

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 theoretical discussions of analogy and the link between reasoning by analogy and justificatory reasoning, ending with an analysis of justification in terms of principle, policy and considerations of fairness underlying the Doctrine of Precedent. The analysis of justification provides some insights into what are 'material' resemblances for the purposes of reasoning by analogy in the law.

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'.

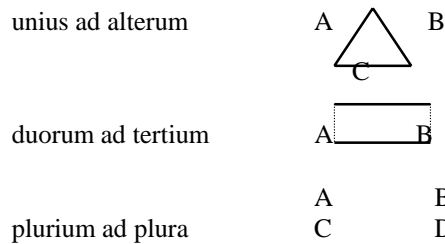
Some philosophical writers have distinguished between reasoning by analogy and reasoning by example, regarding the latter as presupposing a common rule or a concept of which the examples are species. Most writers,

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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.

however, equate the two.

Amongst theologians² the Thomist classification divides analogies into those of *unius ad alterum*, *duorum ad tertium* and *plurium ad plura* which can be represented thus:-



Unius ad alterum is a simple relationship of similarity in a certain respect. *Duorum ad tertium* is based on proportion, that 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 these types of analogies, particularly *unius ad alterum* and *duorum ad tertium*.

Distinctions have been drawn between generic and specific analogy of which we will say more under (C) below. In addition, a number of writers have distinguished between analogies used in necessary or formal reasoning and those used in contingent or material reasoning. This too will be discussed under (C).

The Use of Analogy in Common Law Systems

Case Law

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).
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 (1966) *Journal of the Indian Law Institute* 358.

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 '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.

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 eighteenth 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 Judgment* 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.

8 *The Study of Cases* 17-18.

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 banc cases decided on demurrer settled the law in an 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 specialised 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.

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.

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.

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 hairwash 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.

19 At p. 509.

20 [1893] 1 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

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.

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 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

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.

proposition is converted to: 'In all cases where the conduct and relationship possess 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.

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'. The relationship of analogy to rule we shall discuss further in the context of John Austin's theory of legal analogy. 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 any 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 & 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'.

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.³² 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.³³

Legislation

In the early history of English and Scots Law the courts used statutes as the basis of argument by analogy.³⁴ The basic rule that a local custom

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) 155CLR 549 at 578-587 and Dawson J's useful attempt at a reconciliation of the Brennan and Deane approaches in the recent case of *Hill v Van Erp* (1997) Aust. Torts Reports 63,899 at 63,908.

32 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.'

33 G. Gottlieb, *The Logic of Choice*.

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

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.³⁵ 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 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*³⁶ 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.³⁷ They can be interpreted and reinterpreted but not reworked or extended.³⁸ 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.³⁹ 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.⁴⁰ 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

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

36 3rd ed. 169.

37 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 *Craie's Statute Law* 7th ed. by S.G.G. Edgar 101-3. For a very useful discussion see P. Atiyah 'Common Law and Statute Law' (1985) 48 MLR 1.

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

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

40 See eg. *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 743; *Day v Mead* [1987] 2 NZLR 443 at 451. 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.

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.⁴¹

In *Precedent in English Law*⁴² 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 when it is cited as an analogy upon which 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*⁴³ 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 1907⁴⁴ 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'⁴⁵ in 1992 has argued that the position in Australian Law is as follows:⁴⁶

41 Cf. Priestley 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.

42 3rd ed. 170.

43 [1939] 1 KB. 687.

44 (1907) 21 Harv. L. Rev. 383.

45 (1992) 22 WAL Rev 7.

46 Ibid 23-24.

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;⁴⁷
 - (b) subject to the natural limitations of judgemade law, it may be used analogically in the Common Law itself in its own development;⁴⁸
 - (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.⁴⁹

2. Where a statute or statutory provision is antithetical (or else possibly inconsistent with) a fundamental theme in the Common Law, then:
 - (a) it will be interpreted strictly;⁵⁰
 - (b) it will not be used analogically in the Common Law,⁵¹ and
 - (c) it will be subjected to Common Law doctrines which serve to protect individual rights⁵² or to prevent unfairness.⁵³

This is essentially conservative doctrine. Where a statute has been construed as remedial of the Common Law it has traditionally been given a liberal interpretation.⁵⁴ 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.⁵⁵ Hence, there is arguably less justification for the second proposition as a statement of principle or judicial policy.

Codes

In English and Australian Law a code is a statute which sums up the

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

48 See *Day v Mead* [1987] 2 NZLR 443; LJ Priestley, "A Guide to a Comparison of Australian and US Contract Law" (1989) 12 UNSWLJ 4 at 10.

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

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

51 Ibid 635-6.

52 Cf *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 699-700.

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

54 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.

55 For two differing Cambridge attempts to identify some hierarchy see RWM Dias *Jurisprudence* 5th ed Chap 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.

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.⁵⁶ 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.⁵⁷ 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 Act.⁵⁸ 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*⁵⁹ 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:⁶⁰

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*⁶¹ 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 construed so narrowly as to force upon parties to contracts for the sale of goods promises and consequences different from what they must reasonably 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 draftsman of the Act in 1893.⁶²

It is suggested that this approach is eminently sensible and in line

56 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.

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

58 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] 2QB 545; *Ingham v Emes* [1955] 2QB 366.

59 [1969] 1 AC 454.

60 Ibid 477 B-C.

61 [1972] AC 441.

62 Ibid 501.

with Civilian methods of interpretation. The Nineteenth Century English writer Jeremy Bentham⁶³ 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 Theoretical Explanations of The Nature and Use of Analogy in Common Law Reasoning

In spite of the practical importance of analogy in Common Law systems there has been relatively little coherent theoretical analysis of the process and it has tended to be mixed up with discussions of the Doctrine of Precedent. There are, however, isolated references in a number of major writers which we will now consider together with more extended discussion in recent US writing.

Early Theories

The early writer and judge, Bracton, in his book on the *Laws and Customs of England* stressed the importance of analogy when he said 'If like matters arise, let them be decided by like since the occasion is a good one for proceeding a *similibus ad similia*'.⁶⁴ In this he was merely following Roman Law although analogy is such a fundamental method of practical reasoning that its utility speaks for itself.

Sir Edward Coke constantly uses particular analogies in subtle ways and also refers to the Equity of a Statute but it is to his contemporary Francis Bacon⁶⁵ that we must turn for theory. Even he is disappointing when it comes to Law as opposed to the methods of natural science. He is primarily remembered amongst legal theorists for his maxims which arguably he arrived at in an inductive way. However, he made general remarks about the role of analogy in science which are relevant to Law and he made a number of sensible if not profound remarks on the subject of interpretation and extension of Laws.

His general view of analogy is set out in a letter to the Earl of Rutland⁶⁶ where he states:

The observation of proportion or likeness between one person or one thing and another, makes nothing without example, nor nothing new; and although *exempla illustrant non probant*, examples may

63 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.

64 *Bracton on the Laws and Customs of England* (Thorne edition) Vol II, 21.

65 See B.C. Heron *An Introduction to the History of Jurisprudence* (1860) Book IV Chapter 1 section 1; P.H. Kocher 'Francis Bacon on the Science of Jurisprudence' (1957) 19 *Jo. History of Ideas* 3; Peter Stein *Regulae Juris* p. 170-174 and Roy Stone 'Bacon as Lawyer and Jurist' (1968) *Archiv. für Rechts- und Socialphilosophie* 449.

66 See *Letters and Life* (ed. by Spedding) Vol. II, 196.

make things plain that are proved, but prove not themselves; yet when circumstances agree, and proportion is kept, that which is probable in one case is probable in a thousand, and that which is reason once is reason ever.

In other words similarities achieve nothing by themselves. Strictly argument by example *proves* nothing but it raises a presumption of a probable or rational connection. The presumption is to be verified or falsified by observation.

Analogies are then regarded as suggestive of ideas rather than as sources of exact knowledge and serve more to direct the mind to the whole rather than instruct it in the details. In the *Novum Organum* he states that analogies are:

the first and truest steps towards the union of nature. They do not at once establish an axiom, but only indicate and observe a certain conformity of bodies to each other. But although they do not conduce much to the discovery of general laws (or forms), they are, nevertheless of great service in disclosing the fabrication of parts of the universe, and practice a sort of anatomy upon its members. Thence they sometimes lead us, as if by hand, to sublime and noble axioms, especially those that relate to the configuration of the world rather than to simple natures and forms.⁶⁷

He warns, however, that if analogies are to be fruitful in results they must embrace essential resemblances. He insists:

That in all these (analogies) a severe and rigorous caution be observed, that we only accept, as *similar* and *proportionate* instance those that denote natural resemblances - that is to say, real, substantial, and immersed in nature; not merely casual or superficial, much less superstitious or exceptional, like those always brought forward by the writers on natural magic; ... who with much vanity and folly describe, and sometimes invent, idle resemblances and sympathies.⁶⁸

Bacon's aphorisms on Law are contained in Book VIII, Chapter III of the *Advancement of Learning*. In para X, following Aristotle, he recognises the inability of law to foresee all future cases. Hence for cases omitted there are three remedies. 1. Analogy 2. precedents not yet law and 3. juries.

In paras XI - XX he states his views on the application and extension of laws and makes a number of remarks about the policy to be pursued in such circumstances.

67 Nov. Org. II 27.

68 Lib. II, 27.

In cases omitted 'the rule of law is to be deduced from similar cases, but with caution and judgment'. 'What is received against the reason of a law, or where its reason is obscure, should not be drawn into precedents' (XI).

Laws productive of the common good should give a 'full and extensive' interpretation (XII). 'It is a cruel thing to torture the laws, that they may torture men' (XIII). Statutes repealing the Common Law 'should not be drawn by analogy to cases omitted' (XIV).

Mr Jonathan Cohen,⁶⁹ an Oxford philosopher, comments that it is odd that Bacon seems to say nothing about induction in his legal writings and nothing about legal reasoning in his writings about induction. As we have seen Bacon does say useful things about analogy in general and the policy behind analogical reasoning in Law. It is a pity that he did not leave behind a more systematic analysis of legal reasoning. It may have been because he did not think that legal reasoning was itself sufficiently distinctive. Coke's 'artificial reason' of the Common Law could perhaps be accommodated within the traditional categories of Rhetoric and Logic. Suffice it to say that Bacon's aphorisms which we have considered were written by him not as a lawyer but as a statesman. Lawyers 'have not their judgment free but write as in fetters.' Only the statesman can judge the Law by the principles and precepts of natural justice and politics. (Lib. XXI, Chap. III).

The next writer we shall consider is William Blackstone. He wrote much on the Common Law, precedent and interpretation of statutes but wrote little on the topic of analogy as such. He held the view that precedents and statutes which are clearly contrary to divine law are invalid and that it is an established rule to abide by former precedents unless they are contrary to reason or flatly absurd and unjust. He also held that precedents are the best evidence of the law rather than the law itself. It seems that this is a roundabout way of saying that it is the *ratio decidendi* which binds.⁷⁰ Blackstone was writing at a time before the stricter rules of Stare Decisis developed.

Then we pass to Blackstone's great critic, Jeremy Bentham. Although Bentham was a keen logician he does not seem to have had any great interest in the analysis of case law reasoning which he stigmatised as Law for the Dogs.⁷¹ He uses analogies with enthusiasm in his own reasoning (especially medical analogies) but does not appear to have left much analysis of analogy or reasoning by analogy.

69 *The Implications of Induction*, 160.

70 1 Comm. 69.

71 *The Works of Jeremy Bentham* (ed. J. Bowring) Vol V, 235, 519-20. However, see unpublished material referred to by Gerald J. Postema, *Bentham and the Common Law Tradition* Chap. 6.

John Austin left behind some rough notes on the topic of Analogy which his widow included as an Excursus to his *Lectures on Jurisprudence*, Vol. II, published after his death. The Excursus is an extension of Lecture XXXVII in which Austin compared case law with legislation and the concept of *ratio decidendi* with that of *ratio legis*. Austin regarded case law as induction involving reasoning by analogy with *ratio decidendi* performing an inductive function.⁷²

Austin's analysis of the basic concept of analogy says nothing new. He takes likeness as its basic meaning and distinguishes between analogy and reasoning by analogy. What is more interesting is his distinction between generic and specific analogy and between contingent and necessary reasoning and his explanation of the role of analogy in legal reasoning.

Generic analogy is a resemblance between the species which are parts of a genus. Specific analogy is a resemblance between the individuals as parts of any of the species. Austin's use of the word 'parts' is unfortunate since it is obvious that he means members. Members unlike parts are not necessarily constitutive of the genus or species in question. Since law does not operate with a fixed scheme of genera and species this distinction, though logically sound, is of little practical use as far as case law is concerned and of limited use with regard to legislation. In fact it can be argued that in law analogical relations replace a strictly *genus et differentia* method of classification. It is suggested that case law development at least proceeds on the basis of simple analogical relations in an organic way.⁷³ It is only later that there is some attempt to rationalise the analogical clusters in terms of *genera et differentiae*. This is usually at the stage of rule formulation which is the ultimate inductive stage. However, the process of analogical development also takes place after the formulation of a rule. The position then gets progressively more complicated as analogy competes with a stricter logical inference based on what is entailed by the categories used in the rule. The matter can be illustrated by the piecemeal analogical development of Negligence which was followed by conceptualisation as we have seen.

Austin's distinction between contingent and necessary truth is useful as far as the role of analogy in the sciences is concerned. Contingent truth is based on probability; necessary truth on logical entailment. Austin thought that reasoning by analogy is only really applicable to the former. In his discussion of contingent reasoning Austin recognised the possibility of analogical reasoning which was not inductive.

72 See Op. cit. e.g. 656.

73 *Aristotle's Metaphysics* (Q 1048 a 35-68) and see Mary Hesse 'Aristotle's Logic of Analogy' (1965) 15 *Philosophical Quarterly* 328, 335-6.

Austin recognised that legal reasoning used analogy as the basis of an 'ought' step. Generic or specific resemblances between cases or between the instant case and the hypothetical class covered by the rule or statute means that they ought to be decided in the same way.

Julius Stone⁷⁴ in *Legal Systems and Lawyers' Reasonings* discussed Austin's theory and maintained that he was trying to equate analogy as far as possible with syllogistic reasoning even to the extent of debunking the syllogism. This seems to exaggerate on two counts. Austin clearly recognised the difference between induction and deduction and that analogical reasoning is not always inductive. He also recognised the value of the syllogism but its inapplicability to all the practical reasoning of everyday life. He hoped that his friend John Stuart Mill would shed further light on the matter.

Mill did in fact shed light on the relation of analogy to induction in scientific reasoning but did not elucidate the role of analogy in legal reasoning and is somewhat disappointing in his discussion of the social sciences as a whole. In Book III, Chapter XX, of *A System of Logic* he takes analogy to mean some kind of argument supposed to be of an inductive nature but not amounting to a complete induction. Sometimes it refers to a resemblance of relations; more usually it refers to any sort of resemblance not amounting to a complete induction. Complete induction involves an 'invariable conjunction'.⁷⁵ Most of his discussion is taken up with the use of analogy to establish probability relationships.

The value of an analogical argument, according to Mill, depends on the extent of ascertained resemblance, compared first with the amount of ascertained difference and next with the extent of the unexplored region of unascertained properties. In the sciences analogy is 'a mere guidepost, pointing out the direction in which more rigorous investigations should be prosecuted'.⁷⁶ Subjects like Law and Ethics are a class by themselves, generically different from fact. They are concerned with rights. However, in an interesting passage⁷⁷ Mill states that the reasons of a maxim of policy or any other rule of art can be no other than the theorems of the corresponding science. Law or Ethics supply the ends, science investigates the means. The maxims of policy themselves are, ultimately derived from the philosophia prima of Utility.

Modern Theories

Sir John Salmond in the early editions of his book *Jurisprudence* referred to analogy in case law being based on *ratio juris*. He then added

74 At pp. 312 et seq.

75 8th ed, Longmans New Impression 1967. Ibid 365.

76 Ibid 368.

77 Ibid 616.

that 'analogy is lawfully followed only as a guide to the rules of natural justice. It has no independent claim to recognition'.⁷⁸ This passage which reflects Salmond's very logical mind appeared in editions up to and including Prof Glanville Williams' eleventh edition. It was dropped from the twelfth edition by Prof P Fitzgerald.

Benjamin Cardozo made use of analogy in his famous analysis of the judicial process.⁷⁹ On the whole he seems to have thought of analogy as part of logical method although at least once he seems to have distinguished it from that method.⁸⁰ Sometimes he subsumes both under the broad heading of philosophy.⁸¹ Logic had its place but had to give way, to other methods - the methods of history (or evolution), custom (or tradition), utility and the accepted standards of right conduct. He often uses the term sociology to cover utility and the standards of right conduct. Sometimes he refers to social interests and the mores of the day. The loose usage is regrettable but perhaps inevitable. Whatever its precise meaning sociology was the ultimate measuring instrument. The problem of choice, however, only assumed significance in a minority of cases. The majority of cases before this could not, 'with semblance of reason, be decided in any way but one'.⁸² Of the rest there was a considerable percentage where the rule of law was certain and its application alone doubtful. Finally there was the small but not negligible proportion 'where a decision one way or the other, will count for the future. These are the cases where the creative element in the judicial process finds its opportunities and power ... Here comes into play that balancing of judgment, that testing and sorting of considerations of analogy and logic and utility and fairness, which I have been trying to describe. There it is that the judge assumes the function of a lawgiver'. Cardozo's writings provide useful insights into the judicial mind (hence his popularity with Common Law Judges) but he wrote like an artist or craftsman rather than a philosopher and he did not contribute much to a detailed analysis of analogy.

We have already referred to Julius Stone's criticisms of Austin. Stone's own view seems to be that analogy is one of the combination of techniques which characterise legal reasoning. His overall view was as follows:⁸³

In short a 'rule' or 'principle' as it emerges from a precedent case is subject in its further elaboration to continual review in the light of

78 Ibid 3rd ed. 177. In his article 'The Theory of Judicial Precedents' (1900) 16 LQR 376, 389 he refers to natural justice and public policy, in this connection.

79 See *Selected Workings of Benjamin Nathan Cardozo* ed. by Margaret R. Hall especially 'The Nature of the Judicial Process', 'The Growth of the Law', 'The Paradoxes of Legal Science' and 'Jurisprudence', an address before the New York State Bar Association.

80 'The Nature of the Judicial Process' Ibid 166-7.

81 Ibid 30.

82 Ibid 164-6.

83 'The Ratio of the Ratio Decidendi' (1959) 22 MLR 597, 618.

analogies and differences, not merely in the logical relations between legal concepts and propositions, not merely in the relations between fact situations, and the problems springing from these; but also in the light of the import of those analogies and differences for what is thought by the latter court to yield a tolerably acceptable result in terms of 'policy', 'ethics', 'justice', 'expediency' or whatever other norm of desirability the law may be thought to subserve. No 'ineluctable logic' but a composite of the logical relations seen between legal proposition, of observations of facts and consequences, and of value judgments about the acceptability of these consequences, is what finally comes to bear upon the alternatives with which 'the rule of *stare decisis*' confronts the courts, and especially appellate courts. And this, it may be supposed, is why finally we cannot assess the product of their work in terms of any less complex quality than that of wisdom.

This conveys something of the dynamics of the caselaw method and sees it ultimately as a form of practical reasoning.

A modern American writer who has been influential throughout the Common Law world is Edward Levi⁸⁴ 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 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 desired (8-9).

Levi's analysis was basically adopted by Sir Rupert Cross in his book *Precedent in English Law*.⁸⁵ 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

84 1-2, 8-9. See the critique by C. Prevots, 'On the Nature of Legal Deliberation' (1965) 49 *The Monist* 424.

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

source of law, method of reasoning, process of decision making and pattern of development. In his book, *Law and Logic*, the Israeli writer Joseph Horowitz⁸⁶ 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. They are particularly relevant as we shall see in the determination of what are material resemblances.

In *The Nature of the Common Law*⁸⁷ 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 systemic 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 *Encyclopedia of Philosophy*,⁸⁸ 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 of 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 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'.⁸⁹ Thus some theories refer to 'material' facts.

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.

⁸⁶ At 143.

⁸⁷ (1988) 83-96.

⁸⁸ Vol. 6 edited by P. Edwards, 264 et seq.

⁸⁹ *Ibid* 269.

In 'Definition and Theory in Jurisprudence'⁹⁰ 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'⁹¹ but does not discuss their logical nature or method.

In *Outlines of Modern Legal Logic* Ilmar Tammelo⁹² 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 the 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*,⁹³ not because it is an amphilogy.⁹⁴ We shall return to the criteria of materiality shortly.

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*⁹⁵ Joseph Raz puts forward the view that analogical argument 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.⁹⁶ Relevance as in the concept of material facts can also be

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

91 (1954) 70 LQR 37 at 59.

92 At 129.

93 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.

94 See generally McNerny op. cit. (footnote 2 supra).

95 *The Authority of Law* 201-206.

96 For a very narrow view of this see R. Dworkin, *Taking Rights Seriously*. Cf J. Raz 'Prof. Dworkin's

determined by reference to the issue in the case.

In two recent contributions in the Harvard Law Review, Cass Sunstein and Scott Brewer have put forward some new analyses of analogy in legal reasoning. Sunstein⁹⁷ 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.

Brewer⁹⁸ 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 not the same thing as deduction although Brewer argues that it shares some characteristics in common such as entailment and resolution of all known relevant cases.

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 arguments⁹⁹ He makes the strange claim that the importance of the justificatory context on 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*'.¹⁰⁰ This is a potentially complex claim which does not sit easily with ordinary

Theory of Rights', (1978) *Political Studies* 123.

97 'Commentary on Analogical Reasoning' (1992-3) 106 *Harv. L. Rev.* 741. See also the earlier news 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'.

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

99 *Ibid* 926.

100 (1996) 109 *Harv. L. Rev.* at 926-7.

conceptions of analogy nor 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. The result falls short of the coherent synthesis that we are seeking.

Some Tentative Conclusions

What can be derived from the above theories is a remarkable lack of coherence.

First, everyone accepts the practical utility of reasoning by analogy but emphasises its limitations. Writers differ on its precise character, how useful it is and what its limitations are.

Secondly, a number of writers recognise the difficulties of fitting analogy into a logical framework of either inductive or deductive reasoning but differ in their views as to why. Some recognise the tentative and reflexive nature of rule making or rule identification in analogical reasoning. This is borne out by our examination of caselaw, especially Lord Diplock's analysis in the *Dorset Yacht* case.

Thirdly, an increasing number of recent writers recognise the role of justification in analogical reasoning and the fact that this is not a logical process but differ in their views as to what contributes adequate justification. Conceptions of adequate justification are often expressed in terms of materiality or relevance. Let us conclude by concentrating on this aspect.

Although reasoning by analogy involves some basic notion of material resemblance, the criteria of materiality are never clearly specified.¹⁰¹ They are unwritten conventions which change with context. Law, unlike mathematics, is usually concerned with qualitative as opposed to quantitative relations and using this to justify a decision. Usually the decision is whether to apply the rule of an earlier case. Underlying this process of justification are normative questions of principle and policy. It is clearly relevant to the process of comparison, the formulation of *ratio decidendi* and the distinguishing of cases. It is also the basis of the doctrine of *Stare Decisis*. In case law policy seems in practice from time to time to involve the pursuit of a number of variable goals.¹⁰² We can perhaps identify these goals as interests, values and a miscellany of practical factors promoting efficiency. There is no clear axiology or hierarchy of substantive

101 Cf. material facts in ascertaining ratio decidendi. The criteria of materiality there are similarly elusive and are probably best approached by considering what are patently non-material facts eg. incidental characteristics of the plaintiff or defendant which are irrelevant to the issue. Materiality in the context of analogy has arguably got a more indeterminate context of evaluation. Cf J Raz, *The Authority of Law* Supra 202 et seq. and Steven J Burton *An Introduction to Law and Legal Reasoning* 31-39. Also see Part II of Burton's book.

102 See further J.H. Farrar *Introduction to Legal Method* 1st. ed. 156 et seq.

values in the Common Law even in those countries with a Bill of Rights and it is often difficult to distinguish between the values structurally part of law, values which are the basis of the justification of law, and values which are the criteria of external criticism of law. The study of legal values is in its infancy in the Common Law world¹⁰³ and the tendency to separate them from policy is problematic.

Julius Stone argued strongly that materiality at least in the context of material facts was a category of indeterminate reference.¹⁰⁴ By this he meant that they depended not just on their ascertainment but on their moral evaluation. This indeterminacy presented a *spectrum* of possible judgments consistent with good faith.¹⁰⁵ There is some sense in this view except that the evaluation is not simply moral evaluation. Policy enters into it unless one takes a Dworkinian line of restricting evaluation to consideration of principle as he defines it. Materiality in relation to material resemblances for the purpose of reasoning by analogy can be said to be a category of indeterminate reference and the indeterminacy is even more complex because expressly or impliedly the resemblance is being considered in the context of the desirability or otherwise of subsumption under the same rule or principle.

Resemblance relates not just to the fact relationships between cases but also to the consequences of treating them the same.¹⁰⁶ An American philosopher, Lawrence Becker, in an article entitled 'Analogy in Legal Reasoning'¹⁰⁷ distinguished between static and dynamic analogy - the first being concerned with similarities and dissimilarities, the second with consequences. Indeed he thinks 'a consideration of consequences is at the heart of analogical argument.'¹⁰⁸ Questions of policy do not enter in opposition to logic in analogical reasoning but 'as elements in the evaluation of two competing dynamic analogies.'¹⁰⁹ It is arguable that what Becker designates 'dynamic analogies' are not analogies as such but nevertheless an integral part of analogical reasoning, namely the justification process.¹¹⁰ Consequentialism¹¹¹ is an important element in utility,¹¹² which is one

103 See L. Fuller, *The Morality of Law*; P. Stein and J. Shand *Legal Values in Western Society*; RWM Dias, *Jurisprudence* 5th ed.; J.H. Farrar, 'Legal Values' (1974) 1 BJLS 210; J. Raz 'The Rule of Law and its Virtue' (1977) 93 LQR 195, 198 et seq.

104 *Precedent and Law*, Chap. 4.

105 *Ibid* 67.

106 'Tu-tu' 70 Harv. L. Rev. 812. Cf. A.W. Simpson 'The Analysis of Legal Concepts' (1964) 80 LQR 535.

107 (1973) *Ethics* 248. See also Clifford Hall 'Validity Criteria and the Problem of Choice' (1973) *Cambrian Law Review* 45 citing Becker.

108 Becker *Ibid* 253.

109 *Ibid* 255.

110 As to justification see Richard Wasserstrom *The Judicial Decision*. See the criticism by R. Dworkin 'Wasserstrom: The Judicial Decision' (1964) 75 *Ethics* 47. On the questions of the functions of law see Joseph Raz's paper on the topic in *Oxford Essays in Jurisprudence* (2nd series) ed. by A.W.B. Simpson 278. Dr Raz does not discuss the concept of function itself but his analysis of the normative and social functions of law is useful. Cf also R.S. Summers *Law, its Nature, Functions and Limits* (2nd ed).

111 As to which see Neil MacCormick *Legal Reasoning and Legal Theory*, Chapters VII and VIII.

112 Cf. Gerald J. Postema, *Bentham and the Common Law Tradition*, 203. Bentham argued that

amongst a number of values and other factors entering into an assessment of legal policy.

Ronald Dworkin in 'Hard Cases'¹¹³ distinguished between principle and policy and also put forward the idea of previous decisions exerting a 'gravitational force' of fairness. This motivates a judge to a particular result which is acceptable in terms of the integrity of the system as a whole. These ideas also explain the evolution of a ratio decidendi by the exclusion of irrelevant and unfair characteristics. The problem with this kind of approach is its limitation of justificatory reasoning to arguments of principle to be resolved ultimately by considerations of fairness which underpin the Doctrine of Precedent as a whole. It limits judges to analogies which perpetuate and extend the existing legal ideology as Raz has pointed out. It is conceded that Dworkin's approach to principle and fairness is quite broad, particularly in its most recent formulations. Nevertheless it seems overly restrictive and contrary to current judicial practice to limit justificatory reasoning in this way unless one is simply stipulating what ought to be the practice, i.e. judges ought not to justify decisions exclusively or mainly on policy grounds and should distinguish between value questions and policy questions.¹¹⁴

To sum up, it must be said that despite some elucidation of analogical reasoning, classifications of different types of analogy and the practical importance of analogy to the Common Law we are still relatively primitive in our identification of the criteria of material analogies. The principal faults lie in the inherent formal invalidity of reasoning by analogy, compounded by a doctrine of binding precedent and the understandable reluctance of judges to attempt a systematic analysis of justificatory reasoning and the nature and role of legal policy. Recent writings of legal philosophers are beginning to tackle these questions in a constructive fashion but there is little published empirical work being done outside the USA of a systematic kind about the *process* (as opposed to the results) of adjudication.¹¹⁵

An analysis by legal philosophers of what constitutes rational justification in practical reasoning and the shifting scheme of priorities which they and the courts determine will afford some basis for identification of the criteria of material resemblance for the purposes of analogy in legal reasoning. However, it may be a mistake to start by seeking the criteria

utilitarian calculation is more complex than argument from analogy. It is, however, arguable per contra that the justificatory element in analogical reasoning is potentially more complex than utilitarian calculation.

113 (1975) 88 Harv. L. Rev. 1057. For a later restatement see his *Law's Empire*. For criticism see James R. Murray 'The Role of Analogy in Legal Reasoning' (1982) 29 UCLA L. Rev. 833, 859 et seq.; Cass Sunstein 'Commentary on Analogical Reasoning' (1992-3) 106 Harv. L. Rev. 741, 783-787. For particularly cogent judicial criticism see Mr Justice E W Thomas 'A Return to Principle in Judicial Reasoning and an Affirmation of Judicial Autonomy' (1993) 23 VUWLR Monograph 5, 49 et seq.

114 J. Raz, *The Authority of Law*, 206 Cf *McLoughlin v O'Brian* [1983] 1 AC 410 where only Lord Scarman seems to take a Dworkinian approach.

115 See V. Aubert, *Sociology of Law*, Part Four for now rather dated material on judicial attitudes and prediction. See also Julius Stone, *Precedent and Law*, 118-122.

themselves in the abstract. What is a resemblance is determined by the subject matter but what resemblances are to be regarded as material is determined by principle and policy in the light of the actual issue and what are to be regarded as the legitimate parameters of principle and policy is determined by a particular legal tradition.¹¹⁶ Resemblances are concerned with fact; materiality with value and policy in a particular context. Materiality also concerns the notion of resemblance used as a justification for extension or restriction of the previous law. At the end of the day the legal philosopher's categories of materiality, like the Common Law substantive categories, themselves, may well be a shifting (rather than a clear and immutable) scheme. Our theory then to that extent, and perhaps inevitably, will be analogous to our practice.¹¹⁷

116 See the German writer S. Simitis, 'The Problem of Legal Logic', 3 Ratio 60, 78. He says legal analogy 'appears to be a logical method but is in most cases a teleological process of valuation. Whether and when we are entitled to use an analogy in legal science is not determined by means of formal logic The guiding principle for an analogy stems from the evaluations on which legal order is based and not a formal logical operation, be it as exact as it may.' As to tradition in relation to analogy see Zenon Bankowski, 'Analogical Reasoning and Legal Institutions' in P. Nerhot (ed) *Legal Knowledge and Analogy*, 198. For a bold and fresh approach to the whole question of justification in post modern society see Jurgen Habermas, *Between Facts and Norms*, Chapter 5 and 6.

117 Cf. Kaufman op. cit. footnote 3 ante. See also Giuseppe Zaccaria, 'Analogy as Legal Reasoning - The Hermeneutic Foundation of the Analogical Procedure' in P. Nerhot (ed) op. cit.

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