlier decision is a long-standing precedent. This may be an indicator against overruling. On the other hand where the historical justification for the rule has outlived its usefulness the courts readily overrule. See *Mabo v Queensland* (1992) 175 CLR 1 and *Salituro v The Queen* [1991] 3 SCR 654.

<sup>6</sup> (1992) 66 Australian Law Journal 199.

<sup>7</sup> *Queensland v Commonwealth* (1977) 139 CLR 585, 599-600 per Gibbs J.

3. The position of the earlier case as part of a "stream of authority". Overruling is justified where a previous decision is isolated.
4. Considerations as to whether the judicial approach in the earlier decision is inconsistent with the approach in later cases.<sup>8</sup>
5. Considerations as to the technical sufficiency of the reasoning in the earlier decision.<sup>9</sup> For example, was the decision per incuriam?

**(B) Subject-matter of the decision**

- 6.1 In constitutional cases the force of stare decisis is weakened.<sup>10</sup>
- 6.2 In cases of statutory construction decisions settling the law after a long period of uncertainty should not be overruled.
- 6.3 In criminal cases the need for certainty in the law militates against overruling.<sup>11</sup>
- 6.4 Where businessmen order their affairs on the basis of previous decisions, that fact militates against overruling.
7. Where the issue is more appropriately dealt with by legislative action than by juridical change.<sup>12</sup>

**(C) Consequences**

8. Considerations as to the impact of the precedent on the law. Incorrect previous decisions which can be confined by a restrictive construction should not be overruled.

---

<sup>8</sup> Murphy v Brentwood District Council [1991] 1 AC 398 (HL)

<sup>9</sup> Murphy v Brentwood District Council [1991] 1 AC 398, 471 B per Lord Keith.

<sup>10</sup> See *infra* the discussion on constitutional cases.

<sup>11</sup> C v DPP [1996] 1 AC 1

<sup>12</sup> See Myers v DPP [1965] AC 1001, at 1021-22 (on extending the exceptions to the rule against hearsay).

9. Where there was justified reliance on an earlier decision and government and citizens ordered their affairs on it there should be no overruling. See O'Brien v Robinson [1973] AC 912, 925, 930.
10. Overruling should not be entertained where the previous decision works well in practice especially in commercial matters.

There are two qualifications that apply to the Horrigan categories: (1) the doctrine of stare decisis rarely applies in matters concerning the liberty of the subject<sup>13</sup> (2) the categories are neither closed nor exhaustive.

### Constitutional cases

It has been said that constitutional cases stand apart since in constitutional law the paramount consideration is the maintenance of the Constitution itself.

Murphy J in Queensland v Commonwealth (supra) said:

*"The doctrine of stare decisis is not part of the Constitution and the High Court is not disarmed from altering its previous decisions... The task is to apply the Constitution, not the judicial decisions (Buck v Bavone (1976) 135 CLR 110, 137)".*

Justices Stone and Cardozo in St. Joseph Stock Yards Co. v U.S 298 U.S 38, 94 (1936) expressed similar sentiments. They said *"The doctrine of stare decisis has only a limited application in the field of constitutional law"*.

However, the true position is stated more conservatively in Arizona v Rumsey 467 US 203, 213 (1984)

---

<sup>13</sup> See R v Taylor [1950] 2 KB 368, 371 per Lord Goddard CJ.

where the majority stated: "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification."

Some of the matters that might amount to special justification were canvassed in Planned Parenthood v Casey 505 US 833, 854 (1992):

- (1) Whether the rule has proved practically unworkable.
- (2) Whether there has been such reliance on the rule that overruling would cause hardship and add inequity to the cost of repudiation.
- (3) Whether related principles of law have so far developed as to have left the old rule a mere remnant of an abandoned doctrine.
- (4) Where facts have so changed or come to be seen so differently that they have robbed the old rule of significant application.

Lord Hoffmann in his powerful dissent in Neville Lewis v A.G. [2001]1 AC 50 referred to Casey's case (supra) and apparently accepted the view that even in constitutional cases the doctrine of precedent must be held sacred.

In Casey's case O'Connor, Kennedy and Souter JJ said at 854:

*"No judicial system could do society's work if it eyed each issue afresh in every case that raised it ... Indeed the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."*

It would be wrong to think however that mere "wrongness" of an earlier decision cannot be treated as a

sufficient ground for overruling an earlier constitutional decision. In the American jurisdiction finality has from time to time given way to the concept of constitutional verity. In **West Virginia State Board of Education v Barnette** 319 US 624 (1943) the U.S Supreme Court overruled a decision given three years earlier and held that a law requiring schoolchildren to salute the American flag was unconstitutional.

In the final analysis the doctrine of stare decisis is important in constitutional cases. Precedent may be disregarded if there is special justification.<sup>14</sup> These special situations indicate that mere wrongness of an earlier decision may not be a sufficient reason for overruling. On the other hand, it is not correct to say that courts will never overrule an earlier decision on the sole ground that it was wrong.

### The form of the appellate precedent

Final appellate courts normally sit in benches of three or five. Since the coercive effect of precedent only relates to the ratio decidendi of the case, a question may arise as to precise ratio of a case where there are multiple judgments.

At least three situations might exist: (1) the majority and minority concur in the result but differ on the basis or reasoning supporting the order; (2) the court may be evenly divided as to the proper order to be made; (3) the majority are in favour of a particular order but there is no majority in favour of a particular ratio among those in the majority. In such situations, which I will not explore here, concurring judgments which reach the same result by different routes undermine the force of an appellate precedent.

Again, if one of the advantages of precedent is that it makes for legal certainty and stability, appellate dissents may also serve to diminish the force of precedent.

---

<sup>14</sup> In **Brown v Board of Education** 347 U.S. 483 (1954) the U.S Supreme Court overruled the separate-but-equal doctrine in **Plessy v Ferguson** 163 U.S. 537 (1896).

But there are credible arguments for and against dissent in final appellate courts.

In favour of dissent it may be said that it ensures that no point of view is not aired. Secondly, today's dissent might become tomorrow's leading judgment. Thus, the Privy Council in Pratt and Morgan [1994] 2 AC 1 did not follow its earlier majority decision in Riley v A.G. of Jamaica [1983] AC 719 and expressly preferred the views of the minority in Riley (Lord Bingham and Lord Brightman) that delay of more than five years in the execution of a condemned man was "*inhuman and degrading*" punishment.

Against appellate dissent it might be argued that the appearance of unanimity strengthens a court and inspires confidence in the public. Secondly, dissents foster uncertainty and instability. The effect of the dissent is to weaken the authority of the precedent.

In the final analysis both multiple opinions and dissenting judgments should be used sparingly in final appellate courts. Ultimately each judge should have the right to express his or her concurrence or dissent, but will at the same time consider the impact of such concurring or dissenting judgment on the precedential authority of the case.

### Conclusion

In this essay I have not attempted to deal exhaustively with the problems of the doctrine of precedent in courts of last resort. I have contended for the universality of the common law. That universality does not preclude the common law developing in a different way in separate jurisdictions. However, such developments would be justified by reference to local conditions, different societal norms or public policy. Final appellate courts will not be bound by their own decisions or those of the Privy Council. They will however pay great respect to the decisions of the Privy Council and the decisions of final appeal courts in the common law Commonwealth.

The doctrine of precedent is vital to final appellate courts. Precedent provides the assurance of continuity, consistency, predictability and fairness in a legal system. However, precedent must be flexible. Despite the attempts to analyze and categorize the instances in which the courts will overrule their decisions or not, one is forced to admit with Sir Owen Dixon that "the Court has adopted no very definite rule as to the circumstances in which it will reconsider an earlier decision": see Attorney-General for New South Wales v Perpetual Trustee Co. (Ltd.) (1952) 85 CLR 237, 243-4.

In constitutional law final appeal courts will also observe stare decisis. It is not so much that stare decisis does not apply, but rather it is impossible to predict when the courts will for policy reasons alone depart from their earlier position: see Mabo v Queensland (supra), where the High Court of Australia swept aside the common law doctrine of terra nullius, which treated Australia as having no legal owners, and recognized the native title of the aboriginal communities in possession of land at the date of European settlement.

Finally I caution that final appeal courts in the early stages must exercise restraint in their deployment of concurring and dissenting judgments while they strive to build the stature of the courts.

Rolston F. Nelson  
Port-of-Spain  
February 6, 2006