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TAKING PRECEDENT SERIOUSLY

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The doctrine of precedent is at the heart of our legal system. Every lawyer knows that, except in simple cases, our judges are supposed to consider the relevant pronouncements of our courts (and the courts of similar jurisdictions) in previous cases and explain the legal reasoning by which they reach their conclusion. Has this been happening to a satisfactory degree in our higher Courts? If not, does this have any practical consequences? This note examines these questions and highlights a recent encouraging development in relation to the appointment of research assistants for Supreme Court judges.

It is submitted that there is a trend in modern Irish judgments towards dispensing with a methodical analysis of the authorities. It is not uncommon for a decision to begin with a long recital of the facts, followed by a brief reference to a couple of cases and a conclusion which appears to depend more on the sympathies aroused by the facts than on the force of the legal reasoning. Naturally, without substantial empirical research, this kind of observation must be based on an individual's limited experience of the decisions of our courts. It is also clear that many factors could explain the apparently substantial number of Irish cases where the reasoning appears cursory in comparison with decisions from other jurisdictions. For example, it is possible that our judges are unusually conscientious, and devote written judgments to comparatively simple matters which would be disposed of *ex tempore* in another jurisdiction. However, on the whole, there still appears to be some cause for concern.

Consider two Irish cases from the general area of property law, where certainty and predictability should be at a premium. In the recent (and still unreported) decision in *Re JR* High Court, 2 October 1992, it was decided in effect that promissory estoppel could be used, not only as a shield, but also as a sword. This rather innovative conclusion was based on the citation of three authorities in a judgment which runs to a mere 13 pages of typescript. There was no mention of the Australian decision of *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, where a similar conclusion was reached after 57 pages of analysis and the consideration of over thirty authorities from various jurisdictions and a dozen academic sources. Another example is the well-known case of *L v L* [1992] ILRM 115 on family property. The long-awaited decision of the Supreme Court examined only 5 authorities and concluded that a woman's work in the home could not earn her a share in the ownership of that home. Contrast the Canadian Supreme Court decision in *Sorochan v Sorochan* (1986) 29 DLR (4th) 1 on similar facts (not cited in *L v L*), where a closely reasoned judgment by Dickson CJ lead to the development of the doctrine of unjust enrichment to ensure a remedy for the claimant.

It is an old legal adage that ‘hard cases make bad law’, meaning that a judge may be swayed by his or her sympathy for an individual litigant and give a decision which will distort the development of the law in future cases which will lack the special circumstances of the initial case. For example, in Re *JR*, the respondent's prospects of success were presumably not hampered by the fact that she was an older woman whose common-law husband had recently become senile, who suffered from severe depression and had had two stokes which left her

unable to walk without a stick. It is not intended to criticise the decision in Re *JR* itself, but the fact that that situation does illustrate neatly the pressures which come to bear on a judge to reach a fair conclusion on the facts before him or her, at the expense of certainty in the law. If one is in a situation where the rule of precedent is disintegrating, there may be a strong temptation to ignore the authorities that stand in the way of the desired conclusion, in the knowledge that if the decision proves inconvenient for the judge in the next case, he or she will feel free to ignore it. Counsel may then have less faith in the merits of refined legal argument, and so may pay less attention to the construction of an argument which will assist the judge in determining the legal validity of a particular claim. It becomes more difficult to predict the law, and the ordinary solicitor finds it harder to advise his or her client on how to settle their problem out of court. There is therefore more litigation, more pressure on the judges, less attention to precedent and so the vicious circle continues.

One might attempt to justify the move away from precedent on the basis of an analogy with the terse decisions of the European Court of Justice. Perhaps our courts are demonstrating a progressive tendency to assimilate our procedures with those of our Civil Law European partners. This argument ignores the fact that the succinct pronouncements of Civil Law courts are based on a comprehensive codification of the law, with the possibility in a difficult case of consulting the parliamentary debates leading to the enactment of the relevant code provision. Sadly, the increasing oracular pronouncements of our Courts have no such basis.

How can these problems be resolved? Clearly more judges are needed. Senior figures in the legal professions have recently reaffirmed this need in the strongest terms. As well as reducing the present level of delay, the appointment of more judges would reduce their workload and allow more consideration to be given to individual decisions. Perhaps other steps should be taken. We are a small country, dealing with legal problems as complex as those in other larger countries. We have a small population from which to select our judiciary. How can one justify not selecting High and Supreme Court judges from the ranks of senior solicitors as well as barristers? This might also provide an opportunity to appoint more women to rectify the severe gender inequality which remains in the composition of our senior judiciary. It is also difficult to argue against the creation of an independent body to advise on the selection of our judiciary, thus refuting the suggestion from some quarters that party-political considerations enter into the appointment of judges.

A final possibility is one that we follow other jurisdictions (such as Canada, the United States and Australia) in appointing ‘clerks’ or ‘associates’ to assist our judges. These posts are generally held by young lawyers with exceptional academic qualifications, who research difficult cases and write reports suggesting possible resolutions to the judge. An exciting step has recently been taken in this direction in Ireland with the creation of a number of posts as research assistant to the judges of the Supreme Court. In addition, there will be a new post of Law Librarian of the Judges’ Library.

It may respectfully be suggested that in this country we are particularly fortunate to have such a learned and diligent judiciary. It has however surely been a mark of ingratitude to have expected them to cope unaided with the present weight of cases and the breadth of their subject matter. If one is serious in the belief that adherence to precedent is of real practical value in bringing certainty to the law, it is clearly necessary to provide assistance for judges in this particular area.

The only possible reservation concerning the new developments, which follow on commitments made in the Fianna Fail and Labour *Programme for a Partnership Government* (1993), is that they do not yet go far enough.

It appears likely that three research assistants will be appointed initially, on a one-year basis. It is to be hoped that, as the value of their work is demonstrated, that the scheme will be extended. The next step would be to provide one clerk for each Supreme Court judge. After that one could consider extending the project to the High Court. In the future, it might be possible for this work to be counted, for example, towards an apprenticeship period for a prospective solicitor. The extension of the scheme would also have the advantage of reducing the novel phenomenon of unemployment amongst lawyers, giving some training to potential future judges and generally safe-guarding the dignity of the office of judge by reducing the unacceptable demands which are currently placed on those who take on this public service.

In conclusion, it is appropriate to congratulate those responsible for this innovation in our legal system. It represents a modest step forward but there is still much work to be done.