Lord Toulson Memorial Lecture 2024

"Precedent and Overruling in the UK Supreme Court"

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Lord Toulson, Roger Toulson, was a true master of the common law. For those of us who love the common law's subtlety and creativity, it was always a huge pleasure to read a Lord Toulson judgment. Invariably, we would be treated to a clear, succinct, interesting and illuminating exposition of the principles governing the case. Roger had an unrivalled ability to reduce complexity to simplicity.

I first came to know Roger well when he accepted my invitation to be a member of the group advising me on the drafting of a Restatement of the English Law of Contract. Despite his many other commitments, he conscientiously attended all the meetings, was a forceful presence at those meetings, and emailed detailed comments on my drafts. I remember very well several occasions where he provided me with hypothetical examples which revealed that what I had thought was the law on an issue was not quite so. Of his many great judgments, my own favourite has to be *Patel v Mirza* in 2016 in which, in a bold and clear-sighted way, Lord Toulson led the Supreme Court to adopt a new approach to the defence of illegality in the law of obligations.

I therefore regard it as a great honour and privilege to have been asked to deliver the Lord Toulson lecture for 2024.

1. Introduction

1966 was a great year. England won the World Cup. The Beatles had three No 1s. One of the best English law books ever written, *The Law of Restitution* by Gareth Jones and Robert Goff, was published. And Lord Gardiner LC in the House of Lords, which was then the highest court in the land, laid down what has become known as the 1966 Practice Statement ("1966 PS"). He said the following, and I am going to quote almost all of what he said, because despite its huge significance what he said was brief:[1]

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

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

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. …"

* I am grateful to my judicial assistant, Pete Kerr-Davis, for his help in the preparation of this lecture. This lecture was delivered at the University of Surrey on 20 March 2024. A slightly different version was delivered at the University of Liverpool on March 18 2024 as a keynote lecture marking the 130th anniversary of law at the University of Liverpool. I would like to thank all those who organised or attended either lecture.

[1] [1966] 1 WLR 1234.

In appreciating the significance of that 1966 PS, there are two background points. The first is that under the doctrine of precedent in English law, sometimes referred to as the doctrine of "stare decisis" (meaning literally "to stand by things decided"), courts are bound by decisions of higher courts and, subject to the 1966 PS, appellate courts are almost always bound by their own past decisions.

Secondly, up until the 1966 PS, the position during the 20th century[2] had been that the House of Lords itself, as well as all lower courts, was bound by previous decisions of the House of Lords. Once a point of law was decided by the House of Lords that was it. The law was set in stone for all time, unless of course Parliament chose to intervene by passing amending legislation.

Between 1966 and 2009, when the House of Lords transmogrified into the UK Supreme Court, the 1966 PS was explicitly used by the House of Lords to overrule its earlier decisions in 14 cases.[3] So the Practice Statement was explicitly invoked by the House of Lords in one case every three years. Just to give you one example, it would appear that the first case in which the power was used was *British Railways Board v Herrington* in 1972. Here the claimant was a 6 year old boy who was injured when he trespassed onto a live electric railway line. The fence between the land of the railway and a field where children played had been in a broken state for several months. The House of Lords held that an occupier of land does owe a duty of care, albeit limited, to a trespasser to protect them against dangers on the occupier's land so that the defendants were here in breach of duty to the boy. In so deciding, the House of Lords overruled, with Lord Diplock referring to the change made in 1966, the earlier decision in 1929 of the House of Lords in *Robert Addie & Sons (Collieries) Ltd v Dumbreck*[4] which had held that an occupier of land owed no duty of care to a trespasser in respect of dangers on the premises.

There were also several cases in which the House of Lords overruled one of its past decisions without explicitly invoking the 1966 PS.[5] One can refer to this as the implicit use of the 1966 PS.

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[2] The self-binding precedent rule in the House of Lords is usually traced back to *London Street Tramways Co Ltd v London CC* [1898] AC 375 although it may have applied before then.

[3] By explicit use, I mean cases where a previous decision was overruled and at least one of the Law Lords (or, in a split decision, one of the Law Lords in the majority) explicitly cited the 1966 Practice Statement. On this basis, the 14 cases are: *British Railways Board v Herrington* [1972] AC 877; *The Johanna Oldendorff* [1974] AC 479; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443; *Dick v Burgh of Falkirk* [1976] SC (HL) 1; *Vestey v Inland Revenue Comrs (Nos 1 and 2)* [1980] AC 1148; *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74; *R v Shivpuri* [1987] AC 1; *R v Howe* [1987] AC 41; *Murphy v Brentwood DC* [1991] 1 AC 398; *Pepper v Hart* [1993] AC 593; *Horton v Sadler* [2007] 1 AC 307; *R v G* [2004] 1 AC 1034; *A v Hoare* [2008] 1 AC 844; *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2008] 1 AC 561. Cf Alan Paterson, *Final Judgment* (2013) who suggests, at pp 266 and 268, that the number of overt exercises of the 1966 Practice Statement by the House of Lords was almost 25.

[4] [1929] AC 358

[5] Eg, *DPP v Camplin* [1978] AC 705 overruling *Bedder v DPP* [1954] 1 WLR 1119; *Moodie v IRC* [1993] 1 WLR 266 overruling *IRC v Plummer* [1980] AC 896; *Westdeutsche Landesbank Girozentrale v Islington BC* [1996] AC 669, overruling *Sinclair v Brougham* [1914] AC 398; *Arthur JS Hall & Co v Simons* [2002] 1 AC 615; *Lagden v O'Connor* [2004] 1 AC 1067 overruling *The Liesbosch* [1933] AC 449. There are other cases where it is not entirely clear whether a previous decision was being overruled: see, eg, *Conway v Rimmer* [1968] AC 910; *DPP v Caplin* [1978] AC 705; *R (Purdy) v DPP* [2010] 1 AC 345. There have also been several cases in which the House of Lords considered the 1966 PS but decided not to overrule a previous decision: eg *R v National Insurance Comr, Ex p Hudson* [1972] AC 944 (declining to overrule *R v Deputy Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union*, *In re Dowling* [1967] 1 AC 725); *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435 (declining to overrule *Shaw v DPP* [1962] AC 220); *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345 (declining to overrule *Chancery Lane Safe Deposit and Offices Co v IRC* [1966] AC 85););

There were also cases where an earlier decision was distinguished but I put distinguishing to one side because it is conceptually different from overruling. Distinguishing, in contrast to overruling, leaves the earlier decision intact as still being binding law but, by pointing to factual differences from the instant case, provides good reason why the earlier decision is not being applied in the instant case.

After the creation of the Supreme Court in 2009, and after some initial early doubts, it was made clear in *Austin v Southwark London Borough Council*,[6] that the 1966 PS was to be as applicable to the new Supreme Court as it had been to the House of Lords. And subsequent to that, the Supreme Court issued Practice Direction 3.1.3 to the effect that at the stage of seeking permission to appeal to the Supreme Court a party should make it clear if it is going to ask the Supreme Court to use the 1966 PS to depart from a previous decision of the highest court, whether that be the House of Lords or Supreme Court. The main practical reason for that Practice Direction is not merely to give fair notice to the other party of what one is asking the Supreme Court to do but also because, procedurally, it enables a larger than normal panel to be convened to hear the case.

I should insert here two explanatory points about the workings of the Supreme Court. First, there are 12 Supreme Court Justices and we normally sit in panels of five to hear cases. But where notice is given that a party is seeking to invoke the 1966 PS, the panel will be increased to at least seven. This is so as to avoid any conceivable charge that a subsequent panel of five Supreme court Justices has no legitimacy to overrule an earlier panel of five Supreme Court Justices or Law Lords.

The second explanatory point is to make clear that there is no right of appeal from the Court of Appeal to the Supreme Court. Rather permission to appeal must be sought from the Supreme Court itself or, in rare circumstances, may be given by the Court of Appeal. This essentially means that the Supreme Court is in control of the cases that it hears. As our American Supreme Court colleagues would say, we control our own docket. Permissions to appeal to us are almost always determined on paper by panels of three Supreme Court Justices. The criteria for granting permission, as laid down in the Supreme Court's Practice Directions, is that the appeal must raise an arguable point of law of general public importance. If permission is granted - and over the last year the Supreme Court has been granting permission in about 25% of cases where PTA is sought - we will give directions as to the length of time for the appeal, which nowadays is rarely more than two days and is commonly one day, and how many justices should sit. So it is at that stage that the question of whether a larger than the normal panel of five will sit is considered and, in particular, that will turn on whether the appellants are asking the Supreme Court to overturn a previous decision of the Supreme Court or the House of Lords. There may of course be other exceptional reasons for more than the usual number of five to sit on a case, as for example in the prorogation case of *Miller (No 2)*[7] where 11 Justices sat because of the fundamental constitutional issues raised by the case. You will recall that that was the case which held that Boris Johnson's prorogation, ie suspension, of Parliament for several weeks at a time when Brexit was being decided on was held to be unlawful by the Supreme Court on the basis that no reasonable justification had been given for that suspension.

In the 13 years since the creation of the Supreme Court, the 1966 PS has been explicitly used in only three cases, that is fewer than one case every four years. The three cases have been: first, *Knauer v*

Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd [1979] AC 508 (declining to overrule *British South Africa Co v Companhia de Mocambique* [1893] AC 602); *R v Kansal (No 2)* [2002] 2 AC 69 (declining to overrule *R v Lambert (Steven)* [2001] UKHL 37); *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (declining to overrule *McFarlane v Tayside Health Board* [2000] 2 AC 59.

[6] [2010] UKSC 28, [2011] 1 AC 355, at [25].

[7] *R (on the application of Miller) v Prime Minister (Miller No 2)* [2019] UKSC 41, [2020] AC 373.

Ministry of Justice,[8] which concerned the calculation of damages for future losses under the Fatal Accidents Act 1976; secondly, *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd*,[9] which concerned the restraint of trade doctrine in the law of contract; and, thirdly, *Test Claimants in the Franked Investment Income Group Litigation v HMRC*,[10] on the limitation period – more specifically how the discoverability test under section 32(1)(c) of the Limitation Act 1980 works - in respect of restitution of payments made by mistake of law.

However, as happened in the House of Lords, the 1966 PS has been implicitly used in some other cases. One example dear to my heart, and decided a couple of years before I joined the court, was *Prudential Assurance Co Ltd v HMRC*.[11] This involved the restitution, that is the repayment, of billions of pounds that had been incorrectly charged by HMRC as tax to various companies. The earlier House of Lords case of *Sempra Metals v IRC*,[12] which concerned payments mistakenly paid under contracts that were thought to be valid but were, as a matter of law, void, had laid down that the interest on restitutionary claims should be compound interest to reflect the full benefit that the payee had obtained at the expense of the payor. But in *Prudential* the Supreme Court held that *Sempra Metals* had been incorrectly decided and should be overruled because, applying the correct principles, the interest should be simple not compound – thereby saving the Revenue on the facts of the case around £4-5 billion.

As an academic, I had written a great deal about that area of the law, that is, the law of restitution or unjust enrichment, and I was brought in as junior counsel for HMRC appearing before the Supreme Court in *Prudential Assurance*. We did not ask the Supreme Court to overrule *Sempra Metals* but it went ahead and did so because the Justices thought that the logical consequence of some of the submissions we were making, which they agreed with, meant that *Sempra Metals* could not stand. As we had not asked for *Sempra Metals* to be reconsidered, the panel consisted of only five Justices. Perhaps that is why there was no explicit reference to the 1966 PS although the reasoning of the court in overruling *Sempra Metals* reflected, and could easily have been expressly accommodated within, the criteria of the Practice Statement.

But on close inspection that is not an isolated example of an implicit use of the 1966 PS by the Supreme Court. There have been several other cases in the Supreme Court where earlier House of Lords or Supreme Court decisions have been overruled without expressly referring to the 1966 PS.[13]

It is not clear to me why the technique of implicit use of the 1966 PS is adopted. Perhaps in the past it has served to distract attention away from the power that the court is exercising. That may be

[8] [2016] UKSC 9, [2016] AC 908.
[9] [2020] UKSC 36, [2021] AC 1014.
[10] [2020] UKSC 47, [2022] AC 1.
[11] [2018] UKSC 39, [2019] AC 929.
[12] [2007] UKHL 34, [2008] 1 AC 561.
[13] For example, *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52, which was concerned with the application of the Human Rights Act 1998 to British troops on active service overseas, overruled the earlier Supreme Court decision in *R (Catherine Smith) v Secretary of State for Defence* [2010] UKSC 29, [2011] 1 AC 1; *R (on the application of Barkas) v North Yorkshire County Council* [2014] UKSC 31, [2015] AC 195, which concerned the law on town and village greens, overruled the House of Lords decision in *R (on the application of Beresford) v Sunderland CC* [2003] UKHL 60, [2004] 1 AC 889; *Montgomery v Lanarkshire H Bd* [2015] UKSC 11, [2015] AC 1430, on the duty of care to inform patients, overruled *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871; *R v Jogee* [2016] UKSC 8, [2017] AC 387, on joint enterprise in criminal law, overruled not only the earlier Privy Council decision in *Chan Wing-Siu v R* [1985] AC 168, by which it was not bound, but also the House of Lords case, following the Privy Council, of *R v Powell* [2008] UKHL 45, [2009] 1 AC 129.

especially so where only a panel of five is hearing the case as in *Prudential*. There may also be some awkwardness felt in overruling the decisions of past or present colleagues on the same court so that drawing attention to this by referring to the 1966 PS may be thought inappropriate. It may also simply be thought unnecessary to spell out what may be considered to be very obvious ie that the court must be using the power under the 1966 PS. But in an age of rational transparency, the SC ought to be clear about what it is doing and explicit reference to the 1966 PS is helpful not only for those reading the judgment but also because it triggers reference to the terms of the 1966 PS itself and past cases on the relevant criteria for overruling that I shall examine shortly. There is also the danger that, by not making matters explicit, the court may be interpreted as having implicitly overruled decisions when that is not a true description of what has happened. In my view, implicit use of the 1966 PS should be avoided.

That is all by way of lengthy introduction. In exploring in more detail precedent and overruling in the Supreme Court I have divided the rest of what I want to say into two parts. First, because it is central to understanding overruling, I will consider afresh what is meant by the ratio decidendi of a case. Secondly, I want to examine critically the criteria for deciding whether the Supreme Court should overrule a past decision of the House of Lords or Supreme Court.

2. The ratio decidendi of a case

Many years ago, when I was a law student, I learned that it is the ratio decidendi of a case that is binding under the doctrine of precedent; and that there is a distinction between the ratio decidendi and obiter dicta in a judgment.[14] I was also taught that it is an acquired lawyerly skill to determine what is the ratio decidendi of a case. I was further taught that there can be complications such as where a case has more than one ratio decidendi.[15]

With the benefit of thinking about these issues over several decades and in the light of practical experience, I now think it is helpful to recognise three points about the ratio decidendi of a case and overruling.

First, whatever the literal Latin meaning, the ratio decidendi of a case is a term of art and is best understood as being the decision in the case. That is why the 1966 PS talks of allowing a departure from a previous "decision" of the highest court. But when we here talk about the decision, we are not primarily focusing on the result, or outcome, or order or disposition (eg whether the claimant or defendant wins, or whether the appeal fails or succeeds or an order that the defendant shall pay the claimant damages). Rather for the purpose of the doctrine of precedent, it is the rule or principle explaining (or, one might say, justifying) the result that is of crucial importance.[16] So if a court overrules a previous decision, it is departing from the rule or principle explaining the result in the previous case.[17] And I should add for completeness that that rule or principle may be implicit, as well as explicit, in the judgment or judgments.

[14] For general discussions of precedent, see, eg, Cross and Harris, *Precedent in English Law* (4th edn, 1991); Duxbury, "The Nature and Authority of Precedent" (2008); Endicott, Kristjansson and Lewis (eds), *Philosophical Foundations of Precedent* (2023).

[15] See, eg, FRV Heuston, '*Donoghue v Stevenson* in Retrospect' (1957) 20 MLR 1 looking at four articulations of the ratio decidendi in *Donoghue v Stevenson*.

[16] Cf Cross and Harris, *Precedent in English Law* (4th edn, 1991) p 72; and Leggatt LJ in *R (Youngsam) v Parole Board* [2019] EWCA Civ 229, [2020] QB 387, [48]-[68].

[17] But a court does not overrule a previous decision if it upholds the rule or principle explaining the result in the earlier case albeit by relying on different further underpinning reasoning than that given by the earlier court.

Secondly, one can helpfully distinguish between the decision and further reasoning that underpins that decision.[18] That further reasoning, alongside all other statements about the law in a judgment, is mere obiter dicta. But the line between the decision and the further reasoning underpinning the decision has some flexibility depending on how narrowly or widely one formulates the rule or principle explaining the decision.

Thirdly, and following on from the first two points, overruling involves a court rejecting the decision of the past court but a court can reject the further reasoning that underpins that decision without overruling that decision.

That analysis of levels of judicial reasoning may sound all very jurisprudential and theoretical. So I now want to bring us back to earth by explaining how it works in practice. In particular I want to illustrate the important distinction between the decision, that is the rule or principle explaining the result, and the further reasoning underpinning that decision by referring to two case examples, one from the House of Lords and one from the Supreme Court.[19]

Perhaps the most famous example of the House of Lords overruling itself, using the 1966 PS, was the overruling of the tort case of *Anns v Merton LBC*[20] in *Murphy v Brentwood District Council*.[21] But what exactly do we mean by saying that *Anns v Merton* was overruled by *Murphy v Brentwood*?

In *Anns v Merton,* tenants in a block of flats had noticed cracks in the walls of their building. They brought claims in the tort of negligence against, amongst others, the local authority's building inspectors. The decision in *Anns v Merton* can be expressed as follows. The tenants succeeded on the preliminary issue raised because it was held that a duty of care was owed by local authority building inspectors to tenants of a building in respect of economic loss they suffered consequent on the foundations of the building being defective. But that decision was overruled some 13 years later in *Murphy v Brentwood* when the House of Lords held that there was no such duty of care owed

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So to say that the decision – that is, the rule or principle explaining the result - is correct but for the wrong reasons does not involve overruling because one is upholding, rather than rejecting, the decision.

[18] One can also express this by saying that it depends on how far one is including detailed reasoning in the formulation of the rule or principle. But as a practical matter, there is no need to invoke the 1966 PS if, on the issue in question, one can formulate the rule or principle laid down in the earlier case as remaining good law. Moreover, at a deeper level, if a court was required to invoke the 1966 PS in order to depart from the further reasoning in an earlier case, even though the rule or principle explaining the result was correct for other reasons, that would, in my view, act as an unnecessary curb on the power of the court to develop the law.

[19] There are numerous other examples that could be given of this distinction. Two particularly interesting examples are as follows. (i) Lord Goff's minority judgment in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, in which, contrary to the majority, he did not think the decision in *Sinclair v Brougham* [1914] AC 398 should be overruled (because if a loan was ultra vires, it would be inconsistent for the repayment of the loan in the law of unjust enrichment not to be caught by the ultra vires doctrine) even though he clearly accepted that the implied contract, as opposed to unjust enrichment, further reasoning in *Sinclair v Brougham* could not stand. (ii) There is no dispute that in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, the Supreme Court departed from the so-called reliance rule reasoning in *Tinsley v Milligan* [1994] 1 AC 340 but their Lordships said that the decision in *Tinsley v Milligan* was still correct ie the defence of illegality did not apply because considering a range of policy factors, as opposed to applying the rigid reliance rule, there should be no illegality defence to the claimant's proprietary claim under the presumed resulting trust. The decision in *Tinsley* as articulated in that way remains good law and has not been overruled. Rather it is the reliance rule further reasoning on which *Tinsley* was based that has been disapproved.

[20] [1978] AC 728.

[21] [1991] 1 AC 398.

because, properly analysed, the loss was pure economic loss and that type of economic loss is not generally recoverable in the tort of negligence.

In other cases, during those 13 years, some of the further reasoning in *Anns v Merton* had been rejected by the House of Lords but without overruling *Anns*. In *Anns,* the House of Lords had adopted a particular approach to deciding whether a duty of care was owed in the tort of negligence. That approach involved two stages. The first stage was to ask whether the loss was reasonably foreseeable. The second stage was to ask whether there were reasons of policy that negated the prima facie duty of care established at the first stage. That two-stage test for determining whether there was a duty of care owed in the tort of negligence was firmly disapproved by the House of Lords in *Caparo Industries Plc v Dickman*[22] which held that there was no duty of care owed by an auditor of a company's accounts to investors in the company. But very importantly for the theme of this lecture, the rejection of that further reasoning in *Anns* was not seen as overruling *Anns* and hence did not require use of the 1966 PS. That is precisely because *Caparo* did not depart from the decision in *Anns.* After *Caparo, Anns* still remained good law – that is, the local authorities were still regarded as owing the *Anns* duty of care – and we had to await *Murphy v Brentwood* for the decision in *Anns* to be overruled .

The Supreme Court case that I want to use to illustrate the distinction I am drawing between the decision and the further reasoning underpinning the decision is one in which I was sitting and on which, along with Dame Siobhan Keegan, Lady Chief Justice of Northern Ireland, I gave one of the four leading judgments. The case was *In the Matter of an Application by Rosaleen Dalton for Judicial Review*,[23] and it was an appeal from the Court of Appeal of Northern Ireland. It concerned the death of Sean Dalton, who was killed in a bomb explosion on 31 August 1988. The incident became known as the "Good Samaritan bombing" because, when the bomb went off, Mr Dalton was entering a neighbour's house in order to check on the welfare of his neighbour. The bomb was planted by the IRA with the apparent purpose of luring members of the security forces into a trap. Despite an inquest and an investigation by the Police Ombudsman of Northern Ireland, no-one was ever charged with the killing. The Dalton family claimed that there had been a failure by the police to inform the local community about the bomb. The proceedings that resulted in the appeal to the Supreme Court were brought by the daughter of Mr Dalton, who sought judicial review of the Attorney of Northern Ireland's refusal to order a fresh inquest. It was alleged that that refusal infringed her rights under Article 2 of the European Convention on Human Rights and hence under the Human Rights Act 1998.

Article 2 of the ECHR protects the right to life and it is well-established that it includes a procedural obligation on the State to investigate deaths. The central question of law for us was how far back does that procedural obligation extend for the purposes of the Human Rights Act 1998 given that Mr Dalton was killed in August 1988 and yet the Human Rights Act 1998 only came into force on October 2, 2000. We dismissed the appeal by the Dalton family because, inter alia, the death fell outside the temporal scope of the Human Rights Act because it occurred more than 12 years before the coming into force of that Act.

In an earlier and relatively recent Supreme Court decision called *Re Finucane*,[24] the relevant death was particularly horrific and notorious because it involved gunmen in NI coming round to the house of Mr Finucane, who was a solicitor in NI, and gunning him down in his front room in the presence of

[22] [1990] 2 AC 605.
[23] [2023] UKSC 36, [2023] 3 WLR 671.
[24] [2019] UKSC 7, [2019] NI 292.

his wife and children. That death had occurred in 1989 and was therefore 11 years 8 months before the coming into effect of the Human Rights Act 1998.

The main submission of the AGNI in our case, the *Dalton* case, was that we should overrule *Re Finucane*. He submitted that, relying on his interpretation of the jurisprudence of the European Court of Human Rights in Strasbourg, we should decide that the procedural obligation under Article 2 did not extend more than 10 years back from when the Human Rights Act 1998 came into force. It was on the basis of that submission – that *Re Finucane* should be overruled - that a panel of seven Justices was convened to hear the *Dalton* case.

We unanimously rejected that submission and we therefore upheld the decision, that is the rule or principle explaining the result, in *Re Finucane* that the death in that case fell within the temporal scope of the 1998 Act. Nevertheless, we rejected the further reasoning in *Re Finucane* because that adopted an open-ended multi-factorial approach to deciding the temporal scope of the Human Rights Act in respect of Article 2 whereas we were of the view that, in line with the Strasbourg case law, there was a fixed cut-off point at some stage which, in line with what we had indicated in an earlier case, *Re McQuillan's Application for Judicial Review,*[25] should be 12 years.

For the purposes of this part of the lecture, there are two important points to take from *Dalton*. First, it recognises that there is a distinction between the decision in a case and the further reasoning underpinning that decision. And secondly, and linked to that, there was no need to invoke the 1966 PS because we were not departing from the decision in *Finucane* even though we were departing from the further multi-factorial reasoning adopted in that case.

I want to conclude on this part of the lecture by mentioning another Supreme Court case, heard before I joined the court, namely the restraint of trade case of *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd*. I have already briefly referred to that case as one of only three cases in which the Supreme Court has explicitly invoked the 1966 PS to overrule an earlier House of Lords decision. That earlier decision was *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*.[26] Ironically, if the analysis I am putting forward is correct, it was unnecessary for the Supreme Court to use the 1966 PS.

In *Peninsula* a property developer, Mr Shortall, wished to build a shopping centre on waste ground in Londonderry. He wanted an anchor tenant for the shopping centre, who would attract other retailers. So it was that he leased a site to a well-known Irish retailer, Dunnes Stores. But Dunnes insisted as part of the agreement that there should be a restrictive covenant preventing the developer or any of his assignees from letting a site in the shopping centre to a rival retailer. Mr Shortall subsequently assigned his rights to one of his companies, Peninsula, which was also bound by the restrictive covenant in so far as that covenant was valid. Peninsula wanted to grant a lease of a site to a rival retailer of Dunne's. The question at issue was whether that restrictive covenant preventing a lease of the land to a rival retailer was valid or was unenforceable as being an unreasonable restraint of trade.

The Supreme Court held that the restrictive covenant was valid and enforceable and was not an unreasonable restraint of trade. Peninsula was therefore bound by the restrictive covenant not to grant a lease of the site to a rival retailer. In so doing, the Supreme Court purported to overrule the *Esso* case using the 1966 PS. That case had concerned a petrol solus agreement – that is, a restrictive covenant preventing the petrol station from purchasing petrol from any other company but Esso –

[25] [2021] UKSC 55, [2022] AC 1063.
[26] [1968] AC 269.

and the House of Lords applying what was called the "pre-existing freedom" test had held that that restrictive covenant was an unreasonable restraint of trade and unenforceable. The Supreme Court thought that that case should be overruled using the 1966 PS because the correct test to apply was what it termed the "trading society" test and not the "pre-existing freedom" test.

Yet the Supreme Court considered that the decision in *Esso,* that is, the rule or principle explaining the result, had been correct: the petrol solus agreement in that case was unenforceable because it was within the restraint of trade doctrine and the covenant operating after 21 years was unreasonable. In other words, the Supreme Court was departing from the further reasoning in *Esso* but was upholding the rule or principle explaining the result. In those circumstances, there was, in my view, no need to invoke the 1966 PS.[27] The Supreme Court could have departed from the further reasoning in *Esso* without invoking the 1966 PS.

3. The criteria for deciding whether the Supreme Court should overrule a past decision of the House of Lords or Supreme Court.

In the final part of this lecture I want to turn to the criteria to be satisfied before the Supreme Court uses the 1966 PS to overrule a decision.[28] The 1966 PS speaks of overruling where the highest court considers it "right to do so". On the face of it, that recognises a very wide unfettered discretion. But it is then said that special caution must be exercised so as not to unsettle retrospectively contractual, property and fiscal arrangements and the need for especial caution in the criminal law.

The question as to the appropriate criteria to be applied in overruling is closely linked to the wider debate as to how far the Supreme Court should develop the common law rather than leaving reform of the law to Parliament through legislation. The late Lord Bingham[29] helpfully suggested that particular caution should be exercised by the judiciary in developing the common law in the following five situations: (i) where citizens have reasonably ordered their affairs relying on a certain understanding of the law; (ii) where reform calls for a detailed legislative code; (iii) where the question involves an issue of controversial social policy; (iv) where the issue is already being considered by the Legislature; and (v) where the issue is far removed from ordinary judicial experience.

Against that general background urging caution in the judicial development of the common law, one might say that the topic of this lecture requires us to add another specific situation where particular caution is required. This is where the development of the law would require the overruling of a past decision of the highest court.

It is therefore no surprise that in relation to the use of the 1966 PS the Supreme Court and the House of Lords before it has urged caution. This is the overriding theme of Lord Reed's recent survey of the approach of past cases to the 1966 PS in his judgment in the *Dalton* case. He said the following, for example, at para 47:

"The court will not overrule a previous decision simply because the justices would decide the case differently today: *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36; [2021] AC 1014, para 49, citing *Horton v Sadler* [2006] UKHL 27; [2007] 1 AC 307, para 29. This principle is vitally important to the operation and reputation of a court which does not sit en banc, and whose

[27] See footnotes 17 and 18 above.
[28] For an earlier examination of the criteria being used in the House of Lords, focusing on the contribution of Lord Reid, see Alan Paterson, 'Lord Reid's Unnoticed Legacy – a Jurisprudence of Overruling' (1981) OJLS 374.
[29] Tom Bingham, 'The Judge as Lawmaker: an English Perspective' in *The Business of Judging: Selected Essays and Speeches* (2000) 25-34.

composition consequently varies from one case to another. In such circumstances, the principle is essential to counter the risk that the outcome of cases might otherwise depend, or at least might appear to depend, on who happened to be sitting. It is also essential to enable the consistent application of the law, and its coherent development, to take place. As was said in [*Jones v*] *National Insurance Comr*… [1972] AC 944 pp 996-997, if a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal, and finality of decision would be utterly lost." [30]

In an extra-judicial lecture[31] Lord Reed has highlighted two further cautionary points that have been made in past cases:

(i) The Court is likely to be slower to reconsider detailed questions of construction of legislation or other documents, which are often a matter of impression, than broader questions raising issues of legal principle: see *Jones*, pp 966 (Lord Reid) and 1024 (Lord Simon of Glaisdale). See also *R v G* [2004] 1 AC 1034, paras 30-35 (Lord Bingham).

(ii) More generally, it tends to be easier to reconsider a recent precedent than one which has stood for a long time, since people are more likely to have relied on a decision in the latter category: see *Jones* p 993 (Viscount Dilhorne).

However, Lord Reed went on to make clear that the cautionary approach does not mean that the 1966 PS should not be used in appropriate cases where it has become clear that the common law is in need of updating and he went on to give examples of cases (*Smith v Ministry of Defence*, *Montgomery v Lanarkshire Health Board* and *Test Claimants in the Franked Investment Income Group Litigation v HMRC*) in which past binding decisions have been overruled using the 1966 PS expressly or impliedly. One should interject here that it is well recognised that, in general, the Supreme Court should follow a decision of the European Court of Human Rights in so far as it conflicts with an earlier decision of the House of Lords or Supreme Court.[32]

I would like to add three comments about the approach that the courts have been taking, and the criteria that have been developed, in relation to the use of the 1966 PS.

First, I think we can cut to the quick by saying that the main question should be whether the past decision was *clearly* wrong as a matter of law. Just because one would have reached a different decision does not mean that one should overrule that decision. On questions of law, Supreme Court Justices are all striving to discover and lay down what we consider to be the correct legal answer. But we would also accept that others, striving for the same result, have legitimately come to a different view of the law. Deference to the views of others in the same rank of court suggests caution. It is only

[30] Lord Reed continued: "For all these reasons, there is great force in the observation made by Lord Hoffmann in relation to the Judicial Committee of the Privy Council in *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, 90: 'If the Board feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently', the rule of law itself will be damaged and there will be no stability in the administration of justice'. That observation is equally applicable to this court."

[31] "Departing from Precedent: The Experience of the UK Supreme Court": see Supreme court website.

[32] See, eg, *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17, [2021] AC 633 overruling *N v Secretary of State for the Home Department* [2005] UKHL 51, [2005] 2 AC 296 because of the later decision of the European Court of Human Rights in *Paposhvili v Belgium*, Application No 41738/10, [2017] Imm AR 867.

where one considers that the earlier view is clearly wrong as a matter of law, that one should use the 1966 PS.[33]

I should add in relation to this first comment that, because the assessment of whether the earlier decision was clearly wrong is taking place at a later date, the later court has all the benefits of hindsight. The later court can take into account all changes since the earlier decision and can also take into account the known consequences of the earlier decision.

As a footnote to this first comment, the need for the earlier decision to be clearly wrong means that, as I have previously explained,[34] I have concerns about the Supreme Court's decision in *Prudential* overruling *Sempra Metals*, on the question of compound interest as a restitutionary remedy. In my respectful view, what was there being overruled was, as a matter of principle as fully explained by Lord Nicholls,[35] a plausible contrary view. Having said that, it may be that what was really driving the court was not so much principle as the policy consequences of *Sempra Metals* which, in terms of interest, added massive sums to what could be claimed from HMRC with all of those sums ultimately having to be met from public finances.

The second comment is that I am doubtful about the proposition that one should be more reluctant to overrule a past decision that turns on statutory interpretation than a matter of common law principle. Again, this should turn on how clear one is that the previous interpretation is incorrect. That was the view taken by Viscount Dilhorne and Lord Diplock dissenting in *Jones v Secretary of State for Social Services*.[36] Viscount Dilhorne said:[37]

"I see no valid reason for thinking that this House should be especially reluctant to correct an error if the decision thought to be wrong is as to the construction of a statute."

Certainly, the House of Lords in the past has been willing to overturn precedents on statutory interpretation.[38] It may be that part of the thinking for especial caution here is that Parliament can easily amend previous legislation so as to correct what is seen as incorrect statutory interpretation by the courts. But in my view that puts the matter the wrong way round. The pressures on Parliamentary time mean that, on technical issues of law reform, Parliament is unlikely to act. The courts should go ahead and give the interpretation that they regard as correct. Parliament is always then free to reject that interpretation by amending legislation.

My third comment is that a very important criterion is whether, because common law development is retrospective, overruling will cause significant disruption. However, I am not convinced that the age of the precedent should be of any importance in itself. The idea that new precedents should be more easily overturned than old ones depends surely on how much disruption may be caused by the overruling. Significant disruption is not necessarily a product of age. Indeed, contrary to the idea that recent precedents should more readily be overruled than old precedents, in *Dalton*, it was of importance in *rejecting* the submission that the 1966 PS should be used that *Finucane* had recently

[33] This need for deference to or respect for the views of others is supported by the proposition that the Supreme Court should tend not to overrule an earlier decision of the highest court if the Supreme Court is not unanimous in considering that this should be done. This was recognised to be a particular constraint by the House of Lords, siting as a panel of seven, in *Jones v Secretary of State for Social Services* [1972] AC 944 and I agree with that.
[34] "In Defence of Unjust Enrichment" [2019] CLJ 521, 538 – 541.
[35] [2007] UKHL 34, [2008] 1 AC 561, especially at [102] – [103].
[36] [1972] AC 944 at 993 and 1015.
[37] At 993.
[38] Eg *Vestey v HMRC* [1980] AC 1148 which overruled *Congreve v IRC* [1948] 1 All ER 948.

been decided and had, even more recently, been upheld and rationalised in obiter dicta in *McQuillan.*

To conclude, therefore, it is my view, that accepting the overall need for caution, there are two major criteria to be taken into account in applying the 1966 PS: how clear is it, with the benefit of hindsight, that the past decision was legally incorrect; and how disruptive the overruling will be given that the common law operates by retrospective overruling.

4. Overall Conclusions

Pulling together the themes of this lecture, I would suggest that there are three take-home messages.

(i) There are examples in both the House of Lords and the Supreme Court where a past decision has been overruled without referring to the 1966 PS. Transparency dictates that, where there is a requirement to use the 1966 PS, that is made explicit and implicit use of the 1966 PS is avoided.

(ii) The necessity to use the 1966 PS is limited to where the decision is being overruled in the sense that the rule or principle explaining the result is being departed from.

(iii) In applying the 1966 PS, the two major constraints are how clear it is, with the benefit of hindsight, that the past decision was legally incorrect; and how disruptive the overruling will be, given that the common law operates by retrospective overruling.