to say that the *ratio decidendi* of a case is ultimately determined by its application by a court in a later case. The courts only need to interpret and determine the *ratio* of an earlier case when considering whether it applies to a new set of facts before them.

Isolating the material facts is not always straightforward. *Donoghue v Stevenson* concerned snails and ginger beer, but you would expect the outcome to be the same in a case which concerned ants and lemonade. The facts that the foreign body was a snail and that the drink was ginger beer are not material to the case itself. One test in deciding whether or not you think a particular fact is material to the outcome of the case is to ask yourself 'so what?' in relation to each one. If you think that changing a certain fact would have altered the legal reasoning such that the ultimate judgment was different, then it is likely that the particular fact was material to the case. If changing a fact would most likely have made no difference at all, then you should question whether it was a material fact.

### 6.2.4 The operation of judicial precedent in the courts

#### 6.2.4.1 Court of Justice of the European Communities

The European Court is not bound by its own previous decisions, as it does not formally have the concept of *stare decisis*. This allows it to take future changes in European policy into account. However, it is strongly persuaded by its own previous decisions and rarely departs from them in practice in the interests of legal certainty. All UK courts are bound by the European Court on matters of interpretation of Community Treaties themselves and on the interpretation and validity of Community Regulations and Directives.\(^{14}\)

#### 6.2.4.2 The House of Lords

Until 1966 the House of Lords was bound by its own previous decisions. This was established in the mid-nineteenth century and became known as the *London Tramways* rule after the House of Lords affirmed the position in the 1898 case of *London Tramways Co Ltd v London County Council*.\(^{15}\) Since the House of Lords was the highest appeal court in the hierarchy of the courts, it was considered to be in the public interest for its decisions to be final. The rule was intended to provide absolute certainty in the law and to cut down on cases from being brought to court. The rigidity of this rule was increasingly criticized throughout the twentieth century,\(^{16}\) and the *London Tramways* rule was eventually abolished by the 1966 *Practice Statement (Judicial Precedent)*\(^{17}\) made on behalf of himself and of the House of Lords by Lord Gardiner LC who stated:

> 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 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 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 where it appears right to do so. [emphasis added]

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14. European Communities Act 1972 s 3(1).
15. [1898] AC 375 (HL).
16. See, e.g. *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 (HL) 475 (Lord Reid).
17. [1966] 1 WLR 1234 (HL).
In this connection they will bear in mind the danger of disturbing retrospectively the basis upon which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty in the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House.

The impact of the Practice Statement gives the law sufficiently flexibility to deal with novel situations and to ensure justice in each particular case. The operation of precedent means that the law can develop in line with the changes in society and that judicial decisions are in line with the morals and expectations of the community. While the Practice Statement was generally well received, some considered that such a significant change in the judicial process should have been brought about via legislation rather than a 'mere' Practice Statement in which the House of Lords used its inherent jurisdiction to change its own practices. If an appellant or respondent in an appeal to the House of Lords intends to ask the House to depart from a previous decision it must draw specific attention to this in the appeal paperwork.18

When will the House of Lords depart from its own previous decisions?
The Practice Statement 'does not mean that whenever ... a previous decision was wrong, we should reverse it' (Millangos v George Frank (Textiles) Ltd).19 This may seem to contradict the Practice Statement; in fact it shows that the House of Lords is extremely reluctant to use it, as it is acutely aware of the need for certainty and the dangers attached to departing from its previous decisions (as stated in the Practice Statement). Thus, it will require more than just a previous decision to be wrong; it will only be used where a previous decision caused injustices, caused uncertainty or hindered the development of the law. It is not enough that the earlier decision caused grave concern or was passed by a narrow majority. Even if the Practice Statement might apply, the Lords still consider whether legislation might provide a better solution than departing from its previous decisions.

In R v Secretary of State for the Home Department ex parte Khawaja,20 it was held that, before departing from its own decisions, the House of Lords should be sure that continued adherence to precedent involves the risk of injustice and would obstruct the proper development of the law and departure from the precedent is the safe and appropriate way of remedying the injustice and developing the law.

Further evidence in support of the reluctance of the House of Lords to exercise its powers to bring about change to well-established law can be seen in the approach taken in C v Director of Public Prosecutions.21 Here the House of Lords refused to abolish the presumption of doli incapax (the presumption that children under the age of 14 were incapable of criminal wrongdoing) despite finding it to be anomalous and absurd, preferring to call upon Parliament to remedy the situation. Lord Lowry stated the guidelines for judicial law-making as follows:

(a) judges should exercise caution before imposing a remedy where the solution to the problem is doubtful;

(b) they should be cautious about making changes if Parliament had rejected opportunities of dealing with a known problem or had legislated whilst leaving the problem untouched;

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(c) they are more suited to dealing with purely legal problems than disputed matters of social policy;

(d) fundamental legal doctrines should not be lightly set aside; and,

(e) judges should not change the law unless they can achieve finality and certainty.

Therefore, despite the freedom conferred by the Practice Statement to set aside their own decisions and exercise greater freedom in the development of the law, it is clear that the House of Lords is reluctant to exercise these powers.

However, there are examples of cases in which the House of Lords has departed from its previous decisions. The first example of this was in Conway v Rimmer,22 where the House of Lords unanimously overruled its previous decision in Duncan v Cameron, Laird & Co.23 This case involved public interest immunity: the principle by which courts can grant an order allowing one litigant to refrain from disclosing evidence to the other litigants where disclosure would be damaging to the public interest. Duncan was decided in wartime: here the House of Lords held that the Crown could claim privilege not to disclose documents in civil cases on the strength of an affidavit sworn by a Government Minister. In Conway the House of Lords held that the ministerial affidavit was not binding upon the court.

R v Shippur24 saw the first use of the Practice Statement in criminal law. Here the House of Lords overruled the decision in Anderton v Ryan25 which it had made only one year previously. These cases involved the construction of s 1(2) of the Criminal Attempts Act 1981 which provides that 'a person may be convicted of attempting to commit an offence ... even if the facts are such that the commission of the offence is impossible'. In Anderton v Ryan the appellant was acquitted of attempting dishonestly to handle stolen goods. She believed that the video recorder in question had been stolen, but there was no evidence that it had been. Despite the clear wording of section 1(2), the House of Lords effectively held that they meant something different. In Shippur, the appellant’s conviction for attempting to deal with and harbour prohibited drugs was upheld after he had been caught with a suitcase which he thought contained drugs, but in fact contained an innocuous substance. Their Lordships reapplied the wording of section 1(2), effectively admitting their error in Anderton v Ryan.

In R v Howe26 the Lords took public and social policy factors into account in overruling its previous decision in Director of Public Prosecutions for Northern Ireland v Lynch27 such that the defence of duress is not available to a person charged with murder or accessorius liability (aiding and abetting) to murder.

More recently, in Lagden v O’Connor,28 the House of Lords overruled its long-standing decision in the Liesbosch v Dredge.29

As Lord Bridge stated in Shippur: ‘the Practice Statement is an effective abandonment of our pretension to infallibility’.

It is reasonable to assume that the new Supreme Court of the United Kingdom will follow the same approach as the House of Lords when it replaces the Lords as the highest domestic court (planned for October 2009). It is also presumed that the Supreme Court will normally treat itself as being bound by its own previous decisions.

23. [1942] AC 624 (HL).
29. [1933] AC 449 (HL).