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OBITER, OBITER, OBITER

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I. INTRODUCTION

One of the ways lawyers come into their own is by honing the distinction between the *ratio decidendi* and *obiter dicta* of cases. This distinction is taught since the beginning of their arduous journey in law school, yet emphasized throughout their career as one of paramount importance. *Obiter* in the courtroom is often relegated and back-benched; counsel may demonstrate his wealth of knowledge, but succeeds only by distilling and employing *ratio*.

This article argues, contrary to the general observation of a humble freshman, that *obiter* should not be dismissed. The paradigm is that *dicta* is secondary, but just as rules are subject to exceptions, human paradigm is malleable to so much more; in many instances, *dicta* remains an invaluable form of judicial guidance. Furthermore, with recent developments and unique local circumstances, *obiter dicta* is likely to become invaluable.

II. PRIMARY OF *RATIO DECIDENDI*

Ratio decidendi is recognized as the section of judicial reasoning with direct correlation to material facts at hand.[1] In a system of common law, it is widely recognized as the most valuable section of a judgment, and is the only part which binds lower courts in vertical *stare decisis*. Generally, the law avers from contemplating anything but the *ratio*: apart from making unnecessary complications in interpreting judgments, lawyers are taught that the law operates with analogical reasoning, and like cases must be decided alike. The most predictable result for a present case can only be drawn from another precedent that is "on all fours" with it; if favourable precedent is dissimilar from the

[1] See Robert C. Beckman, Brady S. Coleman, Joel Lee, *Case Analysis and Statutory Interpretation*, (Singapore: National University of Singapore Faculty of Law), 76 for the definition of *ratio*. Further, the authors provide ample warning at p 63 that "the rule of law stated in a case…may not incorporate the material facts…[students] must be cautious and not assume that this wide proposition of law will be accepted as the *ratio decidendi*".

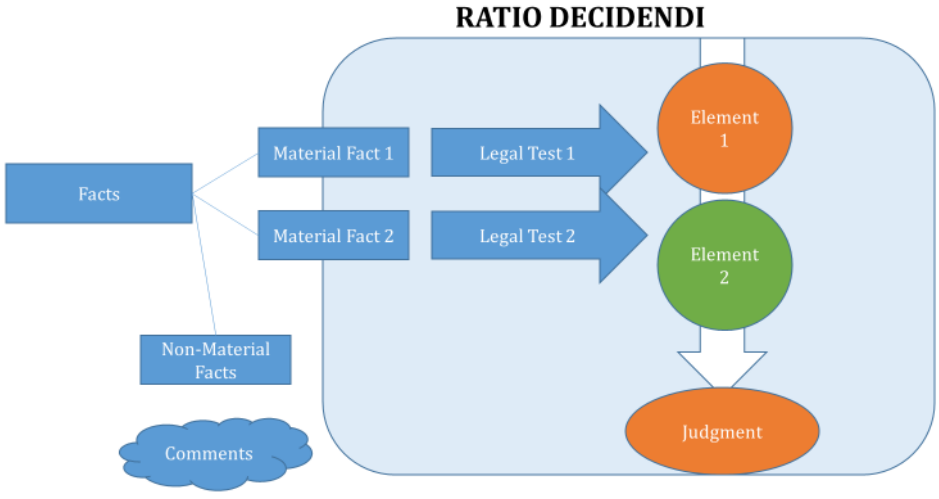
present case in any way, the dissimilar facts must not concern the key reasoning behind judgment. The value that the law places on *ratio* is obvious from the devotion of legal practitioners in refining their skill of crystallizing the *ratio decidendi* of cases.

In contrast, students and practitioners of the law are incessantly reminded of the need – not only to omit – but to criticize and rebuke the use of *obiter dicta*. The *obiter dicta* of the judgment encompass every other part of the judgment not included within the *ratio decidendi*.[2] Just as the *ratio* is persuasive in law, the *obiter* is rarely sufficient to convince; without direct bearing on the ultimate decision of the court, *obiter* are but commentary – passing remarks by judges that can be made without similar care to *ratio*.

This, however, does not seem true in any common law jurisdiction, and especially not in Singapore. The effort made by judges in commentary, both in their judicial capacity and in extra-judicial sitting, do not seem to commensurate with legal instinct that *obiter* is irrelevant. In fact, many of the advances made in substantial law are drawn from pure *obiter*, which have guided local courts in making decisions even before the opportunity to formulate a *ratio* arose.

III. *OBITER* COMPENSATES FOR RESTRICTED *RATIO*

Ratio decidendi faces limitations which *obiter* does not. In explaining the *ratio decidendi* of cases, judges adhere to the principles of legal precedents set before them, and strictly apply material fact to rule. As complex as it is promulgated thereafter, the *ratio decidendi* is essentially an input-output system. What elegant expression masks is legal machinery that makes binary decisions on minor tests.



[2] *Ibid* at 65, where *obiter* is referred to as "statements in a judgment which are not part of the decision, but which nevertheless are important"; at p 76 such significance is then redacted to being "at the most persuasive".

The persuasiveness of *ratio* is precisely due to and correlated with its limitations. *Ratio* is most powerful when it is restricted to key and analogous facts, and it is a fish out of water outside of such limited circumstances.

In contrast, the commentary made by judicial practitioners has wider applicability than the *ratio decidendi* of a case. Judges may consider the application of novel legal principles in alternative factual circumstances, (their opinion) on the disposition and direction of the law, and other comments they may have.[3]

At times, the decisive turn of a judgment may be found in *dicta* instead of its *ratio decidendi*. Where decisions are made and the arm of prevailing legal principle is twisted to achieve a just solution, *obiter dicta* may better explain the results achieved. For instance, the unsatisfactory state of the postal acceptance rule was not supplanted but circumvented in antecedent cases such as *Holwell Securities v Hughes*[4], where the generality may be excepted by specifically requiring "notice in writing" or would produce "manifest inconvenience and absurdity". In effect, *Holwell Securities v Hughes* traced the dissent of Bramwell LJ in *Household Fire & Carriage Accident Insurance Co Ltd v Grant*[5]; the strenuous evasion of the tricky postal acceptance rule followed the expiration of policy considerations encouraging the use of postal delivery for contracts. Yet judges remain hesitant to remove a doctrine entrenched in the law of contract due to respect for the weight of precedent and fear of a vacuum left in the law of acceptance; thus, most of their deliberations are found in *obiter*.

In fact, the undisclosed rationale for decisions may easily be found in ostensibly unrelated comments and *dicta*. A novel application of psychological Freudian analysis to judgments[6] discovered undercurrents to decisions, which were related to neither material fact nor legal principle. The authors found that judges could potentially "reach an early decision" before "iterating backwards…[to] an optimal solution to resolving the case". Notwithstanding fervent hopes that such is anomalous, one cannot now discount the assistance that *dicta* provide in navigating to the heart of a judgment.

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[3] *Ibid* at 65, *dicta* assists in "predicting how related issues might be decided in subsequent cases", especially when a noteworthy judge provides insight that "are not necessary to the decision in the present case", or set "possible limits or exceptions" to the *ratio*.

[4] [1974] 1 All ER 161.

[5] [1879] 4 Ex C 216.

[6] Foo Check Teck, "Freudian Analysis of a Judgment", Singapore Law Gazette (7 February 2003) (http://www.lawgazette.com.sg/2003-2/Feb03-feature3.htm).

IV. MUTUALLY REINFORCING AND INSEPARABLE

Often, *ratio decidendi* makes little sense without the *obiter dictum*. *Obiter* explains the *ratio* of the case in relation to judicial principles, and the *ratio decidendi* is not amply convincing without its *obiter*. At times, judges may even establish limits and exceptions to *ratio* in their remarks.[7]

In fact, judges make a conscious effort to deal with *obiter*. Rare is the instance where a judge remarks that another's word are "just *obiter*" or "*dicta*"; and even on such occasions, judges do not disapprove the *dicta* of another on that basis alone. For instance, Megarry J denied a submission that comments could be dismissed on the basis of being mere *dicta*. He reinforced the position of *dicta* with "the highest authority that any *dictum* can bear", classifying "a third type of *dictum*" which bore the authority not only of the judge's own opinion, but that of "an unseen cloud of his judicial brethren".[8] The spirited defence above evinces wide recognition that *dicta* carries significant weight; the opinion of as learned a practitioner in law as a judge cannot be so sorely mistaken as to be waived with a simple label of "*obiter*".

Furthermore, one cannot truly isolate the *obiter*. Much to the dismay of the concerted efforts of practitioners, there is no clear demarcation between the *ratio* and *obiter* of a case; the interpretation of judicial reasoning is as uncertain as it is human. What is thought to be circumstantial to one lawyer could have substantive value to another.

With multiple lines of reasoning, what takes the position of *ratio* can be contested. Will only one applicable line of reasoning be accepted as binding judicial precedent? Competing *ratios* may ultimately undermine the decisive value of *ratio* as well.

V. *DICTA* MAKES LEAPS AND BOUNDS IN INCREMENTAL DEVELOPMENT

In the doctrine of judicial precedent, the use of *ratio decidendi* is purposed for a slow and careful development of the law. Although wariness is want in larger jurisdictions, slow development by analogy to past cases disadvantages smaller jurisdictions; opportunities to develop substantial law in one area may be limited by the regularity of cases coming forth. Judges may therefore use *dictum* to advance the law's development; doing so is not incompatible with taking care in the law, and may be entirely justified by a plethora of considerations. For instance, where precedents differed over when consideration is provided for contract modifications, Arden LJ advanced an alternative

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[7] *Supra* note 3.

[8] *Richard West and Partners v Dick* [1969] 2 WLR 383 at 388A-D.

idea of a "collateral unilateral contract" in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*[9] to reconcile the precedents. While it may not have been necessary given that Kitchin LJ had not resorted to such a mechanism, the spate of dissonance welcomed a thorough effort to resolve it. One can hardly deny that the rules on "Himalaya clauses" developed in a similar fashion; the cases of *The Eurymedon*[10] and *The New York Star*[11] built on dicta left by Reid L in *Scruttons v Midland Silicones*[12], fleshing out the solution for carriers seeking to protect their stevedores from liability to consigners. After all, the English courts have nothing to lose, and all to gain, from contemplating all viable options to open questions in law.

With the growth of alternatives to litigation in other forms of dispute resolution[13] – most of which carry limited precedential value[14] – common law jurisdictions may lose their source of incremental development. Under such circumstances, *obiter* may easily become more valuable.

Similarly, where the number of circumstances is limited – and desirably so – in a small jurisdiction like Singapore, *obiter* has significance since it is the quickest manner in which law can develop. Unlike larger jurisdictions which have had centuries of time to develop their laws with analogy and incremental development, states like Singapore with little more than half a century inevitably rely heavily on *obiter dicta*. In both *Ngiam Kong Seng v Lim Chiew Hock*[15] and *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd*[16], the Singapore Court of Appeal applied the autochthonous legal test for a duty of care[17] in full in spite of both claims having failed

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[9] [2016] EWCA Civ 553 at [89]. By devising a "collateral unilateral contract" over existing contracts, Professor Mindy Chen-Wishart's device as borrowed could resolve a dispute over whether an agreement to accept payment by instalment was enforceable under consideration. This dispute recognizably plagued English Law since precedents of *In re Selectmove* [1995] 1 WLR 474 and *Williams v Roffey Brothers* [1991] 1 QB 1 were diametrically opposed on the issue.

[10] [1975] AC 154.

[11] [1980] 3 All ER 257.

[12] [1962] AC 446 at 472-479.

[13] The growth of alternative dispute resolution mechanisms ("ADR"), especially in Singapore, can be taken as trite. Notwithstanding the variety of reports, even leading textbooks recognize that ADR has seen "phenomenal development" and "is set to become an undeniable aspect of the Singapore legal system". (*Supra* note 1 at 39).

[14] The rare instances in which alternative dispute resolution mechanisms have binding authority are when they are subject to judicial review: for example, see *Clea Shipping Corp. v Bulk Oil International Ltd* [1983] 2 Lloyd's Rep 646, where the Queen's Bench considered and agreed on the arbitral decision.

[15] [2008] 3 SLR(R) 674.

[16] [2008] 3 SLR(R) 735.

[17] Often and affectionately called the *Spandeck* test, as derived from *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100.

on the threshold requirement of factual foreseeability. Owing to the restricted size of jurisprudence, the honourable Judges of Appeal seized the opportunity to examine the application of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* in psychiatric injury claims. The distinction between primary and secondary victims of psychiatric injury[18] would not have been removed from Singapore law but for Andrew Phang JA's *dicta*.

Obiter dictum could thus supplant *ratio* in developing the law when:

a. *Obiter* is used to explain the preferred route of the law in the future, where the *ratio decidendi* cannot because the case itself does not lend a factual matrix appropriate for a legal issue to be addressed.
b. *Obiter* is used to make up for the lack of situations in which a binding *ratio decidendi* can be formulated.
c. *Obiter* provides the widest explanations of multiple answers in law, and therefore expedites the law's incremental development.

VI. CONCLUSION

An American reference details that apart from the formal restrictions on *dicta*, *dicta* is sparingly used because "the reader may view its use as an attempt to misstate the law".[19] Perhaps the true concern of lawyers and judges alike is not truly against *dicta* being mere comments *per se*, but really against negligence and malice. Yet if this is the concern, our motivations to study *obiter dicta* should be stronger. While it would appease the rudimentary to know of *ratio*, a true and complete comprehension of the law cannot be achieved without reading *dicta*. If students, practitioners and critics of the law are to answer a calling above a vocation, then blindness to *dicta* will only cause us to fall short of our standards, and do injustice on those relying on our expertise.

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[18] Originating from *Page v Smith* [1995] UKHL 7.

[19] Richard K. Neumann, Jr., Kristen Konrad Tiscione, *Legal Reasoning and Legal Writing*, 7th ed, 90.