

The Alphabet case and the doctrine of *stare decisis*

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OPINION



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Anthony Grant

I wrote in [LawNews](#) late last year about the Supreme Court's decision in *A-C v D-E* [2024] NZSC 161 where five judges said the appellants had suffered "a great wrong" which was so bad that it was "not possible to overstate the adverse impact" it had on them, but the judges would do nothing to remedy that great wrong because they said a remedy would require changes to the law that would "create great uncertainty".

Although I was born and grew up in New Zealand, I had the good fortune to practise at the Bar in England at the height of Lord Denning's time as the presiding judge in the Court of Appeal and I could see the huge impact for good that he had on the law at that time.

The doctrine of *stare decisis* (the adherence to precedent) prevailed and judges were generally content to acquiesce in bad law or poor law rather than risk creating legal uncertainty. Denning refused to accept this and single-handedly set about changing the law – for the good.

In doing so, he became "the best-known and best-loved judge in the whole of our history (Lord Bingham), "the greatest judge of our time" (Lord Scarman) and "one of the greatest and most influential judges ever to sit on the English Bench" (Lord Goff).

In Sedley LJ's words, "He had the scholarship, the courage and the sense of opportunity to restore the credit of the common law when the chance came his way."

To achieve this outcome, Denning resigned from the House of Lords, choosing a lesser role in the Court of Appeal where he knew he would be more effective in undoing the harm that was being done by the doctrine of *stare decisis*.

This was his philosophy:

... the principles of law laid down by the judges in the 19th century – however suited to social conditions of that time – are not suited to the social necessities and social opinion of the 20th century. They should be moulded and shaped to the needs and opinions of today."

And:

Each generation has its duty to keep the law in conformity with the needs of the time. the law should be such that it meets with the approval of the

right-thinking members of the community, and only second to that would I put certainty.

The Supreme Court said in *A-C v D-E* that the formulation of an appropriate remedy for “the great wrong” that had occurred in that case “would create great uncertainty in the law”.

This is what Lord Denning said of that form of reasoning:

What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both.

Lord Irvine said Denning had a “huge intellect and reforming imagination in equal measure”. With these attributes, he could fashion new remedies where they were needed. Far from being restrained by the doctrine of *stare decisis*, he used his knowledge of the law to fashion new outcomes that were widely perceived throughout the common law world as being fundamentally just and fair.

The awe and respect with which Denning was held throughout the common law world is evidence enough that bold decisions that may cause some uncertainties in the law should not deter the making of decisions that are widely perceived as being just and fair.

Anthony Grant is an Auckland barrister and trustee who specialises in trusts and estates