

REASONING BY ANALOGY IN THE LAW

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Reasoning by analogy is fundamental to Common Law method and yet until recently has received relatively little analysis except as part of the Doctrine of Precedent. In this article we shall attempt an analysis of the nature of analogy in general, its relationship to logic and its place in reasoning with cases, statutes and codes. We shall then review some recent theoretical discussions of analogy and the link between reasoning by analogy and judicial decision making, ending with an analysis of justification in terms of principle and policy.

A Preliminary Analysis of the Nature of Analogy in General

The English word 'analogy' is derived from the Greek word 'analogia' meaning equality of ratios or proportion. It was originally a mathematical term but was found in an extended sense in Plato.¹ In everyday usage in English, analogy means similarity or resemblance or an argument or reasoning based on them. Analogy treats cases as 'like' if they possess quantitative or qualitative attributes or relations in common which are regarded as relevant or material or important for the purpose in question and these outweigh the differences between them. Such attributes or relations in common will be referred to as 'material resemblances'.

Some philosophical writers have distinguished between reasoning by analogy and reasoning by example, regarding the latter as presupposing a common rule or a concept of which the examples are species.

Most writers, however, equate the two.

Amongst theologians² the Thomist classification divides analogies into those of unius ad alterum, duorum ad tertium and plurium ad plura.

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¹ It is interesting to note that the earliest uses of argument by analogy in Greek literature seem to be largely confined to issues involving human conduct and morality, not the natural sciences. See G.E.R. Lloyd *Polarity and Analogy*, 384.

² See Ralph M. McInerny *The Logic of Analogy – An Interpretation of St. Thomas*, Chapter VI. McInerny maintains that analogy is not a universal term and concludes 'Analogy is analogous'. (p.4)

Unius ad alterum is a simple relationship of similarity in a certain respect. *Duorum ad tertium* is based on proportion, which is a relationship in common to a third thing. *Plurium ad plura* is a relationship of proportionality – A is to B as C is to D. In the Middle Ages when this classification was adopted theology stood at the centre of learning and St Thomas Aquinas made extensive use of analogy to explain the nature of God and the universe. A religious view of the world is now less fashionable but nevertheless reality imposes insuperable limits on our aspiration for precision and rationality and this is particularly true in the case of social reality. One German writer, Arthur Kaufman,³ has even gone so far as to say that all our cognitions are ultimately rooted in analogies. Suffice it to say that analogy is an accepted method of reasoning in all systems of law. It is a basic technique of English and Australian Law and although the judges and writers do not expressly adopt the Thomist classification of analogies they do use types of analogies, particularly *unius ad alterum* and *duorum ad tertium*.

The method used by Common Law judges in deciding cases is a form of practical reasoning, combining reasoning by analogy with reasoning by rule and principle. By rule, we refer to a standard basically in the form of ‘If circumstances X apply, then consequence Y shall (or ought) to follow.’ Principle is a less precise, more general standard and often ethical in content and is to be distinguished from a policy which sets out a social goal to be achieved.⁴ A popular example of a principle is ‘No man shall profit from his own wrong.’ An example of a policy would be road safety. While it is a truism that analogy is an integral part of case law method this very integration makes focus on analogy as a discrete topic difficult. Analogy at its simplest involves comparison. Do the similarities outweigh the dissimilarities? If they do, the earlier case is followed. If not, the earlier case is distinguished. However, to talk about ‘the earlier case’ is over simple since it is not so much the earlier case as the rule or principle implicit in the earlier case which is followed. It is here that the term *ratio decidendi* is introduced.

The concept of *ratio decidendi*⁵ plays a crucial but complex role in relation to analogy. To some extent it bridges the gap between reasoning by analogy and reasoning by rule and principle. *Ratio decidendi* is distinguished first from *res judicata*. The latter is the actual ruling binding on the parties. *Ratio decidendi* is regarded as something more abstract which passes into the general law. There is no fixed definition of it. It is a term which seems to have acquired general currency in the early Nineteenth Century although its origins possibly lie in medieval philosophy.⁶ The first general use of the term which the author has found is in John Austin’s lectures⁷ where he refers to it as

³ *Analogie und Natur der Sache*. Translated as ‘Analogy and The Nature of Things; A Contribution to the Theory of Types’ by Dr Ilmar Tammelo and others in (1996) *Journal of the Indian Law Institute* 358.

⁴ Following Ronald Dworkin *Taking Rights Seriously*, 16-39.

⁵ See Julius Stone ‘The Ratio of the Ratio Decidendi’ (1959) 22 *MLR* 597.

⁶ See St. Thomas Aquinas, *Summa Theologiae* 1a, 87,7 (transl. by F.T. Durbin, Blackfriars 1868) Vol.12 and the Glossary p. 194 for a discussion of ratio. Ratio was often contrasted with oratio.

⁷ See *Lectures on Jurisprudence* (5th ed., by R Campbell) Vol. II p. 627. The phrase appears in the writings of the 18th century Scots jurist, Lord Kames, and the German civilian, Thibaut. Conversely it does not appear in the James Ram’s book *The Science of Legal Judgement* published in 1834 which is the first systematic work on the case law method. The omission is very curious and probably significant in the sense that the phrase had found favour with jurists but not yet with the Bar and Bench. Ram’s book was designed for the latter.

‘commonly styled by writers on jurisprudence’, but the notion of a precedent being some underlying rule or principle had long been recognised in English Law.

The judges have referred to *ratio decidendi* as a reason or the reason for the decision or the underlying principle of a case. Academic lawyers have spent much time in attempting to define it more precisely or to devise a method for ascertaining it. The American jurist, Wambaugh,⁸ unsuccessfully tried to use the logical method of inversion. He instructed the student to take the proposition of law which he thought might be the ratio, negate it and then consider whether the actual decision in the case would have been the same with the negated proposition as a premise. This was vague, artificial and ultimately over-simple since it was based on a strictly logical model of legal reasoning.

Professor A.L. Goodhart⁹ put the emphasis on the material facts. To Goodhart, ‘the principle of the case is found by taking account (a) of the facts treated by the judge as material and (b) his decision as based on them’. This was convincingly attacked by Professor Julius Stone¹⁰ who argued that this was an attempt to produce a prescriptive theory whereas the correct approach was to identify what the judges do. The process, according to Stone, was basically one of choosing an appropriate level of generality. There is thus implicit in a decided case a number of potential *rationes decidendi*. Ratio is not so much a rule as a technique of generalisation productive of a rule.¹¹

Ratio decidendi is contrasted with *obiter dictum or dicta*.¹² Just as ratio is a fuzzy concept so obiter dicta which involves its negation is fuzzy also. Where judges express views on the law relating to facts which they have not found this is regarded as obiter. Where, however, the facts are assumed, as in the old English procedure of demurrer or the Scots procedure of relevance, any view of the law relating to them is treated as ratio. In the old system where judgment was given by the full court sitting in banco cases decided on demurrer settled the law in a particularly authoritative way. There seem to be degrees of obiter depending on the level of the court and the scope of the arguments addressed to it. The distinction between *ratio decidendi* and *obiter dicta* seems to be of less importance today. The courts use the terms loosely and the dicta of appellate courts tends to be followed in practice.

The Common Law case method thus constitutes a source of law, a method of reasoning, a specialist form of decision making and a process of development.¹³ The process of development combines analogy, elements of induction and deduction and a shifting classification system. All of this takes place within a system in which the Doctrine of Precedent applies. This creates problems of its own. To a system of reasoning which is not formally valid is added an appeal to authority as definitive which in other contexts would itself constitute a logical fallacy. Let us look at some examples¹⁴ where methodological questions have been to the fore.

⁸ *The Study of Cases* 17-18

⁹ *Essays in Jurisprudence and the Common Law*, 25-26

¹⁰ ‘The Ratio of the Ratio Decidendi’ (1959) 22 MLR 597

¹¹ J.H.Farrar and A.M. Dugdale *Introduction to Legal Method* 3rd ed, p. 95

¹² *Ibid* pp. et seq. As to reasoning with fuzzy concepts see Bart Kosko *Fuzzy Thinking* (1994).

¹³ Roy Stone in ‘Ratiocination not Rationalisation’ (1965) LXXIV *Mind* 463 uses the term ‘paraduction’ to characterise the validity of caselaw reasoning which he compares with the strength of a rope made up of a number of cords.

¹⁴ The discussion which follows is based on J.H. Farrar and A.M. Dugdale *op.cit.* Chapters 7 and 8.

Analogy at Work in Case Law – Negligence

The development of Negligence in the last hundred and fifty years provides a good illustration of the role of analogy in the case law process. The law gradually accepted a category of things dangerous in themselves.

In *Longmeid v Holliday*¹⁵ this is recognised but an oil lamp was regarded as outside the category. In *George v Skivington*,¹⁶ however, a defective hair wash is included and in *Parry v Smith*,¹⁷ a defective gas appliance.

In *Heaven v Pender*¹⁸ a defective scaffold was included in the category and Brett M.R. attempted to formulate a methodology. He said:¹⁹

“The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premises there must be a more remote and larger premise which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in the cases of collision and carriage. The proposition which these recognised cases suggest and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger”.

His description of inductive reasoning is very confused and his induction was generally regarded as having produced too wide a rule. He later recanted in *Le Lievre v Gould*.²⁰

The preference of the Common Law was thus for a catalogue of particular duties of care. Although there are other reported cases in the period 1883 to 1932 they are illustrative of this latter approach.

In 1932, however, we have the famous case of *Donoghue v Stevenson*²¹ which not only was a landmark in the law but also provides a very useful further example of the Common Law method. The House of Lords under the Scottish procedure of relevance had to determine whether the assumed facts disclosed a cause of action and they found for the appellant by a bare majority of 3 to 2. Of the majority, Lord Atkin rested his speech on the widest grounds and, while rejecting the formulation of Brett M.R. in *Heaven v Pender* as too wide, set forth the neighbour principle as a new general principle or standard. Lords Thankerton and Macmillan were more cautious and found the duty to exist in the case of manufacture of food and drink for consumption by the public.

¹⁵ (1851) 6 Ex. 761.

¹⁶ (1869) LR Ex. 1.

¹⁷ (1879) 4 C.P.D. 325.

¹⁸ (1883) 11 Q.B.D. 503.

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²⁰ [1893] I Q.B. 491

²¹ [1932] A.C. 562

Lord Atkin said:²²

“It is remarkable how difficult it is to find in the English authorities statements of general application defining the relationship between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger and so on. In this way, it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett M.R. in *Heaven v Pender* (11 Q.B.D. 503, 509), in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide”.

He then went on to expound his neighbour principle. At the same time he formulated a narrower rule about manufacturer’s liability to consumers for defective products. The former has been influential but there is controversy as to its juridical status. It seems to be too wide to be a legal rule. It is more in the nature of a principle or standard. The narrower formulation is accepted as a legal rule.

*Home Office v Dorset Yacht Co*²³ shows an interesting difference of approach to Lord Atkin’s general principle by Lord Reid, a Scots lawyer and Lord Diplock, an English lawyer.

Lord Reid said:²⁴

“In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. *Donoghue v Stevenson* [1932] A.C. 562 may be regarded as a milestone, and the well-known passage in Lord Atkin’s speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion”.

It is noticeable that Scots lawyers are more at home with discussion of legal principle than English lawyers. This may be because of the Roman and Civilian influences on a substantial part of Scots law. Principle to a Scots lawyer represents an established maxim of the law or an inductive generalisation from a number of contemporary rules or cases. It is used more in the classical philosophical sense of a starting point for

²² Ibid at [1932] A.C. 578. For an admirable discussion of the background to Lord Atkin’s speech see Geoffrey Lewis, *Lord Atkin* 51-67

²³ [1970] A.C. 1004

²⁴ Ibid 1026H.

reasoning. It is not to be confused with an axiom which has the additional quality of primacy through self evidence. Until Lord Diplock's analysis which is discussed below there seems to have been a tendency amongst English judges (particularly modern judges) to regard a legal principle as simply a rule pitched at a higher level of generality with a number of exceptions.

Lord Diplock put the matter slightly differently from Lord Reid in the following didactic and rather mechanistic remarks:²⁵

“the judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care.

The method adopted at this stage of the process is analytical and inductive. It starts with an analysis of the characteristics of the conduct and relationship involved in each of the decided cases”.

Lord Diplock is thus regarding the identification of analogical relationships as a first step in an overall inductive process at this stage. He adds rather interestingly that this perhaps presupposes some assumption as to the basis of liability.

He states:

“...the analyst must know what he is looking for, and this involves his approaching his analysis with some general conception of conduct and relationships which ought to give rise to a duty of care. This analysis leads to a proposition which can be stated in the form:

‘In all the decisions that have been analysed a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc. and has not so far been found to exist when any of these characteristics were absent’.

For the second stage, which is deductive and analytical, that proposition is converted to: ‘In all cases where the conduct and relationship possesses each of the characteristics A, B, C, D, etc. a duty of care arises’. The conduct and relationship involved in the case for decision is then analysed to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in the case for decision.

But since *ex hypothesi* the kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will take at least one of the characteristics A, B, C or D, etc. And the choice is exercised by making a policy decision as to whether or not a duty or care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration.

²⁵ At p. 1058F-1060E. Lord Diplock was a logic man. For an interesting discussion of him as a law lord, see Lord Wilberforce interviewed in Garry Sturgess and Philip Chubb, *Judging the World. Law and Politics in the World's Leading Courts*, 274-275.

The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as was used in approaching the analysis. The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations imposed by the former definition which are considered to be inessential.”

Here Lord Diplock seems to be discussing the analogical growth of a Common Law rule or principle, and notice he avoids using either term and prefers the neutral term ‘proposition’.

Lord Diplock continues:-

“The proposition used in the deductive stage is not a true universal. It needs to be qualified so as to read:

‘In all cases where the conduct and relationship possess each of the characteristics A, B, C, and D, etc but do not possess each of the characteristics Z, Y, or X etc which were present in the cases eliminated from the analysis, a duty of care arises’.

But this qualification, being irrelevant to the decision of the particular case is generally left unexpressed. ...The plaintiff’s argument in the present appeal... seeks to treat as a universal not the specific proposition of law in *Donoghue v Stevenson* which was about a manufacturer’s liability for damage caused by his dangerous products but the well-known aphorism used by Lord Atkin to describe a ‘general conception of relations giving rise to a duty of care’ [1932] A.C. 562, 580. ... Used as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care this aphorism marks a milestone in the modern development of the law of negligence. But misused as a universal it is manifestly false.

We have looked at Lord Diplock’s speech at considerable length because it is the most explicit and detailed analysis of the case law method ever attempted by an English judge in a case. The view he represents would probably be generally accepted by the judiciary although judges normally shrink from such overt statements of their methodology. A later attempt to reduce the particular rebuttable question of principle to a two stage rule based formula (albeit of a prima facie kind) by Lord Wilberforce in *Anns v Morton London Borough Council*²⁶ originally found favour. The first stage was based on proximity or neighbourhood which led to a prima facie duty of care. The second stage involved weighing up the relevant policy arguments which might negative a duty in such circumstances. This approach now has been rejected by the House of Lords in *Peabody Fund v Parkinson*²⁷ and *Leigh and Sullivan v Aliakmon*,²⁸ by the Privy Council in *The Mineral Transporter*²⁹ and by the High Court of Australia in *Sutherland S.C v Heyman*³⁰. Rather, as Brennan J said in *Sutherland S.C v Heyman*³¹ the Common Law proceeds ‘incrementally and by analogy with established categories.

²⁶ [1978] AC 728, 751 F-H, 752 B.

²⁷ [1985] AC 210.

²⁸ [1986] AC 785.

²⁹ [1986] AC 1.

³⁰ (1985) 157 CLR 424.

³¹ (1985) 157 CLR at 481. Although compare this with Deane J’s attempt to develop proximity in *Jaensch v Coffey* (1980) 155 CLR 549 at 578 – 587 and Dawson J’s useful attempt at a reconciliation of the Brennan and Deane approaches in *Hill v Van Erp* (1997) 188 CLR 159, 176-179.

These decisions in the House of Lords and the High Court of Australia demonstrate the tension between principle and policy in negligence and the difficulty of distinguishing between them.³² The later English attempt to reduce the duty of care to a three stage test comprising foreseeability, proximity and policy has been rejected in Australia and attempts have been made to develop a “salient features” approach to bridle the unruly horse of policy.³³ This is a “typical case”³⁴ approach, rather than an essentialist system of closed categories. However, there is no settled methodology or universal test of a duty of care in Australia which is unfortunate.³⁵

The development of Negligence provides a particularly clear illustration of the role of analogy in case law. It is the first step in a movement which involves induction by enumeration of examples.³⁶ This produces a generalisation which is then used deductively. However, the deductive process is tentative rather than dogmatic and the status of the generalisation is more of the nature of a principle or presumption of liability than a firm rule. This is sometimes put in the form of a test of liability but the status of the test is usually merely presumptive. The description of this as a principle does not necessarily elucidate the discussion unless one thinks of it in the Scottish sense used by Lord Reid. The classification, induction and deduction do not need to comply with formal logic in order to be valid for the reasons stated by Lord Diplock. Hence one writer has described the whole process as the logic of choice.³⁷ In the decision making process policy plays a significant role. What is less clear is how this is accommodated in the reasoning process. We shall return to this topic in the conclusion.

Legislation

In the early history of English and Scots Law the courts used statutes as the basis of argument by analogy.³⁸ The basic rule that a local custom must date back to 1189 seems to have arisen in this way. The statutory period of limitation for an action for the recovery of land was used as an analogy by the Common Law courts. The old Equity of the Statute approach recognises the possibility of statutory analogies.³⁹ That approach, which was perhaps necessitated by the fact that many early statutes were ‘ill penned’ and excessively terse, has now been discredited. Nevertheless one can find some relatively modern examples where courts seem to have used statutory provisions by analogy. The Common Law presumption that a person is dead if he or she has been

³² See *McLoughlin v O’Brian* [1982] 2 WLR 982, 994 – 996, 997 – 8. See the High Court cases in footnote 33.

³³ See *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-8 disapproved in *Sullivan v Moody* (2001) 207 CLR 562, 579; See *Caltex Oil (Australia) Pty Ltd v The Dredge ‘Willemstad’* (1976) 136 CLR 529, 576; *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 253; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597-8. See the useful comment by Christian Witting “Duty of Care: An Analytical Approach (2005) 25 OJLS 33; “Tort Law, Policy and the High Court of Australia” (2007) 31 Mel. U. L. Rev. 569

³⁴ Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379 E-F.

³⁵ See Kirby J. in *Harrington v Stephens* (2006) 226 CLR 52 at 73.

³⁶ See Martin P. Golding *Legal Reasoning* 44. Golding says ‘Arguments by analogy proceed from certain given or assumed resemblances to an inferred resemblance.’ He adds, ‘The difference between analogical argument and induction by enumeration is that the inference depends not so much on the number of instances as on the resemblance of the compared items.’

³⁷ G.Gottlieb, *The Logic of Choice*

³⁸ See the examples given in *Maxwell on the Interpretation of Statutes* 12th edition by P.St.J. Langan, 236 et seq.

³⁹ See *Eyston v Studd* (1574) 2 Plow. 463.; 1.Inst. 24b

absent from and unheard of by those likely to hear from him or her for a continuous period of seven years is generally supposed to have been developed by analogy with certain seventeenth century statutes. In Equity the Court of Chancery applied the Statutes of Limitation analogically. In addition there are one or two other isolated cases in criminal law and conflicts of laws which Sir Rupert Cross cited in *Precedent in English Law*⁴⁰ as examples of statutory analogy.

However, the general approach of modern courts is to regard the legislative categories as closed categories and not to regard statute law as a source of legal principle.⁴¹ They can be interpreted and reinterpreted but not reworked or extended.⁴² There are some exceptions to this general approach. First, a recognised exception is where the statute refers to a Common Law concept. Here the concept is capable of further analogical development qua Common Law.⁴³ Examples of this are the implied warranties under the Sale of Goods Act 1893 and the duty of care under the Occupiers' Liability Act 1957 (UK). The former is generally regarded as a code and we shall consider it under that head.

Secondly, occasionally legislation is used as an expression of public policy in the Common Law world although this is relatively rare in the United Kingdom and Australia.⁴⁴ In *Esso Australia Resources Ltd v F.C.T.* (1999) 201 CLR 49, 61 the majority (Gleeson CJ, Gaudron and Gummow JJ) limited this in a federal system to federal statute law or where there is a consistent pattern of state legislation which seems rather narrow.

Thirdly, references are sometimes made to the interpretation of a legal concept or ordinary word in one statute to aid in the construction of another, although this is treated with caution. Its most frequent occurrence is where the statutes are in *pari materia* that is where they deal with the same subject matter as the Act being interpreted. For example, the interpretation of a phrase in an earlier Patent Act is likely to be referred to in the interpretation of a later act on this topic.

Fourthly, there is an increasing use of well established concepts such as fairness and reasonableness in modern statutes and in the formulation of guidelines for exercise of statutory discretions. These are sometimes used analogically.⁴⁵

⁴⁰ 3rd ed. 169

⁴¹ See the fourth edition by Rupert Cross and J.Harris, 175 et seq. for a narrower formulation. See also J.Bell and Sir George Engle *Cross on Statutory Interpretation* 2nd ed. 41 et seq. Also see *Maxwell on the Interpretation of Statutes* 12th ed. By P. St. J Langan 237 and *Craies on Legislation*, 9th ed. by D. Greenberg, 2008, 2. 3. 1. For a very useful discussion see P. Atiyah 'Common Law and Statute Law' (1985) 48 MLR 1.

⁴² See Sir Owen Dixon *Jesting Pilate* p. 13 and Windeyer J. in *Damjanovic & Sons Pty Ltd v the Commonwealth* (1968) 42 ALJR 102, 109.

⁴³ See Viner *Abr. Statutes* (E.6) 14.

⁴⁴ See eg. *Erven Warnick BV v J Townend & Sons (Hull) Ltd* [1979] AC at 743; *Day v Mead* [1987] 3 NZLR 443 at 451; *South Pacific Manufacturing Co Ltd v NZ Security Consultants and Investigators Ltd* [1992] 2 NZLR 282, 298. For an unsuccessful attempt by Kirby J see *Public Service Board v Osmond* [1984] 3 NSWLR 447 overruled by the High Court (1986) 60 ALJR 209. See also *Esso Australia Resources Ltd v F.C.T.* (1999) 201 CLR 49, 61-63. For a criticism of the Common Law approach see Roscoe Pound 'Common Law and Legislation' (1908) 21 Harv. L Rev. 383. See also Ernst Freund, 'Interpretation of Statutes' (1917) 65 U. Pa L.Rev. 207, Frank Horak Jr. 'The Common Law of Legislation' (1937) 23 Iowa L.Rev. 41. See also Guido Calabresi *A Common Law for the Age of Statutes*, 98-9.

⁴⁵ Cf. Priestly JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* [1992] 26 NSWLR 234 at 268 talking about the effect of statute law on concepts of fair dealing and good faith.

In *Precedent in English Law*⁴⁶ the late Sir Rupert Cross took the matter further and argued that:

“a legislative innovation is received fully into the body of the law to be reasoned from by analogy in the same way as any other rule of law. Whether the courts regard legislation as the equal or superior of judge-made law then it is cited as an analogy upon to found a decision must be regarded as an open question.”

Sir Rupert put the matter too boldly. It is not possible now to use a statute as the basis of analogy except in the indirect ways which we have mentioned. Strictly speaking these are not examples of statutes being used analogically at all. Sir Rupert based his view on the criminal case of *R v Bourne*⁴⁷ where the judge used another statutory provision to aid in the interpretation of the word ‘unlawfully’ in s.58 of the *Offences against the Person Act*, 1861 which dealt with abortion. In other words it was an aid in interpreting the general word ‘unlawfully’ rather than an analogical extension of a concept. He also refers to older cases and to a few modern cases which are far from conclusive support.

Sir Rupert’s views were influenced by the American writer Dean Roscoe Pound’s article in the *Harvard Law Review* of 1907⁴⁸ which he cited. Here Pound argued that statutory analogies should be a superior kind of analogy since they are the best expression of public policy. Cross, however, refused to go so far. He would only countenance their superiority where there was a competition of analogies of equal weight. It is suggested that the position in English and Australian law is not completely clear but the view which Sir Rupert expressed probably reflects more what the law ought to be rather than what it is. It may be as a result of European influences that the United Kingdom will eventually adopt the position he described.

In the meantime, Professor (now Justice) Paul Finn in an interesting article on ‘Statutes and the Common Law’⁴⁹ in 1992 argued that the position in Australian Law is as follows:⁵⁰

1. Where a statute or statutory provision is consonant with or else builds upon a fundamental theme in the Common Law, then
 - (a) it should be interpreted liberally and in disregard of common law doctrines which would narrow its effect.⁵¹
 - (b) subject to the natural limitations of judgemade law, it may be used analogically in the Common Law itself in its own development.⁵²

⁴⁶ 3rd ed. 170

⁴⁷ [1939] 1 KB. 687.

⁴⁸ (1907) 21 Harv. L. Rev. 383.

⁴⁹ (1992) 21 WAL.Rev. 7

⁵⁰ Ibid 23-24. See also his later paper, ‘Statutes and the Common Law: The Continuing Story’ in S. Corcoran and S. Bottomley (eds), 2005. 52. See further J. Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 LQR 247; D.C Pearce and R. S Geddes, *Statutory Interpretation in Australia* 6th ed. 2006 [1.14]; WMC Gummow, *Change and Continuity- Statute, Equity and Federalism*, 1999, Lecture One – The Common Law and Statute. See also Kirby J in *Harriton v Stephens* (2006) 226 CLR 52 at 95-98.

⁵¹ Cf *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84, 88.

⁵² See *Day v Mead* [1987] 2 NZLR 443; LJ Priestley, “A Guide to a Comparison of Australian and US Contract Law” (1989) 12 UNSWLJ at 10.

- (c) but where it is cast in broad and general terms, it may be interpreted in the light of limiting consideration to be found in the relevant Common Law doctrines, where such doctrines are conducive to the attainment of justice in individual cases.⁵³
2. Where a statute or statutory provision is antithetical (or possibly inconsistent with) a fundamental theme in the Common Law, then:
- (a) it will be interpreted strictly:⁵⁴
 - (b) it will not be used analogically in the Common Law,⁵⁵ and
 - (c) it will be subjected to Common Law doctrines which serve to protect individual rights⁵⁶ or to prevent unfairness.⁵⁷

Where a statute has been construed as remedial of the Common Law it has traditionally been given a liberal interpretation.⁵⁸ Also the courts have been somewhat hesitant to identify fundamental themes or principles of the Common Law. The Common Law has tended to grow up as an untidy pluralistic system without a clear hierarchy of principles or values.⁵⁹ Hence, there is arguably less justification for 2(c) as a statement of principle or judicial policy.

As we have seen in *Esso Australia Resources Ltd v FCT* (Supra) Gleeson C.J, Gaudron and Gummow J.J took a narrower view in a federal system.

Codes

In English and Australian Law a code is a statute which sums up the pre-existing case law and legislation on a particular topic. Codes are relatively rare but the orthodox approach in the interpretation of codes is to ignore the previous case law and concentrate on the words of the code unless they are ambiguous.⁶⁰

It is arguable that provisions of codes which embody the previous case law should be capable of being used as the basis of argument by analogy otherwise they will stultify the law.⁶¹ The most conspicuous area in English law where something approximating to this has taken place has been in the Law of Contract where the *Sale of Goods Act 1893* has often been consulted as a source of analogy in contract cases which fall outside the

⁵³ Professor Finn had in mind matters such as discretionary considerations in the grant of relief.

⁵⁴ Cf *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

⁵⁵ Ibid 635-6

⁵⁶ Cf *Minister for Lands and Forests v McPherson* (1991) 2 NSWLR 687 at 699-700

⁵⁷ Professor Finn gave the example of circumventing the Statute of Frauds and other cases of statutory legality.

⁵⁸ The orthodox view is expressed by Isaacs J (dissenting) in *Bull v Attorney General of NSW* (1913) 17 CLR 370 at 384. See further DC Pearce and RS Geddes, *Statutory Interpretation in Australia* 3rd ed, 164-6. Cf Griffith CJ in *Master Retailers Assoc of NSW v Shop Assistants Union of NSW* (1905) 2 CLR 94 at 106.

⁵⁹ For two differing Cambridge attempts to identify some hierarchy see R W M Dias *Jurisprudence* 5th ed Chapter 10 and P Stein and J Shand *Legal Values in Western Society*. Apart from identifying a number of values and expressing some tentative priority for a handful of values the authors recognise the pluralism of the Common Law. Oddly, neither work refers to the other. See further JH Farrar 'Legal Values' (1974) 1 BJLS 210.

⁶⁰ See *Bank of England v Vagliano Brothers* (1891) AC 167. See also Harry Calvert, 'The Vitality of Caselaw under a Criminal Code' (1959) 22 MLR 621, 626.

⁶¹ See Viner Abr. Statutes E.6 14 citing *Moore v Hussey* Hob 93,99.

Act.⁶² This is generally justified on the basis that the principles were similar before the Act and the Act merely codified the principles relating to contracts of sale of goods. Indeed in *Young & Marten, Ltd v McManus Childs, Ltd*⁶³ the House of Lords expressed strong views on the undesirability of drawing unnecessary distinctions between the different classes of contract. Lord Wilberforce described the position as follows:⁶⁴

“Before the Sale of Goods Act 1893, the courts had to consider questions of implied warranty under the Common Law and they did so, both in relation to sales, proprio sensu and to analogous contracts, not strictly or at least not purely sales, in precisely the same way. Their conclusions as to sales were taken into the Act, but the pre-existing principles remained and continued to be applied”.

In *Ashington Piggeries Ltd v Christopher Hill Ltd*⁶⁵ Lord Diplock said:

“Unless the Sale of Goods Act 1893 is to be allowed to fossilise the law and to restrict freedom of choice of parties to contracts for the sale of goods to make agreements which take account of advances in technology and changes in the way business is carried on today, the provisions set out in the various sections and subsections of the code ought not to be considered so narrowly as to force upon parties to contracts for the sale of goods promises and consequences different from what they must reasonable have intended. They should be treated as illustrations of the application to simple types of contract of general principles for ascertaining the common intention of the parties as to their mutual promises and their consequences, which ought to be applied by analogy in cases arising out of contracts which do not appear to have been within the immediate contemplation of the draftsmen of the Act in 1893.”⁶⁶

It is suggested that this approach is eminently sensible and in line with Civilian methods of interpretation. The Nineteenth Century English writer Jeremy Bentham⁶⁷ who influenced the movement for codification in the British Commonwealth argued strongly against the analogical extension of a code but his theories on case law and this aspect of codification are rather extreme and have not found general acceptance.

Some Recent Explanations of the Nature and Use of Analogy in Common Law Reasoning

An American writer who has been influential throughout the Common Law world is Edward Levi⁶⁸ of Chicago. In his book *An Introduction to Legal Reasoning* he described the nature of legal reasoning thus:

“The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a threefold process described by the doctrine of precedent in which a

⁶² See eg. *G H Myers & Co v Brent Cross Service Co* [1934] 1 KB 46; *Samuels v Davis* [1943] KB 526; *Stewart v Reavills Garage* [1952] 2 QB 545; *Ingham v Emes* [1955] 2QB 366.

⁶³ [1969] 1 AC 454

⁶⁴ Ibid 477 B-C

⁶⁵ [1972] AC 441.

⁶⁶ Ibid 501.

⁶⁷ See *General View of a Complete Code of Laws* (Works-Bowring edition Vol. 3, 193). For criticisms see Sir C. Ilbert *Legislative Methods and Forms*, 123.

⁶⁸ 1-2, 8-9. See the critique by C. Prevots, ‘On the Nature of Legal Deliberation’ (1965) 49 *The Monist* 424.

proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases: next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case (1-2).

In the long run a circular motion can be seen. The first stage is the creation of the legal concept which is built up as cases are compared. The period is one in which the court fumbles for a phrase. Several phrases may be tried out; the misuse or misunderstanding of words itself may have an effect. The concept is more or less fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desirable (8-9)".

Levi's analysis was basically adopted by the late Sir Rupert Cross in his *Precedent in English Law*.⁶⁹ A criticism that can be made of Levi's analysis is that he fuses if not confuses a number of different aspects of case law – the source of law, method of reasoning, process of decision making and pattern of development. In his book, *Law and Logic*, the Israeli writer Joseph Horowitz⁷⁰ makes some detailed criticisms along these lines. It is, however, difficult to analyse the role of analogy in case law without paying some attention to these factors.

In *The Nature of the Common Law*⁷¹ Melvin Eisenberg made some telling criticisms of Levi's approach. He attacked Levi's emphasis on example which he nevertheless accepted has a part to play in the initial intuitive leap of discovery. However, in Eisenberg's opinion, 'reasoning by example' is, as such, virtually impossible. Reason cannot be used to justify a normative conclusion without first drawing a maxim or a rule from the example. Reasoning by analogy in the Common Law is a special type of reasoning from standards. It is the mirror image of distinguishing. Eisenberg then talks about consistent extension of rules and systematic consistency. These points are more relevant to the development of the Common Law. He also argues that, although reasoning by analogy and reasoning by precedent are substantively equivalent, the difference depends largely on the generality with which the rule announced in the precedent is stated. Eisenberg argues that if the rule is formulated at a high level of generality, this would be reasoning from precedent.

H.L.A Hart contributed much to the analysis of the concept of law, legal systems, legal concepts and legal reasoning. Surprisingly enough he had little to say specifically on analogy. In his contribution, Problems of Philosophy of Law in *Encyclopaedia of Philosophy*⁷² he talks of case law reasoning as a form of inverted application of deductive reasoning. The past case must be an instance of the rule in question in the sense that the decision in the case could be deduced from a statement of the rule together with a statement of the facts in the case. In this he seems to resemble Wambaugh. Hart recognised that this is merely one necessary condition and not a sufficient condition of the court's acceptance of a rule on the basis of past cases, since there is logically an indefinite number of alternative general rules which can satisfy the

⁶⁹ Third Edition 1977 Oxford at the Clarendon Press pp. 182 et seq. Cf now the Fourth edition 192 et seq.

⁷⁰ At 143.

⁷¹ (1988) 83-96.

⁷² Vol. 6 edited by P. Edwards, 264 et seq.

condition. Such choice is not a matter of logic but involves 'substantive matters which vary from system to system or from time to time in the same system'.⁷³

Hart thought that the use of the term induction to describe this process could be misleading since it suggested stronger analogies with probabilistic inference used in the sciences than in fact are the case.

In 'Definition and Theory in Jurisprudence'⁷⁴ he shows how the concept of corporation is built up analogically. He links analogy with shift of meaning as a judicial technique. He refers to 'analogies latent in the law'⁷⁵ but does not discuss their logical nature or method.

In *Outlines of Modern Legal Logic* Ilmar Tammelo⁷⁶ of the University of Sydney maintained that the normal form of an analogical argument in Law is logically invalid because it represents an amphilogy i.e. a compound whose ultimate value constellation contains both true and false.

Thus:-

If a set of facts F is given then this act ought to be treated as larceny. A set of facts essentially similar to F is given. This act ought to be treated as larceny.

It is submitted that in case law the argument can *never* be strictly logical, because the minor premise of material similarity with F is implicitly *normative and teleological*⁷⁷ not because it is an amphilogy.⁷⁸

Tammelo regards analogy, inversion and arguments *a fortiori* as all examples of *modus deficiens* and argues that if premises are supplied to make them logically valid then they are not strictly examples of these particular arguments.

In *The Authority of Law*⁷⁹ Joseph Raz puts forward the view that analogical arguments is a form of justification of new rules laid down by the courts in the exercise of their law making discretion. He thinks that the criterion of relevance in analogical reasoning lies in the rationale of the rule which is more abstract than the rule itself. Argument by analogy is essentially an argument that if a reason is good enough to justify rule X then it is equally good to justify rule Y which similarly follows from it. Although this explains some analogies it does not explain them all. Arguments unius ad alterum are simpler in nature and, conversely, some arguments duorum ad tertium and plurium ad plura are not necessarily explained in terms of such justification but the more overtly logical subsumption under a more general rule. Judges sometimes justify both these steps in the way Raz describes but not always. This leaves open the possibility of implicit justification.⁸⁰

⁷³ Ibid 269.3

⁷⁴ An inaugural lecture delivered before the University of Oxford on 30 May 1953, Oxford; Clarendon Press, 1953. Also published in (1954) 70 LQR 37.

⁷⁵ (1954) 70 LQR 37 at 59.

⁷⁶ At 129.

⁷⁷ Cf. Theodor Heller *Logik und Axiologie der Analogen Rechtsanwendung* Berlin 1961: esp. At pp. 144-5 and S. Simitis, 'The Problem of Legal Logic', 3 Ratio 60, 79.

⁷⁸ See generally McInerney op. cit. (footnote 2 supra).

⁷⁹ *The Authority of Law* 201-206.

⁸⁰ For a very narrow view of this see R. Dworkin, *Taking Rights Seriously*. Cf J. Raz 'Prof. Dworkin's Theory of Rights', (1978) *Political Studies* 123.

In two contributions in the Harvard Law Review, Cass Sunstein and Scott Brewer have put forward some new analyses of analogy in legal reasoning. Sunstein⁸¹ argues that the distinctive properties of analogical reasoning are a requirement of principled consistency, a focus on concrete particulars, incompletely theorised judgements and the creation and testing of principles having a low or intermediate level of generality. Analogical reasoning usually operates without express reliance on more general principles. These properties have certain disadvantages when compared with economics and empirical social science. On the other hand, given limited time and capacities and disagreement over first principles, Sunstein argues that they have certain advantages. They do not require the development of full theories, they promote moral evolution over time, they suit a system of Stare Decisis and they allow people who differ on abstract principles to converge on particular outcomes. Sunstein's 50 page article seems to be a good summary of earlier thinking and has the advantage of clarity and relative brevity which no doubt accounts for its status as a mere Commentary in the Harvard Law Review.

Brewer⁸² analyses analogical reasoning at greater length in terms of a three step rule guided process. This consists of an inference (called 'abduction') from chosen examples to a rule; confirmation or disconfirmation by a process of reflexive adjustment of the rule; and application of the confirmed rule to the case. Abduction is derived from C.S Peirce's explanation of scientific discovery.⁸³ As a psychological explanation it is useful. As a method of logical reasoning it rests on the fallacy of *post hoc propter hoc* as Brewer in fact recognises.⁸⁴

Sunstein distinguished reflexive equilibrium from reasoning by analogy whereas Brewer incorporates it as an essential part of his theory. Both writers make some telling points but Brewer seems to move beyond simple analogical reasoning to reasoning with rule and precedent which involves more elaborate processes of reasoning and decision making as we have seen. At the same time both Sunstein and Brewer seem to spend insufficient time linking reasoning by analogy with theories of justification. In the case of Brewer this is odd since he claims that he is dealing with justificatory arguments.⁸⁵ He makes the strange claim that the importance of the justificatory context of legal argument is that it 'shapes the structure of the reasoner's legal analogical argument by requiring him to construct and rely on a type of *deductively applicable rule within* the legal analogy.'⁸⁶ This is a potentially complex claim which does not sit easily with ordinary concepts of analogy or with his other arguments about the nature of abduction which we have mentioned above. Nor does it seem to fit a nonformal theory of justification too well.

⁸¹ 'Commentary on Analogical Reasoning' (1992-3) 106 Harv. L. Rev. 741. See also the earlier views of Judge Richard Posner in *The Problems of Jurisprudence* 86. Posner is more sceptical about analogical reasoning which he describes as 'an unstable class of desperate reasoning methods'.

⁸² 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' (1996) 109 Harv. L. Rev. 923.

⁸³ See Wikipedia entries for Charles Peirce and Abductive Reasoning and materials cited.

⁸⁴ Ibid 926 Brewer 949

⁸⁵ Ibid 926.

⁸⁶ Ibid 926-7

Judge Richard Posner⁸⁷ is critical of reasoning by analogy. He argues that it belongs not to legal logic, but to legal rhetoric. Reasoning by analogy tends to obscure the policy grounds that determine the outcome of a case because it directs attention to the cases being compared rather than to the policy considerations that connect or separate the cases.

It is in this context that we now consider the new work by Lloyd Weinreb of Harvard Law School.⁸⁸ Weinreb rejects the views of Levi, Sunstein, Posner, and others, which regard analogical reasoning as logically flawed. He argues that it is the same as the reasoning used in every day life and is dictated by the nature of law which requires the application of rules to particular facts. He considers the arguments of Sunstein and Brewer at some length. The problem with Weinreb's book is that it seems to fall between two separate genres. One is an introduction to legal reasoning intended for new law students, and the other is jurisprudential theorising about the nature of legal reasoning and its justification.

Chapter 1 discusses Brewer's account at some length. Chapter 2 provides three sets of cases for discussion. Chapter 3 engages in more theoretical debate, and Chapter 4 discusses the role of analogical reasoning in legal education and law. While Weinreb makes some sound criticisms of his colleague, Brewer, he is rather weak on policy and questions of justification, and here Posner seems right in emphasizing the significance of policy argument in the case law process.

Conclusion

Where does all this leave us? Most practising lawyers and judges accept the practical utility of reasoning by analogy but accept its limitations. Secondly, most accept that it is difficult to fit it into a logical framework of either inductive or deductive reasoning, but differ in the ways in which they explain this. Thirdly, most people these days recognise the role of policy arguments in judicial decision making and the justification of case law reasoning.⁸⁹

As a decision making process case law operates as follows.

The inputs – *facts*, *rules* (which we use in a wide sense to cover principles and standards), the particular *stare decisis principles*, and *legal policy* – are all variables⁹⁰ which, together with what one American writer described as 'within-puts' (i.e. *judicial attitudes*) influence the decision-making by the court.⁹¹

⁸⁷ *The Problems of Jurisprudence* (1990), 86-100.

⁸⁸ *Legal Reason – The Use of Analogy in Legal Argument* (2005)

⁸⁹ However see the somewhat narrow view expressed by the High Court in *Sullivan v Moody* (2001) CLR 562 at 579 which assumes a clear distinction between principle and policy.

⁹⁰ This is based on J.H. Farrar, *An Introduction to Legal Method* 1st edition (1977). This was omitted from later editions.

⁹¹ Glendon Schubert, *Judicial Policy Making* (1963), 139. Compare his *Systematic Model of Judicial Policy Making* at 140. Schubert categorizes the three major attitudes as (1) *political liberalism* and conservatism (2) *social liberalism* and conservatism and (3) *economic liberalism* and conservatism.

Legal policy is a species of public policy which is hard to define in clear terms.⁹² Speaking generally, in legal policy there seem to be three sets of variables operating and interacting: *interests*, *legal values*, and we shall call *other relevant factors* – ORFs for short.⁹³ *Interests* are the claims or expectations of individuals or groups which are perceived by the judges or the legislature to exist in society in respect of matters such as property, reputation and freedom from personal injury.⁹⁴ By claims we do not mean the enforcement of an *established* legal right but an attempt to establish the existence of such a right. In addition, in the words of the philosopher, Henry Sidgwick, there is a ‘borderland, tenanted by expectations which are not quite claims and with regard to which we do not feel sure whether Justice does or does not require us to satisfy them.’⁹⁵

Legal values are the broad measures of social worth which are accepted and acted upon in the legal system. Examples are the rule of law, the freedom of the individual, justice and so on.

ORF’s are a miscellaneous category which are mainly concerned with efficiency and include matters such as cost, convenience and political expediency which we do not normally think of as social values.

The main limitations here are that we do not know what influence the various variables have on the ultimate decision of a court. All that we know is that they do operate and that how they *will* operate in a particular case is to a degree a matter of intuition. One can state certain tendencies. Obviously the scope of the existing rules is very important and the closer the facts of two cases, the more likely one is to follow it even where the rule is contained in *obiter dicta*. The all-pervasive concept of legal policy, although I have tried to simplify it in the above analysis, is, however, a fluid one which is difficult to tie down. It seems to be relevant to ascertaining the scope of the *ratio decidendi* of a case and in determining whether the facts of an earlier case are sufficiently analogous to justify following it in a later case. It seems to have some bearing on *stare decisis* in that a later court will be influenced by it in ascertaining the *ratio* of an earlier case for the purposes of considering whether it is bound by the earlier case or whether it can distinguish it. Legal policy is crucial to the process of distinguishing cases. We can describe it as a factor or variable in each of these situations. We cannot say more. The nature of judicial attitudes and their possible relationship to legal policy are also relatively uncharted seas. The problem is how to reconcile this decision making process with the reasoning process⁹⁶ and yet any analysis of the role of analogy in legal reasoning that does not adequately address these questions is incomplete.

⁹² Cf. D. Lloyd, *Public Policy* (1953), Lord Radcliffe, *Law in its Compass* (1961). Chap. II and Clive Symmons ‘The Duty of Care in Negligence: Recently Expressed Policy Elements’ (1971) 34 MLR 394. 528.

⁹³ Cf. Benjamin N Cardozo, ‘The Paradoxes of Legal Science’ I M. Hall (ed.) *Selected Writings of Benjamin Nathan Cardozo*, (1947) 251, 298-9.

⁹⁴ See Roscoe Pound, *An Introduction to the Philosophy of Law* (1954) 89 et seq. See also J Stone, *Social Dimensions of Law and Justice* (1966), 164-469.

⁹⁵ *The Methods of Ethics* (1901), 270.

⁹⁶ “Policy considerations... are material to judicial decision making only to the extent that they inform the formulation of a relevant rule or the interpretation of a statutory or constitutional provision...” – Anthony Mason, “Policy considerations” in *Oxford Companion to the High Court of Australia* ed. by T. Blackshield, M. Coper and G. Williams, 2001, 535-6. See also Justice M H. McHugh, “The Judicial Method” (1999) 73 ALJ 37, 45-6 and Brennan J, in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 29 and *Dietrich v The Queen* (1992) 177 CLR 379 at 320-1 (“the skeleton of principle”).

The common law evolved as a pluralistic system with no clear hierarchy of values and the very looseness of analogical reasoning served its purpose and may add something to philosophical method. Indeed, the distinguished Belgian philosopher Chaim Perelman in his book *Justice et Raison* put it this way:

“...in studying with attention and analysing with care the techniques of legal procedure and interpretation which permit men to live under the Rule of Law, the philosopher, instead of dreaming of the Utopia of an ideal society, can derive inspiration... from what secular experience has taught men, charged with the test of organising a reasonable society on earth.”⁹⁷

Weinreb recognises in his conclusion that there is no escape from doubt and the possibility of error. Reasoning by analogy enables us continually to evaluate and improve the law in the light of experience. Perhaps this is the true meaning of Oliver Wendell Holmes Jr’s mystical utterance, ‘The life of the law has not been logic: it has been experience’.⁹⁸

⁹⁷ (1963), 255 (my translation)

⁹⁸ *The Common Law* (1881),1.