

# LAW For Laypersons

The theory of precedent, although it is often controlling and requires a certain income in many cases, is a rather loose concept. Technically, if the facts of the previously decided case are slightly different from the facts of the new case, the outcome in the previous case need not be followed in the new case, because the cases are not really alike. Even if the facts are quite different, however, a court may still follow the previously decided case under the theory of precedent because the cases are analogous, even if their facts are not similar. In addition, although a previously decided case may appear to be a perfect precedent for a present case because of similar facts, a court may decide the present case differently because the older case was decided by the court of another jurisdiction or by a court inferior to the court making the present decision.

The theory of precedent can be loosened even more in other cases. For example, suppose that you have a new controversy which is factually very similar to a previously decided case which was heard by the very same court to be heard by the present controversy. In short, the previously decided case seems like a perfect precedent which will require the court to decide the present case in a similar manner. Is there any way that a lawyer could logically argue that the previously decided case should not be followed?

The use of the historical argument has been very effective in a situation when a lawyer finds an unfavorable precedent controlling his case. The idea is that the older case must be viewed in its historical setting.

Imagine that the case which acts as precedent is one hundred years old, and even though it is factually very similar with the present controversy, the lawyer has looked into the historical setting out of which the old case arose. He may well be able to argue that certain factors which made the decision acceptable in years gone by are no longer present. He may press upon the court that intervening events render the older decision out of keeping with modern legal development.

This historical approach has often changed a judge's mind about the value of an old case as precedent and brought about growth or change in the law.

The theory of precedent, that like cases should be decided alike, may be varied as a result of historical or sociological arguments. Surely an earlier case should not control the outcome of a present case if that earlier case arose in a different historical setting or if the case is just contrary to the way that society acts.

Lawyers have also argued against the application of precedent in cases in which economic considerations call for a different outcome. Assume that you as a lawyer have a case of a consumer who has bought from a manufacturer a certain product which turns out to be defective. The manufacturer made no written warranty about the performance of the product but because the product does not do what it was manufactured to do, you want to sue the manufacturer for the product's defect. You reason that the product should certainly do what it was manufactured to do.

Unfortunately, you find that an earlier case with a consumer in a similar situation denied recovery against the manufacturer because no written warranty was made about the performance of the product. According to the theory of precedent, that like cases should be decided alike, your present-day consumer should also not be able to recover against the manufacturer since there was no written warranty.

An economic argument, however, might be used to convince a judge that the earlier precedent should not demand a similar outcome. For example, you might argue that the manufacturer, which gets a considerable profit on each product, can bear the loss of one of its products being defective every now and then more easily than a customer can bear that same loss. In fact, you might point out that if the manufacturer knows it must bear the loss for a defective product, it can protect itself by raising the cost of each product just a little so that it will make enough extra money in order to cover the risk of loss it will have for a defective product. In this manner, the risk of loss to the manufacturer is spread over all of the people buying the product rather than being placed just on the one

consumer who happens to buy the defective product.

Of course, the manufacturer could make an economic argument on this point as well. It might argue that the sale of this particular article is so competitive that it cannot raise the price on each article enough to compensate it for any loss that it might have to bear for a defective product. In addition, it might argue that it will be put out of business, and the product will no longer be manufactured if it must bear the loss for every defective product.

In summary, an economic argument requires that lawyers and judges look at all the facts surrounding a particular problem and take into account economic considerations. If those economic considerations are indeed valid and were not considered at the time the prior case was decided, the theory of precedent should, perhaps, not be followed.

*This article is written as a matter of general interest only. It is not to be construed as legal advice, and you should not rely on the statements made in any specific case. If you have a particular question or problem, you should contact an attorney.*

## Things That Matter

by Lucien Coleman

THOUGHTS ON CHURCHLY EDUCATION

I did a double-take when I spotted this sign out in front of a church-sponsored school the other day. The sign had the name of the school on it. Then, under that, just three words: Discipline -- Patriotism -- Athletics.

Now, there's certainly nothing wrong with discipline, patriotism, or athletics in an educational institution. I'd vote for all three. But they don't exactly set a Christian school apart from others. That isn't to say they are unchristian. They simply aren't uniquely Christian qualities.

For instance, the ancient Spartans, who were on the scene 400 years before Christ, were big on all three of those virtues. To them, patriotism was virtually synonymous with manhood. Athletic training was a major part of their education, not just a sideline. And they certainly were disciplinarians. So much so that "Spartan" is a synonym for rigorous discipline even today. But the Spartans didn't regard any of these as basically religious attributes.

To take a more modern example, Hitler's Nazi Germany placed a lot of emphasis on discipline, patriotism, and athletics. And so does the Soviet Union today. But in neither case did these spring from Christian roots.

You might think a Christian school would choose a slogan with a distinctive scriptural tone to it, like, maybe, "faith, hope, and charity." But, then, who wants to pay hard-earned tuition money for something as bland as faith, hope, and charity? Schools don't award letters and trophies for things like that. Have you ever heard anyone brag, "Hey, my kid was all-state in faith this year?"

A few days later I was telling a friend about my reaction to the sign mentioned earlier. "I can give you a personal testimony," he said. "My son went to a church-operated academy for a year. Their major emphases were God, country, and sports -- in reverse order."

This brought to mind a comic strip I had seen a few years ago. The scene was a locker room, just before a game. The coach was whipping the team into a pre-game frenzy.

"What is the word?" he belted.

"Kill!", they responded.

"I can't hear you," he shouted.

"What is the word?"

"Kill! Kill! KILL!", they hollered.

"That's better," the coach said.

"Now let's bow our heads for our team prayer. Our Father . . ."

What is the word?

"Kill!", they responded.

"I can't hear you," he shouted.

"What is the word?"

"Kill! Kill! KILL!", they hollered.

"That's better," the coach said.

"Now let's bow our heads for our team prayer. Our Father . . ."

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