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Ratio Decidendi : Adjudicative Rational and Source of Law

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Abstract

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Keywords

ratio decidendi, rule of precedent, Goodhart's Theory, classes of facts, material facts

RATIO DECIDENDI: ADJUDICATIVE RATIONALE AND SOURCE OF LAW



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According to Professor Lücke, Goodhart's 'material facts' theory of precedent is the best explanation of ratio decidendi yet proposed. However, 'material' and 'facts', as used by Goodhart, are fundamentally ambiguous. 'Facts' should be taken to mean the actual facts of the precedent, to be applied to other cases by analogical reasoning (not 'classes of facts', to be applied deductively), Professor Lücke argues. 'Material' should be taken to mean 'important for the purpose of justifying the decision' (not 'important for prescriptive purposes'). So clarified (or, perhaps, modified) Goodhart's theory yields a realistic and adequate explanation of the binding force of precedent.

Introduction: the single case doctrine

The rule of precedent is a fundamentally important legal institution in common law countries: even the single judgment of a higher court speaks with a voice of authority and must be followed by lower courts.¹ This doctrine is also known as stare decisis.² It is one of the important contributions made by common lawyers to the theory and practice of jurisprudence and it has had some kind of impact in almost all legal systems. In England the principle that like cases should be treated alike can be traced back to the thirteenth century when Bracton wrote: 'If like matters arise let them be decided by like, since the occasion is a good one for proceeding a similibus ad similia'.³

Most of the basic elements of the rule of precedent such as the distinction between ratio decidendi and obiter dictum were known to seventeenth century English lawyers.⁴ However, a consistent practice of precedent could not develop until a single hierarchy of courts and a reliable system of law reporting had been established. In England these conditions were fulfilled in the second half of the nineteenth century.⁵ Today, the single case doctrine, or, as it is sometimes called derisively,

1 Salmond, 'The theory of judicial precedent' (1900) 16 LQR 376.

2 Dias, *Jurisprudence* (5th edn 1985) 126.

3 Thorne (transl), *Bracton on the Laws and Customs of England* (1968) 21; see also Lewis, 'The history of judicial precedent' (1930) 46 LQR 207, 341; (1931) 47 LQR 411; (1932) 48 LQR 230.

4 Chief Justice Vaughan is reported as having stated in 1673: 'An opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary, opinion had been broached is no judicial opinion, nor more than a gratis dictum.' (1673) Vaugh 360, 382.

5 Dias above n 2 at 126; Boule, 'Precedent and legal reasoning' in Corkery (ed), *The Study of Law* (1988) 76, 78.

‘the superstition of the single case’,⁶ is applied in common law countries with varying degrees of strictness.

Civilian systems of jurisprudence have not evolved a similar doctrine. That judges should not seek to usurp the power to make law—a power which belongs to the ruler alone—is a recurring theme in the early history of the civil law.⁷ In the last hundred years, the law-making function of the courts has been more openly avowed in civil law countries⁸ and increasing interest has been shown in the common law doctrine of precedent.⁹

If judgments are a source of law, judges are a source of power and authority. The rule of precedent is the instrument through which that power is exercised in common law countries. It is thus not just of legal, but also of political importance. Accordingly it comes as no surprise that the mysteries of judicial law-making, and of the rule of precedent in particular, continue to attract attention and much intense reflection from prominent judges,¹⁰ academic lawyers,¹¹ and legal philosophers.¹² The jurisprudential debate about the nature of the judicial process may one day tell us all there is to know about the rule of precedent, but, in the meantime, we must seek to advance our understanding of the doctrine at a technical level. The fruits of such efforts will, perhaps, assist legal philosophers in their endeavours.

Judges are bound by legislation and the nature of their obligation is greatly elaborated by the rules of statutory interpretation.¹³ The rule of precedent declares judges equally bound by the decisions of higher courts, but to account for the exact nature of this judicial obligation has proved rather elusive. This contribution is an attempt to shed some new light upon this subject.

In general, courts are bound by the decisions of higher courts, not by their own, nor by those of lower courts. Until 1966 the House of Lords was exceptional in regarding itself strictly bound by its own previous decisions.¹⁴ The technical rules which determine the hierarchical

6 MacCormick, ‘Can stare decisis be abolished?’ (1966) 11 *Jurid Rev* (NS) 197, 213.

7 Contrast the following passages from the *Corpus Juris* compiled in the 6th century under the Emperor Justinian:

‘The final decisions of the Prefecture, or the court of any other supreme magistrate, are not binding if not legal, and We order all Our judges to confirm to the truth, and to follow the principles of law and justice.’—*Code of Justinian*, Book VII, Title XLV, 13.

‘When his Imperial Majesty examines a case for the purpose of deciding it, and renders an opinion... this law will apply, not only to the case with reference to which it was promulgated, but also to all that are similar. For what is greater and more sacred than the Imperial Majesty?’—*Code of Justinian*, Book 1, Title XIV, 11. Scott (transl), *The Civil Law* (1932) Vol 14, 189 and Vol 12, 88.

8 For Germany: Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956); for France: Gény, *Méthode d'interprétation et sources en droit privé positif* (2nd edn 1954, Mayda transl).

9 Coing, *Zur Ermittlung von Sätzen des Richterrechts* (1975) 15 *Juristische Schulung* 277.

10 McHugh, ‘The law-making function of the judicial process’ (1988) 62 *ALJ* 15, 116.

11 Maltz, ‘The nature of precedent’ (1987) 66 *NCL Rev* 367.

12 Perry, ‘Judicial obligation, precedent and the common law’ (1987) 7 *Oxford J of Legal Stud* 215.

13 Pearce, *Statutory Interpretation in Australia* (2nd edn 1981).

14 Dias, above n 2 at 127.

relationship between courts in the various Australian jurisdictions will not be further examined here.

Determining the ratio decidendi

The binding essence of a judicial decision is traditionally summed up in the phrase ratio decidendi ('reason for deciding'). A great deal of thought and effort has been expended in defining and analysing this concept and in finding a reliable method for working out how the ratio decidendi of a case is best ascertained. There appear to be three main approaches: the so-called classical theory; the wide-spread view, of which Julius Stone was a prominent supporter in Australia,¹⁵ which considers the whole notion that a single case could stand for a single ratio decidendi as a complete illusion; and the 'material facts' theory developed by Goodhart.¹⁶ The purpose of this contribution is to develop a modified version of Goodhart's theory. Should this succeed, the 'illusion' theory will have been disproved and the arguments advanced in support of it need not be dealt with in any detail.

1 *The so-called classical theory*

Montrose has defined the so-called classical view as being that the ratio decidendi of a case is 'the principle of law propounded by the judge as the basis of his decision'.¹⁷ Similar definitions are to be found in early textbooks on jurisprudence.¹⁸ Such definitions seem to imply that the determination of the ratio decidendi is not an unduly difficult task: first one searches the precedent for a convenient statement of a rule, then one ensures by an appropriate test¹⁹ that this rule was actually the basis of the decision rather than a mere obiter dictum, and then one applies the rule to the facts of later cases, rather as one would apply a statutory provision. There appears to be some judicial support for the so-called classical view,²⁰ but, in truth, there probably never was a golden age in which life was quite so simple.²¹ It has probably always been true that, as McHugh has recently observed, judges, even of the highest courts, lack the power to issue legal prescriptions commanding the kind of literal obedience which is due to statutes.²² The correctness of this observation is borne out by the long-established maxim that judicial pronouncements as to the law must be read as subject to the underlying facts (*secundum*

15 Stone, *Precedent and law* (1985).

16 'Determining the ratio decidendi of a case' (1930) Yale LJ 161; 'The ratio decidendi of a case' (1959) 22 MLR 118.

17 'Ratio decidendi and the House of Lords' (1957) 20 MLR 124.

18 'The classical view was that the ratio was the principle of law which the judge considered necessary to the decision.'—Paton, *Jurisprudence* (1946) 159.

'A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.' Salmond, *Jurisprudence* (7th edn 1924) 201.

19 One such test is 'Wambaugh's test'—see Cross, *Precedent in English Law* (3rd edn 1977) 53-59.

20 See Montrose, above n 17 at 125.

21 Goodhart, above n 16 at 123.

22 Above n 10 at 122.

subjectam materiam). In *Quinn v Leatham*²³ Lord Halsbury affirmed this maxim as follows:

Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found.

It is certainly a matter of common experience that judges often express the legal principle upon which they are acting too widely and that courts are later forced to issue qualifying statements. A random, but well-known and fitting example is the statement of the 'High Trees' principle in the original case²⁴ by Denning J and the way in which it was later limited by the Court of Appeal in *Combe v Combe*.²⁵

Conversely a stated ratio may be too narrow and in need of being broadened,²⁶ or it may be too broad in some respects and too narrow in others, so that it later becomes authority for a proposition quite different from the one originally stated.²⁷ Several judges of an appellate court, even when they concur as to the result, may announce quite different ratios which are not easy to reconcile.²⁸

The difficulties faced by the adherents (if any) to the classical theory do not end here. A judgment may contain reasons but no statement of a single proposition which could serve as a coherent ratio. Worse still, judges sometimes announce decisions without giving any reasons whatsoever. The classical theory would force one to the conclusion that such decisions can have no ratio; yet that is not how they have been viewed. For example, the judgment in *Raffles v Wichelhaus*²⁹ consists of only one sentence ('There must be judgment for the defendants.'). yet generations of common lawyers have debated the legal effect of the decision as a precedent.

When the difficulties of establishing the intended ratio become extreme, the suggestion that such ratios are binding assumes an air of unreality. As Lord Dunedin stated in *The Mostyn*:³⁰

When any tribunal is bound by the judgment of another court, either superior or co-ordinate, it is, of course, bound by the judgment itself. And if from the opinions delivered it is clear . . . what the ratio decidendi was which led to the judgment, then that ratio decidendi is also binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it.

23 [1901] AC 495, 506.

24 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

25 [1951] 2 KB 215.

26 See Cross, above n 19 at 45-46.

27 See the example of *Tulk v Moxhay* given by Montrose, 'The ratio decidendi of a case' (1957) 20 MLR 587, 594. In *Osborne v Rowlett* (1880) 13 Ch D 774 at 785, Jessel MR stated:

it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle . . . and it is for a subsequent Judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle.

28 See Boule, above n 5 at 80.

29 (1864) 2 H&C 906; 159 ER 375.

30 [1928] AC 57, 73.

Even the most clearly stated ratio will not necessarily be given an operation in accordance with its literal meaning. Should a judge feel that such a ratio leads him in an inappropriate direction, he is able to declare the precedent in which the ratio was stated inapplicable by pointing to a significant factual difference between the precedent and the case before him, and then to distinguish the precedent 'on the facts'.³¹

2 'Leeways of choice'

The apparent ease with which judges seem to be able to escape the supposed binding effect of precedent has, not surprisingly, persuaded many lawyers that the whole system is nothing more than an illusion. One of the most striking comments to this effect was made by Bentham, who condemned the common law for its uncertainty, its arbitrariness and its lack of political legitimacy.³² His version of the rule of precedent was: 'Follow it unless it is most evidently contrary to what you like.'³³ Stone, who was, unlike Bentham, a life-long admirer of the common law, summed up his scepticism towards the binding force of precedent in the phrase 'leeways of choice'. Like Bentham, he denied the binding force of precedent, but saw the resulting judicial freedom as a positive, creative force which kept the legal system open to great and, perhaps, changing values and new influences, and enabled it to adapt to changing circumstances.

When members of the school of thought of which Stone was a representative deny the binding force of precedent, they do not mean thereby to accuse the judiciary of lax practice. Rather, they tend to view the case law (or at least the authoritative force of individual decisions) as so lacking in logical structure that a truly binding effect is not really possible. It is submitted, with respect, that such a view is mistaken.

3 Goodhart's 'material facts' theory

Goodhart wrote his seminal article in 1930³⁴ upon the basis that the classical theory, as he understood it, was untenable: 'it is not the rule of law "set forth" by the court or the rule "enunciated" as Halsbury puts it, which necessarily constitutes the principle of the case.'³⁵ Nevertheless, Goodhart did not join the ranks of the sceptics; he did not abandon his belief in the binding nature of the single precedent.

Goodhart seems to have been impressed with what German lawyers have aptly called 'the normative power of facts'. When judicial statements of principle must be read 'subject to the underlying facts' and when precedents can be distinguished 'on the facts', one is led to consider what magic there might be in 'facts' which seem able to override the law. When the actual facts of a precedent can be used to qualify a judicial statement of a rule or principle, one must wonder whether 'facts' are not the most important building blocks of judicially created rules. Having discarded the classical view of precedent, Goodhart suggested that the

31 Dias, above n 2, at 145-146.

32 'Truth v Ashhurst' in *The Works of Jeremy Bentham* (Bowring edn 1843) Vol 5, 233, at 235.

33 Quoted by Cross, 'Blackstone v Bentham' (1976) 92 LQR 516, 519.

34 Above, n 16.

35 *Ibid* 165.

true ratio consisted of the material facts of the case plus the actual ruling of the court. Nearly thirty years after he wrote his original article, he summed up its essence as follows: 'The principle of the case [can] be found by determining (a) the facts treated by the judge as material, and (b) his decision based on them.'³⁶

In his original article, Goodhart had illustrated his thesis with a number of examples. One may suffice for the purpose of illustration. In *Hambrook v Stokes*³⁷ a woman died of shock when she witnessed a car accident, caused by the defendant's carelessness, which threatened to kill or injure her child. The deceased's husband recovered damages. Goodhart asked whether the fact that the deceased was the child's mother rather than a mere bystander was material. That, Goodhart suggested, depended upon the way in which the judge had treated it. If he had, expressly or by implication, declared it non-material, then the estate of a mere bystander could recover if he had lost his life in similar circumstances. As Goodhart said: 'It is by his choice of the material facts that the judge creates law.'³⁸

Goodhart's contribution has been very influential and it is undoubtedly of great intrinsic importance. Its full implications seem never to have been completely spelt out.

A critical assessment of Goodhart's theory

Goodhart's formula (ratio decidendi = material facts, as determined by the precedent judge, plus decision) must be examined in some detail. Goodhart used 'ratio' and 'principle of the case' as if they were interchangeable.³⁹ 'Rule' has been used as yet another synonym for the same concept.⁴⁰ That creates terminological difficulties. 'Rule' and 'principle' are often used in different senses in modern jurisprudential debates. Moreover, both these concepts are fairly securely tied to deductive reasoning, which ratio decidendi is not. However, as long as one bears in mind these difficulties they should not cause any serious confusion. The really serious difficulties with Goodhart's formula lie in (1) his reference to the 'facts of the case' as part of the ratio, and (2) his insistence that the precedent judge has the power to declare facts material or non-material and thus to shape the future course of the law. These aspects of his theory raise issues of fundamental importance concerning the logical structure of the ratio decidendi and the nature of the judicial law-making process.

1 *The 'facts of the case'*

- (a) The judicially adopted version of the facts and the true facts:
One must distinguish between the facts adopted by the precedent judge (guided by party admissions, the evidence before the court, the rules concerning the onus of proof and such factual assumptions as it is legitimate for the judge to make) and the true facts. The true facts are those events which have actually occurred and those circumstances which

³⁶ Above n 16 at 119.

³⁷ [1925] 1 KB 141.

³⁸ Above n 16 at 119.

³⁹ Above n 16, 40 Yale LJ 161, 182.

⁴⁰ Simpson, 'The ratio decidendi of a case' (1957) 20 MLR 413, 414

actually exist or have existed. Painstaking detective work might give us a better chance of discovering them than do court proceedings. For the purpose of discovering the ratio decidendi, it is not the true facts which matter, but those which the judge took to be established. Dias has illustrated this with reference to one of the most famous precedents, *Donoghue v Stevenson*:⁴¹

what is important in law is the statement of facts rather than even their truth. The House of Lords remitted the case to the Scottish court for trial on the ruling laid down by the House, but this did not take place because of the death of one of the parties. So the truth as to whether or not there was a snail in the bottle was never established and is irrelevant to the ruling.⁴²

(b) The facts of the precedent case and ‘classes of facts’:

In the late 1950s Goodhart’s theory sparked off a lively debate in the pages of the *Modern Law Review*. The participants were Montrose,⁴³ Simpson,⁴⁴ Goodhart himself⁴⁵ and Stone.⁴⁶ Goodhart’s use of ‘facts’ and ‘facts of the case’ was subjected to some scrutiny in this debate. Simpson put forward, as unquestionable and axiomatic, his understanding of the logical nature of ‘rule of law’ (which all participants to the debate took the ratio decidendi to be) as follows:

A rule of law will always be found to contain two parts; the first specifies a number of facts and the second specifies the legal result or conclusion which ought to follow whenever these facts are found to co-exist.⁴⁷

Neither Simpson nor Goodhart had given any indication whether, in their respective statements, ‘facts’ was intended to refer to the actual, concrete facts of the precedent case, as established before the precedent judge, or to some generalised and abstracted version of those facts as is usually found in legal rules and statutory provisions. Montrose took both writers to task for this alleged ambiguity of their statements:

The ambiguity of the phrase ‘facts of the case’ is concerned with the distinction between words which refer to classes of facts and words which refer to particular facts. The brute facts of the world deal with individual men and women, particular things and unique events... Rules of law specify in their antecedents *classes* of facts...⁴⁸

As Montrose explained, it is one thing to refer to the dead snail in the ginger beer bottle in *Donoghue v Stevenson* as that unique dead snail, it is quite another to refer to it, when we turn the case into a rule, as ‘a harmful drink, or a harmful thing for human consumption, or a harmful thing for personal

41 [1932] AC 562.

42 Dias, above n 2 at 139; see also Simpson, above n 40 at 114.

43 (1957) 20 MLR 124 and 587.

44 (1957) 20 MLR 413; (1958) 21 MLR 155.

45 (1959) 22 MLR 117.

46 (1959) 22 MLR 597.

47 20 MLR 413, 414.

48 20 MLR 587, 589.

use or a thing capable of any kind of harm'.⁴⁹ It is easy to see that these expressions are general references to things like the snail in the bottle at differing levels of generality and that, depending upon which one is chosen for incorporation into a rule, that rule will embrace a narrower or broader range of actual cases. Montrose's observation was grist to the mill for Stone, who elaborated it in great detail and demonstrated successfully that, when rules had a number of factual components which could all be stated at different levels of generality, the possible combinations and permutations meant that large numbers of rules could be constructed from them which vied amongst themselves for recognition as the one *ratio* of the precedent.⁵⁰ To Stone this was proof indeed of his contention that judges had an ample range of 'leeways of choice'.

To lawyers conditioned to thinking in the categories of deductive logic, the criticisms made by Montrose and Stone are indeed incontrovertible. Before analysing Montrose's proposed distinction, one should note in passing that, in his reply to Montrose, Goodhart simply ignored the fundamental point which Montrose had made,⁵¹ whilst Simpson adverted to it briefly and denied the validity of Montrose's distinction with arguments which seem inconclusive.⁵² It seems strange that the fundamental difficulties involved in the distinction have been given so little attention in the literature since 1959.

(c) Classes of facts and their use for descriptive purposes:

As it stands, Montrose's distinction between 'words which refer to classes of facts and words which refer to particular facts' is in need of some further clarification. We employ words of the first type continually when we refer to particular facts. The purpose of descriptive statements of the facts in judgments is to acquaint the reader with the relevant events, to put him in the position in which he would be if he had personally witnessed the events which led to the dispute. If the reader is already familiar with a thing, the best way of evoking it for him is to use its name ('Festival Theatre', 'Sydney Opera House'). The same applies to persons ('Bob Hawke', 'Rolf Harris'), or to events ('The great train robbery', 'World War I'). No 'level of generality' problem can arise, for names are entirely specific: they simply 'point to' some temporally and spatially unique thing. However, we find that, even in the context of factual description, generic terms are used with much greater frequency than are simple names. All persons have names, but many things and events have not; even when names exist, they often mean nothing to readers who lack familiarity with the circumstances of the

49 Ibid 591.

50 22 MLR 597.

51 22 MLR 117.

52 21 MLR 156-158.

dispute. We resolve the resulting linguistic problem by using generic terms instead. The reader will not know Jack Brown who came to inspect the crash site, but the reader knows 'policeman' as a genus, and (if Jack Brown was one) we introduce Jack by using the indeterminate 'a policeman' and add some distinguishing characteristic ('who appeared at the crash site shortly after the accident') which makes our reference specific to Jack. In subsequent references to him we speak of 'the policeman', using a generic term with a definite article in much the same way as we would a name. The use of 'a policeman' was a convenient and short-hand way of conveying a good deal of specific information to the reader about the person who appeared at the crash site.

The nature of the class terms we use in such a context, in particular their level of generality, is determined by the descriptive purpose which we are pursuing. As Montrose has said, 'the relativity of classification to purpose is a commonplace of logical thought'.⁵³ The function of the statement of facts is to convey concrete information about the facts of the case. Accordingly, the level of generality of the generic terms we use is very low, for the lower it is, the greater is the amount of information it will convey about the specific facts of the case. For example, when describing the facts in *Donoghue v Stevenson* one might wonder whether to say that the ginger beer was in a 'container' or in a 'bottle'. At the *descriptive* level of the judgment the latter term is preferable because it is more specific and thus creates a more distinct image of what happened.

Although terms like 'policeman' or 'bottle' are generic terms and are capable, depending on the way they are used, of referring to classes of things, they would usually be quite useless as components of rules which we might wish to formulate to govern facts such as those in *Donoghue v Stevenson*. As has often been pointed out, if the ratio of that case were confined to Scottish widows who swallow snails in ginger beer bottles, it would not be of much value. When sensible rules to govern legal affairs are formulated, a much higher level of generality is often appropriate.

The distinction proposed by Montrose is more fundamental than the merely linguistic distinction between generic terms and names, it is concerned with the logical structure of our thinking about facts, events and circumstances and with the purposes which we pursue when we formulate and use words to reflect our various images of them. The distinction is so fundamental that Goodhart should not have ignored it in his reply to Montrose.

- (d) The specific facts of the case as part of the ratio decidendi:
If Goodhart had given serious attention to Montrose's criticism, he would have been forced to ponder the merits

53 20 MLR 587, 590.

of a ratio decidendi which has the specific and concrete facts of the precedent case as its first component. Such a version of the concept is in danger of invoking nothing more than a factual description of an historical event, including its forensic aftermath. If it is to be turned into a working hypothesis, a number of qualifications will be unavoidable.

As already explained, we are concerned with the judicially established version of the facts which may or may not differ from the true facts. Moreover, the statement of the facts which we find in judgments is already heavily selective: much that cannot be of any legal relevance has already been ignored. If the law is a seamless web, so are the facts of any case. Each fact related in a judgment has a 'tail' of further facts attached to it which a judge is bound to ignore lest his statement of the facts turn into an epic. For example, a divorce judge must identify the immediate parties and, perhaps, the children, but there is no need for a full list of blood relations or of friends. Some facts may be related only because they add colour and plausibility to the overall account of the case (eg, '*intending to visit his uncle*, the defendant set out in his car', as the introduction to the account of a traffic accident), but apart from such facts, the judge will usually only establish and relate what is conceivably of some legal relevance. As Montrose might have said, the scope of the judicial statement of the facts is determined by a forensic purpose. Whilst this is little more than a statement of the obvious, our hypothesis must contain one further qualification which is both less obvious and more crucial.

If concrete facts are to be of any use as parts of a ratio decidendi, they must be abstracted at least to the point where they are detached from their temporal setting. If *Donoghue v Stevenson* is to be applied today we must ignore the fact that the events occurred in 1928. Those facts must be projected forward to the present day so as to test their applicability to a present-day dispute. As Goodhart expressed this requirement: 'All facts of . . . time . . . are immaterial unless stated to be material.'⁵⁴ We think of rules and statutory provisions as being projected forward in this way. Precedents must be given the same notional treatment, if only to make their operation comparable with that of rules and statutes.

Rules specify 'classes of facts' which enable us to draw deductive inferences and thus to apply them to further concrete cases. Although concrete facts cannot yield *deductive* inferences, they are a suitable basis for *analogical* inferences and these may be just as useful and compelling. The operation of precedents without the medium of rules is a well-established feature of the law.

Not infrequently a judge comes to the conclusion that a precedent 'is in point' (and therefore binding on him if it has been decided by a higher court in the same judicial

hierarchy) on the simple basis that the facts of the two cases are 'substantially the same', 'on all fours', 'identical', 'indistinguishable'. Once that is established, it is not necessary to formulate the rule which might flow from the precedent. Cross⁵⁵ expressly acknowledges that precedents can have this simple effect: 'a court bound by a judgment, as distinct from a ratio decidendi, is bound to make a similar order to that made in the previous case when all the material facts are similar.' In order to formulate a rule of general application, one has to imagine a whole range of cases which, for the same reasons, deserve the same legal treatment. To make a judgment that a mere two cases (the precedent and the case to be decided) require the same legal treatment if the law is to be consistent, is bound to be a somewhat simpler process. Judges resort to that process quite frequently in practice.

The binding quality of a statutory provision stems, at least in part, from our syllogistic approach to its application. Once the case to be decided (the minor premise) fits under the provision (the major premise) the result seems to become a logical necessity. The logic of deductive reasoning allows for no doubts, no gradations and no escape.

Rules derived from cases also parade as major premises, but, as we have seen, are often modified in the light of new minor premises and are thus much more flexible in their operation. To pronounce them binding on future judges involves obvious difficulties.⁵⁶

Application of precedents without the medium of rules, ie because the facts of the two cases are 'on all fours' or 'indistinguishable', proceeds by way of analogical reasoning: inferences are based upon perceived factual similarities which are thought to justify the same legal treatment. An argument could be mounted to the effect that precedents are not truly binding even when applied in this seemingly compelling way: if the strongest possible case for application is the case involving the closest possible factual similarity, and if growing dissimilarity weakens the case for application, then a precedent would never be completely binding, for some difference between the precedential facts and the facts of later cases can always be detected. Analogy may work in such a fashion in some situations; it doesn't in the legal sphere. Factual dissimilarities may either weaken *or strengthen* the case for the application of a precedent.

A simple example will suffice to illustrate this suggestion. Extension of *Hambrook v Stokes* to a situation involving a bystander not related to the child would be an extension to a weaker case; the precedent would not be strictly binding. However, if we reverse the two cases, taking the bystander case to be the precedent, its application to a case involving a mother would be an extension to a stronger case to which

55 Above n 19 at 63.

56 Above p 38 (1).

the precedent would apply a fortiori. If a judge were to seize upon such a difference to distinguish the precedent and thus to avoid its application, he would be defying its authority. In such a case the precedent would be truly indistinguishable and the judge should therefore regard himself as bound by it.

It follows that a precedent of a higher court is binding *by the force of analogical legal logic* upon a lower court in the same hierarchy if the lower court has to decide a case which is factually similar to the precedent case, and is as strong or stronger in requiring the same legal outcome.

2 The material facts

As pointed out earlier,⁵⁷ there are many facts which are connected with the precedent but which the judge will have ignored because they are legally irrelevant. Other facts might at first have been thought potentially relevant (and are thus included in the judicial account of the case) but then turned out, on closer inspection, to be just as irrelevant legally as those which the judge excluded from his descriptive account in the first place. It seems obvious that such facts cannot have been part of the reason for the decision. It must have been considerations of this kind which prompted Goodhart to include in his proposed ratio decidendi only those facts which were considered material facts by the precedent judge. The first difficulty with this suggestion is that Goodhart's use of 'material' is just as fundamentally ambiguous as is his use of 'facts'. The second difficulty arises from his suggestion that the precedent judge has the power to rule one or several factual features of the case before him material or non-material.

(a) 'Material'

A single word often suffices to attribute a particular quality to a thing. Examples are 'green' or 'invisible'. 'Material' was intended by Goodhart to ascribe a quality to 'facts', but 'material' is a relational term, rather like 'related' or 'larger than'; it lacks a complete and distinct meaning until further words are added which provide a relationship ('related to Bob Hawke', 'larger than a jumbo-jet') or a context in which the expression acquires a clear and unambiguous meaning. For example, it is easy to demonstrate that a fact which would clearly have been non-material in Goodhart's sense, could be material in another sense. '*Intending to visit his uncle, the defendant set out in his car*' as the introduction to an account of an accident case⁵⁸ would almost certainly be non-material to the defendant's liability, but quite material *descriptively*, for it would perform a useful function in helping to provide a complete and plausible account of the facts. Naturally, one cannot blame Goodhart for having failed to rule out this possible meaning of 'material' since it is obvious from his articles that he did not intend to use 'material' in this sense.

⁵⁷ Above p 44 (d).

⁵⁸ Ibid.

However, there are two other possible meanings of 'material', which faced Goodhart with a choice. For the sake of clarity, he should have made that choice. Did he mean *material for purposes of justification* or *material for purposes of prescription*? A fact may be material in providing or helping provide a justification or rationale for a particular decision, yet not material prescriptively, in the sense that it would play no role in a rule pitched at its optimal level of generality and intended to govern a wide range of future cases. Depending upon which of these two meanings is chosen, the result can be significantly different.

Hambrook v Stokes may yet again serve as a convenient and simple example to illustrate the problem. Goodhart raised the question whether the close blood relationship between the child and the deceased had been a material fact. If one means 'material' in a justificatory sense, the blood relationship was undoubtedly a material fact, for it provided added justification for holding the defendant liable. If, on the other hand, 'material' is understood in a prescriptive sense, then the answer becomes doubtful. Should a judge subscribe to the view that recovery should extend to all such bystanders, whether related to the accident victim or not, then the blood relationship would (prescriptively) be non-material.

A perhaps even clearer illustration is provided by *Barwick v English Joint Stock Bank*.⁵⁹ One of the defendant's employees, acting in the course of his employment, had defrauded the plaintiff. The employee had not sought to enrich himself, but benefit his employer, the defendant, by his fraudulent conduct. That fact was unusual, for when employees stoop to fraud they usually do so for selfish reasons. When Willes J stated the rule of vicarious liability which he considered appropriate to this case,⁶⁰ he included the words 'and for his master's benefit' as part of the rule. In *Lloyd v Grace, Smith & Co*,⁶¹ Willes J was criticised on the ground that, by including that element, he had stated the rule too narrowly. The House of Lords adopted a broader version of the rule (ie the version which excluded 'and for his master's benefit') and held an employer liable in a similar situation, even though the employee had sought to benefit himself. Did Willes J deserve to be criticised? Instead of searching for what might, in the abstract, be the ideal rule for such cases, he preferred to state, instead, the strongest possible rationale for his decision, ie a rule which would most effectively and persuasively justify the imposition of liability upon the defendant. Assuming that

59 (1867) LR 2 Ex 259. The case is not a perfect illustration, for it is complicated by the existence of early authority and by the fact that Willes J (speaking for the Court) considered that the facts fell under an already established rule which decreed vicarious liability of employers for the torts of their employees. These complications will be ignored. For the sake of the argument it will be assumed that Willes J was faced with a case of first impression.

60 *Ibid* 265.

61 [1912] AC 716.

to have been his main task, it would have been quite wrong for him to have ignored ‘and for his master’s benefit’, a factual feature which provided considerable added justification for holding the defendant liable. Expressing the same point differently, one might say that a rationale with that element included would command more general approval than one which excluded it. To put it another way: the fact that the employee had acted for his master’s benefit was *justificatorily* material, even though it eventually turned out, when the rule was developed further by the House of Lords, to be *prescriptively* non-material.

(b) Judges and material facts

Goodhart failed to grapple with a problem which was most important to Montrose and particularly to Stone: at which level of abstraction or generality is the ‘principle of a case’ to be pitched if it is to be regarded as binding in future cases?⁶² Judges are free to adopt as abstract a style as they like, but if they extend a passion for abstraction to rules of law which they formulate, they run the risk of having these treated as obiter dicta. As Glanville Williams has said,⁶³ judges do not accord to their predecessors the unlimited right to lay down wide propositions of law. It is submitted that there is a two-fold answer to the question posed by Montrose and Stone: (1) a judicially formulated ratio decidendi is only binding if its level of abstraction is such that it includes only cases which are as strong as or stronger than the precedent case;⁶⁴ and (2) even if so expressed, the formula chosen remains subject to review by later judges to ensure that it does not extend beyond the scope defined in (1) without some separate justification being provided.

Goodhart’s theory was really an attempt, only partially successful, to ‘switch’ the ratio debate from the realm of deductive logic to that of analogical logic which is undoubtedly more appropriate to the common law.⁶⁵ Within the altered framework in which he was thus working and to which neither Montrose nor Stone seemed able to adapt sufficiently, Goodhart did provide an answer of sorts to the questions posed above.⁶⁶ He accorded to the precedent judge the power to create law by declaring facts material or non-material.⁶⁷ The more facts are thus eliminated, the broader the sweep of the ratio decidendi will become.⁶⁸ The judge who decided

62 Above p 42 (b).

63 *Learning the law* (11th edn 1982) 75.

64 Above p 44 (d).

65 See the following famous observation by Parke J:

‘we are not at liberty to reject [those rules of law which we derive from legal principles and judicial precedents] and to abandon all analogy to them, in [cases] to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.’

Mirehouse v Rennell (1832) 8 Bing 490, 515.

66 Above at n 62.

67 Above at n 38.

68 See observations by Montrose, above n 27, 590.

Hambrook v Stokes, to refer once again to our stock example, had had the power, so Goodhart thought, to declare the blood relationship between the deceased and the accident victim non-material, and thus to bind future judges in similar cases involving bystanders who were not blood relations. Were a judge able, in this way, to make law for cases materially different from the one before him, he would have crossed the line which separates adjudication from legislation.

It is submitted, with respect, that Goodhart defined the judicial law-making power too broadly. The better view is that judges do not make strictly binding law when they go beyond providing the strongest possible rationale or justification for their decisions, a rationale which must always incorporate all those factual features of the precedent case which have significant justificatory weight in indicating that the actual decision is legally appropriate.

To see the judicial function in purely adjudicative terms was once accepted by most lawyers. This orthodox position is well expressed in the famous Irvine Memorandum of 1923, which established the traditional refusal of the judges in the State of Victoria to become involved in commissions of inquiry:

The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary. It is mainly due to the fact that, in modern times, at least, the Judges in all British Communities have, except in rare cases, confined themselves to this function, that they have attained, and still retain, the confidence of the people.⁶⁹

A purely adjudicative model of the judicial function has fallen out of favour in more recent times, as more and more judges have openly asserted, in their extra-judicial writings, a judicial law-making role.⁷⁰ This issue has a legal-philosophical dimension which has generated a voluminous literary controversy.⁷¹ Whatever the merits of the various positions adopted in these debates, it must be said *that the generation of binding case law by virtue of the rule of precedent is entirely compatible with a purely adjudicative understanding of the judicial function.* Lord Scarman has called the common law 'an incidental benefit thrown up by another process, that of adjudication'.⁷² With respect, that is a duly modest and realistic assessment of the true origin of case law. As this

69 Quoted by McInerney, 'The appointment of judges to commissions of inquiry and other extra-judicial activities' (1978) 52 ALJ 540, 541.

70 McHugh, above n 10; see also Lücke, 'The common law: judicial impartiality and judge-made law' (1982) 98 LQR 29, 45-50.

71 A recent contribution, concerned specifically with *ratio decidendi*, is Perry's article, above n 12.

72 *A code of English law* (1966) 11.

writer has sought to demonstrate elsewhere,⁷³ one important function of the rule of precedent is to make the adjudicative process more impartial and more persuasive. If judicial rationales are to be fully convincing, the judiciary as a whole must demonstrate its true commitment to them. What more convincing way of doing this than by declaring them binding in future cases?

Conclusion

This paper is not an attempt to tell judges how they should or should not write their judgments. It neither expresses nor implies any suggestion that judges should cease to formulate and propose the broad principles and policies by means of which the best of our judges have enriched the legal system with their imagination, experience and wisdom. The law of torts would be much the poorer if Lord Atkin had refrained from announcing his neighbour principle in *Donoghue v Stevenson*.⁷⁴ It may well be that such broad principles and policies are the necessary raw material for the making of analogical judgments which enable the precedent system to work in practice. However, such broad pronouncements are not binding: their authority depends entirely upon their inherent rational appeal and upon the prestige of their authors.

One of the main submissions of this paper is that the ratio decidendi, correctly understood, incorporates the actual facts of the precedent case rather than some generalised version of those facts. That in no way implies that judges should not also seek to articulate a generalised version. In *Donoghue v Stevenson*, Lord Atkin provided a carefully-worded rationale intended to embrace no more than truly like cases⁷⁵—a rationale which has a good chance of being respected and applied by other judges. He also included the neighbour principle, at a much more abstract level, and experience has shown how useful such a combination can be.

When a narrow rationale is stated in a judgment, a broadening of the rule in later cases may well be appropriate. In this respect, judge-made law differs significantly from legislation. Suppose an act of parliament had decreed liability for 'parents and other close blood relations' for situations such as that in *Hambrook v Stokes*. It would be appropriate to read into this legislation an implication that other bystanders were meant to be excluded. No such implied exclusion should ever be read into the same proposition if it were to appear as an expressly stated judicial rationale. The analogical extension of rationes decidendi to appropriate *weaker* cases is a legitimate part of the common law process.

⁷³ Lücke, above n70, particularly at 73-76.

⁷⁴ [1932] AC 562.

⁷⁵ 'A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.' Ibid 599.