# Chapter 6
# INDUCTIVE REASONING

If we can say that deductive reasoning moves from the general to the particular, we can also say that inductive reasoning moves either from the particular to the general, or from the particular to the particular. Although all logicians do not agree with this characterization, for the purposes of legal reasoning, however, this approach is appropriate because it is useful.[1]

An induced generalization in mathematics is a truth or certainty. In the law, there is no pretense that the product of inductive reasoning is a certainty. All that we represent is that the result is more probably true than not. If in mathematics we take a series of consecutive odd numbers beginning with 1, the sum of these numbers will be equal to the number of terms multiplied by itself. Thus, the sum of the numbers 1-3-5-7-9-11 is 36 or 6 times 6. We reach the generalization—that the sum will equal the number of terms multiplied by itself—only after experience in adding sets of particular numbers. This produces a generality that is certain.

The absence of complete certainty, however, does not dilute the importance of induction in the law. Inductive reasoning is critical in the common-law tradition. It lies at the heart of the judicial process and is the most distinctive characteristic of that process. More than any other technique, it is responsible for a legal tradition that began in England at the beginning of the eleventh century and continues today. Because it is reasoning by example, it is the key to many things. It undergirds the doctrine of precedent or *stare decisis:* Like things must be treated alike. In the law, the circumstances or phenomena that constitute the particulars in inductive reasoning are the holdings in previous similar cases. These are our putative precedents. Recall the definition of precedent outlined in Chapter 2: “A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is

then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts ...."[2] In part this indicates the hold which the legal process has over litigants. Professor Levi has emphasized this:

> [The litigants] have participated in the law making. They are bound by something they helped to make. Moreover, the examples or analogies urged by the parties bring into the law the common ideas of the society. The ideas have their day in court, and they will have their day again. This is what makes the hearing fair, rather than any idea that the judge is completely impartial, for of course he cannot be completely so. Moreover, the hearing in a sense compels at least vicarious participation by all the citizens, for the rule which is made, even though ambiguous, will be law as to them.[3]

The principle that underlies all inductive argument is that nature is sufficiently regular to permit the discovery of causal laws having general application. The laws of nature will operate today as they did yesterday because in basic ways nature is uniform. Therefore, we may rely on past experience to guide our conduct in the future. Applying these concepts, two forms of inductive reasoning are vitally important in the law:

> *Inductive generalization:* Also known as induction by enumeration, this is the process of arriving at general or universal propositions from the particular facts of experience, relying on the principle of induction. The premises are instances of certain facts with accompanying legal consequences which repeatedly accompany one another (legal rules) from which it is concluded that the legal consequence will always accompany the facts (legal principle). By inductive generalization, we may infer that *every* instance of the one attribute will also be an attribute of the other.
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> *Analogy:* This is reasoning from the particular to the particular, and this is technically distinguished from

> reasoning from the particular to the general. To draw an analogy between at least two entities is to indicate one or more respects in which they are similar. It is to argue that the legal consequence attached to one set of particular facts may apply to a different set of particular facts because of similarities in the two sets of facts. By analogy we may infer that a different particular instance of one attribute will also exhibit the other attribute.

It becomes apparent, however, that an induction by enumeration is very similar to an argument by analogy. They differ only in the breadth of their conclusions. By enumeration, you induce a generalization; by analogy, you induce a particular.

# INDUCTIVE GENERALIZATION

It bears repetition that in the law when we reason from the particular to the general we call it inductive generalization. It is the method of arriving at a general, or perhaps, a universal, proposition (a principle or doctrine) from the particular facts of experience (legal rules or holdings of cases). We borrow this process from the certainty of laboratory science experiments.

If nine particular pieces of blue litmus paper turned red when dipped in acid, we may draw a general conclusion about what happens to *all* blue litmus paper dipped in acid. We use the technique of enumeration to reach an inductive generalization. Unlike in science, however, in law we do not assert that our conclusion is true; we represent only that it is more probably true than not.

Inductive generalization is used in all aspects of the legal profession—in studying law, in practicing law and in judging cases. Thus, it looms large in the common-law tradition in the development of legal precepts in the case by case experience.

Instance 1 of fact A is accompanied by legal consequence B.

Instance 2 of fact A is accompanied by legal consequence B.

Instance 3 of fact A is accompanied by legal consequence B

...

Instance 25 of fact A is accompanied by legal consequence B.

Therefore, every instance of fact A is accompanied by legal consequence B.

Apply this to a precise example in the law:

A's oral conveyance of real estate is invalid.

B's oral conveyance of real estate is invalid.

C's oral conveyance of real estate is invalid.

Z's oral conveyance of real estate is invalid.

Therefore, all oral conveyances of land are invalid.

All inference proceeds on the assumption that the new instances will exactly resemble the old one in all material circumstances. This is purely hypothetical, of course, and sometimes we discover we are mistaken. Thus, for years the Europeans proceeded along the following induction:

A is a swan and it is white.

B is a swan and it is white.

C is a swan and it is white.

...

Z is a swan and it is white.

Therefore, all swans are white.

But then Australia was discovered and it was learned that there are swans which are black.

Inductive generalization underlies the development of the common law. From many specific case holdings, we reach a generalized proposition. From many cases deciding that individual oral conveyances of real estate were invalid, we reached the conclusion that all such conveyances were invalid. We arrived at that point by what Lord Diplock described as "the cumulative experience of the judiciary." In generalization by enumeration, we can say that the larger the number of specific instances, the more certain is the resulting generalization. This is simple fealty to the concept of probability. We must beware of the converse fallacy of accident (also known as the fallacy of hasty generalization), a fallacious reasoning that seeks to establish a generalization by the enumeration of instances, without obtaining a representative number of instances. We call it also "jumping to conclusions." It is a practice in which a conclusion is drawn before all the particular instances have been taken into consideration. Thus, "Lawyer A lost a case last year; he lost another six months ago, and another just yesterday. Lawyer A loses all his cases."

In 1988, the Supreme Court decided a narrow issue. The Veterans' Administration characterized primary alcoholism as "willful misconduct" for the purpose of a statute which grants veterans extensions of time in which to use educational benefits, if they are prevented from using their benefits by a physical or mental disorder that did not result from their own "willful misconduct." The Court held that this characterization did not violate section 304 of the Rehabilitation Act, which prohibits discrimination against handicapped individuals solely because of their handicap. This was an extremely narrow decision, and even though the Court said that "[t]his litigation does not require the Court to decide whether alcoholism is a disease whose course its victims cannot control," most press accounts and television reports of the case leaped to a hasty generalization that the Court had decided that alcoholism is a disease within the control of the individual.[4]

Some arguments by enumeration may establish their conclusions with the more persuasive degree of probability than others. The greater the number of cases in the cumulative experience, the higher the degree of probability in the conclusion. The various instances of fact A and legal consequence B are called confirming instances of the causal relationship between fact A and legal consequence B. The greater number of confirming instances, the higher the probability of the conclusion.

# ANALOGY

Closely related to induced generalization is the process of analogy. Analogy is reasoning from the particular to the particular, instead of from the particular to the general. If, from the experience of nine pieces of blue litmus paper, we conclude only that the tenth piece will turn red, we reach a particular, not a general conclusion. We do not represent that all pieces will turn red, only that the tenth will do so.

Analogy does not seek proof of an identity of one thing with another, but only a comparison of resemblances. Unlike the technique of enumeration, analogy does not depend upon the quantity of instances, but upon the quality of resemblances between things.

J. S. Mill reduced it to a formula: Two things resemble each other in one or more respects; a certain proposition is true of one; therefore it is true of the other.[5] In legal analogies, we may have two cases which resemble each other in a great many properties, and we infer that some additional property in one will be found in the other. Moreover, the process of analogy is used on a case-by-case basis. It is used to compare factual or procedural resemblance in a prior case or cases to the case at bar.

Thus, we can reduce an analogical argument to the following schematic where A, B, C and D are facts, and X, Y and Z are attributes or “respects” of these facts (or legal consequences attached to them):

Facts A, B, C and D have legal consequences X and Y.

Facts A, B and C have legal consequence Z.

Therefore, Fact D probably has legal consequence Z.

Schematics aside, the success of this or any other analogical arguments lies in demonstrating the *resemblances* or *similarities* in the facts. Take a very simple analogical argument showing facts and consequences:

> My old shoes were purchased at the same store as my new shoes.
>
> My old shoes wore very well.
>
> Therefore, my new shoes will probably wear very well.

Copi and Burgess-Jackson offer the following analysis of this argument:

> The two things said to be similar are the two pairs of shoes. Three points of analogy are involved: The respects in which the two entities are said to resemble each other are, first in being shoes; second, in being purchased at the same store; and third, in wearing well. The three points of analogy do not play identical roles in the argument, however. The first two occur in the premises, whereas the third occurs both in the premises and the conclusion. In general terms, the given argument may be described as having premises that assert first, that two things that are similar in two respects, and second, that one of those things has a further characteristic, from which the conclusion is drawn that the other thing also has that characteristic.[6]

There are buzz words and phrases that indicate analogical arguments: same (as); in comparison; alike; resembles; as (in); analogously; analogue; similar(ly); like; in like manner; by the same token; just as p, so q; by analogy.

If reaching a conclusion by enumeration has the benefit of experience, reaching a conclusion by analogy has the benefit of the high degree of similarity of the compared data. The degree of similarity is always the crucial inquiry. Clearly, you cannot conclude that a partial resemblance between two entities is equal to an entire and exact correspondence. Here the skill of the advocate will often be the determining factor. Plaintiff's lawyer may argue that the historical event or entity "A"—in law, a putative precedent—bears many resemblances to the case at bar, "B." The opponent will argue that although the facts in "A" and "B" are similar in some respects, this does not mean that those similarities are material and therefore

relevant, or that the cases are similar in other respects; he or she will argue that a false analogy is present.

What is one person's meat is another person's poison. What is one attorney's material and relevant fact in analogical comparisons is the other attorney's immaterial and irrelevant fact. Often the art of advocacy resolves itself into convincing the court which facts in previous cases are indeed positive analogies, and which are not. The judge is required to draw this distinction. The successful lawyer is one who is able to have the judge draw the distinction in the manner most favorable to the advocate.

But effective advocacy in determining positive/negative analogies must at all times be kept within the perimeters of objectivity. Students and lawyers must not fall in love with pet theories by opening their eyes only to instances that corroborate a favorite belief more readily than those that contradict it. In the process of analogy you must always have a full view of all that relates to the question. Do not be the type of person who sincerely believes that he or she thinks that reason is being followed, but in the words of John Locke: "They converse but with one sort of man, they read but one set of books, they will not come in the hearing but of one set of motions. They have a pretty traffic with known correspondents in some little creek, but will not venture out in the great ocean of knowledge."[7]

It should now be understood that points of unlikeness are as important as likeness in the cases examined. In examining the cases, as does a scientist in a laboratory, the lawyer should not look for the rigid fixity of facts. Seldom are there perfectly identical experiences in human affairs. The lawyer must recognize also the problems of those facts, which when compared, prove to be the rare experience in human affairs. And in order to understand completely what is being compared, always be aware of subtleties and minuteness.

Analogies can be considered the most important aspect of the study and practice of law. It is the method by which putative precedents are subjected to the acid test of searching analysis. It is the method to determine whether factual differences contained in the case at bar and those of the case compared are material or

irrelevant. This requires counsel to be intellectually responsible at all times, to consider the consequences of projected steps when they reasonably follow from any position taken or about to be taken. Intellectual responsibility means integrity; it means recognizing the true consequences of any proposition or belief. It is irresponsible to cling to a proposition without acknowledging those consequences that will logically flow from it. If it is necessary to abandon the idea, do it, then move to another theory. If you don't, your opponent will kill it for you.

Arthur L. Goodhart has written:

> Having established the material and immaterial facts of the case as seen by the court, we can then proceed to state the principle of the case. It is to be found in the conclusion reached by the judge on the basis of the material facts and on the exclusion of the immaterial ones. In a certain case the court finds that A, B and C exist. It then excludes fact A as immaterial, and on facts B and C it reaches conclusion X. What is the *ratio decidendi* of this case? There are two principles: (1) In any future case in which the facts are A, B and C, the court must reach conclusion X, and (2) in any future case in which the facts are B and C the court must reach conclusion X. In the second case the absence of fact A does not affect the result, for fact A has been held to be immaterial. The court, therefore, creates a principle [makes a value judgment?] when it determines which are the material and which are the immaterial facts on which it bases its decision.[8]

The importance of legal reasoning by analogy cannot be overstated. It is the heart of the study of law; it lies at the heart of the Socratic method in the classroom and the courtroom. It is important for professors to use the Socratic method, because the method of analogy goes to the fundamentals of the common-law tradition. Cardozo has taught us that "[t]he common law does not work from pre-established truths of universal and inflexible validity to

conclusions derived from them deductively. Its method is inductive and it draws its generalizations from particulars."[9]

One must always appraise an analogical argument very carefully. Several criteria may be used:

- The acceptability of the analogy will vary proportionally with the number of circumstances that have been analyzed.
- The acceptability will depend upon the number of positive resemblances (similarities) and negative resemblances (dissimilarities).
- The acceptability will be influenced by the relevance of the purported analogies. An argument based on a single relevant analogy connected with a single instance will be more cogent than one which points out a dozen irrelevant resemblances.

Here, the keystone is materiality or relevance. Professor Wigmore gives us an example:

> To show that a certain boiler was not dangerously likely to explode at a certain pressure of steam, other instances of non-explosion of boilers at the same pressure would be relevant, provided the other boilers were substantially similar in type, age and other circumstances affecting strength.[10]

# United States v. Grey
# 56 F.3d 1219, 1224-25 (10th Cir. 1995)

[The defendant was prosecuted under the federal statute for money laundering. The evidence was that he paid a club official $200 in cash to "sweeten the pot" for a payout from a video poker machine. The defense argued that there was no nexus between the cash that was paid and the necessary proof that the cash had traveled in interstate commerce in order to justify federal jurisdiction.]

We are left only with the contention that the nexus is somehow met by concluding, without any proof in the record, that the particular $200 handed to Mr. Toman had traveled in interstate commerce. However, the government can garner no support from the money laundering cases they cite because, in each of those cases, the prosecution successfully, in the Watergate idiom, "followed the money" both before and after the incident and introduced appropriate evidence demonstrating how the money affected interstate commerce. *See* United States v. Kelley, 929 F.2d 582, 586 (10th Cir. 1991)(money laundering proceeds used to buy car made in Michigan but sold in Oklahoma affected interstate commerce), *cert. denied,* 502 U.S. 926, 112 S.Ct 341, 116 L.Ed.2d 280 (1992); United States v. Gallo, 927 F.2d 815, 823 (5th Cir. 1991) (evidence showed that Gallo received $300,000 in proceeds from drug sale and transported it in a shoebox by car on an interstate highway, the court emphasizing interstate highway use but "reserving judgment on a case in which the connection between the money and the drugs or illegal activity is not so clear as it is here"); United States v. Peay, 972 F.2d 71, 74 (4th Cir. 1992)(nexus satisfied because money derived from drug sale was deposited in FDIC insured bank, and because reports sent to FDIC deal with money deposited from many sources, including those outside the state); United States v. Eaves, 877 F.2d 943 (11th Cir. 1989) (effect on interstate commerce shown where developers sent option payments for purchase of property from Atlanta, Georgia, to a bank in Jacksonville, Florida).

We find no proper analogy between these cases and the one at bar. In the language of the logicians, the positive resemblances in the facts do not outweigh the negative resemblances in the compared factual scenarios.

Here the government did not introduce a shred of evidence showing the origin or destination of the specific $200 in Federal Reserve Notes that constituted the single alleged money laundering transaction, no proof of the circumstances or location under which Huey Grey came into their possession or how they were eventually distributed by the two Halstead American Legion employees—Finance Officer Gilbert Toman or the bartender.

# Dole v. Local
# 427 894 F.2d 607, 612 (3rd Cir. 1990)

[Pursuant to the Labor-Management Reporting and Disclosure Act, the government sought to enjoin a local union from refusing to permit one of its members to review collective bargaining agreements between the unions and employers other than her own. The district court dismissed the action on the basis of a six months statute of limitations borrowed from § 10 of the National Labor Relations Act. On appeal the court reversed, holding that the United States is not bound by any statute of limitations brought by it as a sovereign to enforce a public right. The concurrence relied on the holding in United States v. Beebe, 127 U.S. 338 (1888), to justify a limitations provision. In response the majority argued that the analogy was not well taken.]

The concurrence draws an analogy between the present action by the Secretary on behalf of Ms. Colmenares, and the problems of the Philbrook heirs [in *Beebe]* in a land dispute and concludes that the issue here merely involves the "assertion of Colmenares' private rights." To rely on the *Beebe* case as the foundation of one's analysis, and to assume that the Government is a "nominal complainant" who has "no real interest in the litigation" is to rely on an analogy which does not possess a high degree of similarity between the situations compared. Analogy does not seek proof of an identity of one thing with another but only a comparison of resemblances. J. S. Mill reduced it to a formula: Two things resemble each other in one or more respects; a certain proposition is true of one; therefore, it is true of the other …. [R]eaching a conclusion by analogy has the benefit of the high degree of similarity of the compared data. The degree of similarity is always the crucial inquiry in analogies. Clearly, you cannot conclude that a partial resemblance between two entities is equal to an entire and exact correspondence.

The concurrence seeks to compare the relationship between the Attorney General and the Philbrook heirs in *Beebe* (a private action with no public interest) to the relationship between the Secretary of

Labor and Ms. Colmenares in the instant case (a public action with a substantial public interest), concluding that since the relationship is the same, the result (the applicable statue of limitations) is the same. But the degree of similarity is always crucial in analogies. Here the degree of similarity in the concurrence's analogy is very low. In fact, the concurrence's argument might be a *non sequitur.*

We differ completely with the concurrence's minimization of such an important aspect of union democracy and its reduction of the issue here to merely one of a private right.

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The use of analogy is graphically illustrated by Judge Cardozo's opinion in MacPherson v. Buick Motor Car Co.[11] which we discussed in Chapter 5 in another context. Buick sold an automobile to a retail dealer who in turn sold it to *MacPherson.* While MacPherson was in the car it suddenly collapsed and he was thrown out and injured. One of the wheels was made of defective wood and the spokes crumbled into fragments. Buick had bought the wheel from another manufacturer. There was evidence, however, that its defects could have been discovered by reasonable inspection and that Buick had not inspected the wheel.

The question to be determined was whether Buick owed a duty of care to anyone but its immediate purchaser, in this case the dealer. Until MacPherson was decided, it was settled New York law that liability in negligence was limited to the immediate purchaser, except where the manufacturer's negligence "put human life in imminent danger." The leading case was Thomas v. Winchester,[12] in which a poison was falsely labeled and sold to a druggist, who in turn sold it to a customer.

The *Winchester* rule of "imminent danger" had been applied in a very limited fashion over the years. The defense in *MacPherson* was that an automobile was at best an "inherently dangerous" instrument and that there is a difference between things "inherently dangerous" (no liability) and things "imminently dangerous" (liability).

Cardozo outlined a series of cases in an effort to determine which facts in the previous cases were similarities and which were

dissimilarities relevant to establishing or denying liability on the part of a manufacturer, where the injury was sustained by one who was not the immediate purchaser.

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| Case 1. | *Winchester:* Manufacturer falsely labeled poison.<br>Held: Manufacturer liable. |
| Case 2. | Manufacturer's defect in a small balance wheel used in a circular saw. Wheel lasted five years before defect surfaced.<br>Held: Manufacturer not liable. |
| Case 3. | Boiler exploded after testing by manufacturer and owner.<br>Held: Manufacturer not liable. |
| Case 4. | Contractor built scaffold for painter. An employee of painter was injured when it collapsed.<br>Held: Contractor liable. |
| Case 5. | Large coffee urn installed in a restaurant exploded and injured a customer.<br>Held: Manufacturer liable. |
| Case 6. | Bottle of aerated water exploded.<br>Held: Manufacturer liable. |
| Case 7. | Builder built a defective structure.<br>Held: Builder liable. |
| Case 8. | Otis built a defective elevator.<br>Held: Manufacturer liable. |
| Case 9. | Contractor furnished a defective rope.<br>Held: Contractor liable. |
| Case 10. | Cadillac produced a defective car. The car was then in an accident.<br>Held: Manufacturer not liable. |
| Case 11. | (Leading English case) Action by driver of mail coach against a contractor who had agreed with the postmaster general to provide and keep the vehicle in repair for |

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| | the purpose of conveying the royal mail over a prescribed route. The coach broke down and the driver was injured.<br>Held: Contractor not liable. |
| Case 12. | Dock owner put up a staging outside a ship. Servants of shipowner injured.<br>Held: Dock owner liable. |
| Case 13. | Defendant sent out a defective truck laden with goods which he had sold. Buyer's servants injured.<br>Held: Seller liable. |
| Case 14. | Defendant made contract to keep van in repair.<br>Held: Repairman not liable. |
| Case 15. | A livery stable sent out a vicious horse. A guest of the customer was injured.<br>Held: Stable owner liable. |
| Case 16. | Master bought a tool for a servants' use. The servant was injured by the defective tool.<br>Held: Master not liable. |

In determining that there was liability in *MacPherson,* Judge Cardozo reasoned:

- A relevant resemblance that established liability in the cases was whether the defendant was a manufacturer.
- A relevant resemblance that established liability in the cases was where injury was almost certain.
- A relevant difference in the older cases, especially case 10, the leading English case, is the change in methods of locomotion. Precedents drawn from days of travel by stagecoach do not fit the conditions of travel today.
- The "inherent/imminent" distortions are inapplicable. "[T]he case does not turn upon these restricted niceties. If danger was to be expected as reasonably certain, there was a duty of negligence, and this whether you call the danger inherent or imminent."

Thus, cases 1, 5, 6 and 8 all involved manufacturers and imposed liability. Cases 2, 3 and 10 involved manufacturers and imposed no liability. Cases 4, 7, 9, 13 and 15 imposed liability but did not involve manufacturers. Cases 11, 14 and 16 denied liability but did not involve manufacturers.

The *MacPherson* case was a landmark decision that produced a major change in the law. Its success as an example of reasoning by analogy can be attributed to the large number of circumstances that were analyzed, the number of positive resemblances in the cited cases and the admitted relevances of the purported analogies. *MacPherson* announced a legal rule by the method of analogy, but because of the number of enumerated resemblances it soon became known as enunciating a legal principle through the method of inductive generalization.

Whether using enumerated instances to reach a generalized conclusion to frame a broad legal precept, or selected instances to bring about a convenient analogy, it is well to keep in mind the object of bringing into consideration a multitude of cases. It is to facilitate the selection of the evidential or significant features upon which to base inference in some single case.

To do this effectively, you will be well served to: (1) jettison any pet beliefs or theories if the research is not supportive; do not be dogmatic; (2) not hesitate to confront the novel situation and (3) remember that the study and practice of law has no room for mental inertia and laziness. Be aware always that the analysis you have failed to pursue will often be performed by your adversary, and if not by him or her, by the judge or the chambers' law clerks.

Jeffrey G. Murphy observes:

> Most of us, in claiming analogies between various things, rely on perception. That is, we "just see" that Mary is mighty like a rose. And, if pressed to give reasons for making such a claim, we will direct our questioner to certain features of the case that he too can "just see." But there are no decision procedures for "just seeing." There is no logic of perception. However, the legal use of analogy is more like the scientific use

> than the ordinary use in the following sense: that the claim that X and Y are analogous is made with respect to some theoretical basis. The appeal is not (at least wholly) to perception. Rather the theoretical basis (in law, certain conventional rules of relevance established as precedents) gives us a decision procedure for determining whether or not cases X and Y are indeed analogous.[13]

We must be very careful to make sure that “Mary is mighty like a rose.” We must look at Mary with all her warts and blemishes.

# UNDERSTANDING INDUCTIVE REASONING

We repeat again for emphasis that the conclusion reached by inductive reasoning is not considered a truth; rather, it is a proposition that is more probably true than not. We must also understand that often in inductive reasoning the two processes of enumeration and analogy are often used simultaneously. If the conclusion is reached by simultaneously using the twin processes, there is a greater probability that truth will lie in the conclusion. Jevons described this process: “The things usually resemble each other only in two or three properties, and we require to have more instances to assure us that what is true of these is probably true of all similar instances. The less, in short, the intention of the resemblance the greater must be the extension of our inquiries.”[14]

There must be open-mindedness, whole-heartedness and responsibility.[15] From my own experiences as a lawyer, with juices running fast because of intense sympathy for my client’s cause—yes, a cause, not a case—I know how strong the tendency is to be close-minded. This is a mistake. The consummate advocate must look at things free from bias, partisanship and traits and habits that close the mind and make it unwilling to consider new problems and entertain new ideas. In analyzing previous cases for resemblances and differences in the facts, give full attention to facts from whatever source they come; give full attention to alternative propositions. It is difficult, to be sure, to abandon a pet notion and recognize the possibility of error. But the true advocate realizes that self-conceit is not always the best attitude and that to do your job properly for your client you must be prepared to undergo troublesome hours to alter beliefs held very strongly at the beginning of research, but which, upon analysis find little or no support in the law.

To do this there must be whole-heartedness, the ability to work long hours to test both old and new theories. Remember, your responsibility is to advance your client’s interest, even if it means dumping the client’s original theories and embarking upon fresh consideration of new points of view and new ideas.

But reasoning by induction is more than a mere tool in the logical process. It permits the law to move with the times, as aptly illustrated by Cardozo's comparison of the automobile wheels to those of the stagecoach. It is the counter-agent of attempts to embalm legal precepts. It permits the elasticity necessary in order to hearken to the adage: "The law must be stable, but it must not stand still." In a given year, a concept may be introduced in an argument suggesting differences from or similarities to precedents, but fail to win the court's acceptance. Although rejected, the idea achieves a standing in society, or at least in the legal community, because it has been offered in a public brief and discussed in the official reports of the court either in the majority opinion rejecting it or in a concurring or dissenting opinion endorsing it. Later, in another case, the idea is suggested again. This time the court may interpret the previous case, perhaps suggesting slight differences in the facts, but this time deciding to adopt the once rejected idea. In future cases, the idea may be given further definition and tied to other ideas. In this manner, ideas of the community and the social, behavioral or political sciences now bear the imprimatur of the law. And the process continues. In time the "new idea," once so fresh and novel, itself becomes encrusted and, perhaps, undesirable because new social, economic and political concepts have been accepted by society. New ideas are then suggested to the court, in a given case. Again, there may be a rejection by the court, but as time goes on and new cases are presented, the new "new idea" comes to replace the old "new idea."

In this respect, Cardozo quoted Munroe Smith:

> In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the law-finding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified

> at once for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.[16]

New ideas may take an extensive period of time to germinate and reach acceptance. They do not simply appear one day; they emerge by means of attorneys' use and judges' adoption of analogies to older, well-established ideas, legal precepts and public policies to which society has grown accustomed. A classic example is the following concurring opinion of Justice Roger J. Traynor, of the California Supreme Court, suggesting the new concept of strict products liability. The opinion was written in 1944.

# Escola v. Coca-Cola
# 24 Cal. 2d 453, 150 P.2d 436, 440-41 (1944)
# (Traynor, J., concurring)

I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann.Cas.1916C, 440, established the principle, recognized by this court, that irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it. Sheward v. Virtue, 20 Cal.2d 410, 126 P.2d 345; Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481. In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is in the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is in the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible

for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

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Notwithstanding the logic of his opinion, Justice Traynor had to wait 19 years, from 1944 to 1963, to see his individual views accepted by the California Supreme Court in Greenman v. Yuba Power Prod., Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Justice Traynor persisted, his views survived and he eventually wrote the opinion of the court adopting the concept of strict products liability that he had introduced almost two decades before. In the law, new ideas sometimes take many years to gain acceptance and the primary method through which attorneys and judges can facilitate this process is by analogy to older, already accepted ideas and principles.

It must be emphasized that the acceptance or rejection of a new idea is a question of law and this is for the judge, not the jury. It is for the judge to delineate the scope of the rule of law. Often this depends on what facts in the later case will be considered similar to those present when the rule was first announced. The key step in the process of analogy is the finding of similarity or difference, or, if you will, positive resemblances and negative resemblances. In a given case, a judge may find as relevant the existence or absence of facts which prior judges thought unimportant. The judge attempts to see the law as a fairly consistent whole, and in our tradition, he or she must always confront the problem: when is it just to treat different cases as though they were the same? And conversely, when is it just to treat seemingly similar cases as different? This is the ever-present challenge for the advocate and the judge alike.

The system works because reasons must be given to justify the determination of resemblances and differences in the relevant facts. The fairness and durability of a judicial decision will always be directly dependent upon how thoughtfully and disinterestedly the

court has first identified and then weighed the conflicting social interests involved.

The system works also because there is a large measure of predictability or reckonability in the law. These qualities will be present to the extent that there is correlative logical processes by which conclusions are reached. After many years as a judge and teacher, I can quickly recognize the illogical lawyer or student. This person wanders aimlessly. He or she shifts the topic without being aware of it, skips about at random, not only jumps to a conclusion, but fails to retrace steps to see whether the conclusion to which he or she has jumped is supported by evidence. The illogical person makes contradictory, inconsistent statements without being sensitive to what he or she is doing.

The system works because the good lawyers and most judges function as logical persons. They are persons who carefully regulate processes of perception, comparison, suggestion, inference and constant testing, all of this, to determine what consequence will flow from that being perceived, compared, suggested, inferred and tested. But this does not mean that an analysis, loud with good reason, and presented in logical order will command the same results. Consider these cases that address whether steamboat owners owe the same care to their passengers as innkeepers to their guests.

# Clark v. Burns
# 118 Mass. 275, 277 (1875)

The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time, and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public house, and does not attach to a carrier who has no house and is engaged only in the business of transportation. The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might perhaps be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers.

Whether the defendants' regulations as to keeping the doors of the state rooms unlocked, the want of precautions against theft, and the other facts agreed, were sufficient to show negligence on the part of the defendants, was, taking the most favorable view for the plaintiff a question of fact, upon which the decision of the court below was conclusive.

# Adams v. New Jersey Steamboat Co.
# 151 N.Y. 163, 45 N.E. 369 (1896)

The principle upon which innkeepers are charged by the common law as insurer of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extra-ordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties…. The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests.

The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest.

A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest since the same considerations of public policy apply to both relations.

The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern. We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence.

# Hixson v. Arkansas
# 266 Ark. 773, 587 S.W.2d 70, 75-76 (1979)
# (Newbern, J., dissenting)

[Defendant was convicted of unlawfully, feloniously and knowingly obtaining an aggregate sum of money in excess of $2,500 by deception, with the purpose of depriving owners, members of churches, of their funds by promising to deliver church directories to the churches. Defendant appealed and the majority affirmed. Judge Newbern dissented.]

Assuming there was substantial evidence of deception here, however, I believe this record is devoid of evidence that the Appellant obtained property in excess of a value of $2,500.00 as a result of the offenses charged. As the majority opinion points out, the churches were to pay nothing for the directories. Those institutions were out the value of whatever their services (no pun intended) might have been worth, but there was no attempt whatever to produce evidence of the value of the efforts they expanded in getting their constituent families rounded up for the photography sessions. Nor was any attempt made by the State to show the difference between the value of what the church members received (the photographs) and what they were promised (the photographs plus the “free” directories).

The argument could be made that regardless of the fact that many if not most of the church members received photographs for their money, … all that was paid to Appellant for photographs and directories was obtained by deception. The logical extension of that argument, and its fallacy, is perhaps best demonstrated by these illustrations which bear degrees of analogy:

1. X promises A a one-carat diamond in exchange for $1,000.00. A gives X $1,000.00, but X then delivers to A a chunk of glass which is completely without value and which X intended all along to deliver to A instead of a diamond.

2. X promises A a one-carat diamond in exchange for $1,000.00. A gives X $1,000.00, but X then delivers to A a diamond weighing three-quarters of a carat which X intended all along to deliver to A, knowing of the deficiency. The lesser stone is worth $750.00.

3. X promises A a one-carat diamond in exchange for $1,000.00. A gives X $1,000.00, but X then delivers to A a diamond weighing one and one-quarter carats which X intended all along to deliver to A, knowing it to be larger than the one promised. The stone delivered is worth $1,200.00.

If no account is taken of the value received by A, then in each of these illustrations X could be convicted of theft of property of a value in excess of $1,000.00. I simply cannot believe our statute contemplates that result in illustrations 2 and 3.

The record here shows many church members received accepted photographs in exchange for their money. The most that can be said for certain is that Appellant took those parts of their payments which could fairly be attributed to the value of the “bonus” directories. We have no idea what that value was.

The record here is indeed “replete” with testimony as to other churches which had entered agreements with the Appellant. Even if that evidence was relevant to show a scheme or Appellant’s intent, it was completely irrelevant to show the value of the property obtained in the theft alleged here.

# A FABLE FOR OUR TIME

*Once upon a time in a galaxy far, far away, certain tribunals held forth to say what was just or what was unjust. The judges who did sit on the tribunals, those who wore beards and long robes, were said to be strong and brave. So brave were they that they feared not the beast of the forest nor man who walked tall and strong in the field and in the town. Yet they had one fear, and its name was woman. The judges feared the rolls of papyrus upon which was written the proclamation of civil righteousness. And when the causes came to be heard before the tribunal, the judges consulted the moon and the stars and the oracles who divined to discover in the entrails that which they called resemblances in life to serve as implements of decisions that they called analogies. And the analogies of an ancient time—as in the eighth decade of the century nineteenth—did showeth how benighted were those cultures and practices from which the solons and the soothsayers summoned to draw forth the laws that they did bestow upon the multitudes.*

# Joyner v. Joyner
# 59 N.C. 322, 324-26 (5 Jones 331, 333-35) (1862)

It is said on the argument that the fact that a husband, on one occasion "struck his wife with a horse-whip, and on another occasion, with a switch, leaving several bruises on her person," is, of *itself,* a sufficient cause of divorce, and consequently the circumstances which attended the infliction of these injuries are immaterial, and need not be set forth. This presents the question in the case:

The wife must be subject to the husband. Every man must govern his household, and if by reason of an unruly temper, or an unbridled tongue, the wife persistently treats her husband with disrespect, and he submits to it, he not only loses all sense of self-respect, but loses the respect of the other members of his family, without which he cannot expect to govern them, and forfeits the respect of his neighbors. Such have been the incidents of the marriage relation from the beginning of the human race. Unto the woman it is said, "Thy desire shall be to thy husband, and he shall rule over thee," Genesis, chap. 3, v. 16. It follows that the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place. Why is it that by the principles of the common law if a wife slanders or assaults and beats a neighbor the husband is made to pay for it? Or if the wife commits a criminal offense, less than felony, in the presence of her husband, she is not held responsible? Why is it that the wife cannot make a will disposing of her land? and cannot sell her land without a privy examination, "separate and apart from her husband," in order to see that she did not do so voluntarily, and without compulsion on the part of her husband? It is for the reason that the law gives this power to the husband over the person of the wife, and has adopted proper safeguards to prevent an abuse of it.

We will not pursue the discussion further. It is not an agreeable subject, and we are not inclined, unnecessarily, to draw upon ourselves the charge of a want of proper respect for the weaker sex.

It is sufficient for our purpose to state that there may be circumstances, which will mitigate, excuse, and so far justify the husband in striking the wife “with a horse-whip on one occasion and with a switch on another, leaving several bruises on the person,” so as not to give her a right to abandon him and claim to be divorced. For instance: suppose a husband comes home and his wife abuses him in the strongest terms—calls him a scoundrel, and repeatedly expresses a wish that he was dead and in torment! and being thus provoked in the *furor brevis,* he strikes her with the horse-whip, which he happens to have in his hands, but is afterwards willing to apologize, and expresses regret for having struck her: or suppose a man and his wife get into a discussion and have a difference of opinion as to a matter of fact, she becomes furious and gives way to her temper, so far as to tell him he *lies,* and upon being admonished not to repeat the word, nevertheless does so, and the husband taking up a switch, tells her if she repeats it again he will strike her, and after this notice she again repeats the insulting words, and he thereupon strikes her several blows; these are cases in which, in our opinion, the circumstances attending the act, and giving rise to it, so far justify the conduct of the husband as to take from the wife any ground of divorce for that cause, and authorize the Court to dismiss her petition with the admonition, “if you will amend your manners, you may expect better treatment,” see Shelford on Divorce. So that there are circumstances under which a husband may strike his wife with a horse-whip, or may strike her several times with a switch, so hard as to leave marks on her person, and these acts do not furnish sufficient ground for a divorce. It follows that when such acts are alleged as the causes for a divorce, it is necessary in order to comply with the provisions of the statute, to state the circumstances attending the acts and which gave rise to them.

# In re Goodell
# 39 Wisc. 232, 244 (1875)

So we find no statutory authority for the admission of females to the bar of any court of this state. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into the well being of society; and, to be honorably filled and safely to society, exacts the devotion of life. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all lifelong callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcome to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the courtroom, as for the physical conflicts of the battle field. Womanhood is molded for gentler and better things. And it is not the saints of the world who chiefly give employment to our profession. It has essentially and habitually to do with all that is selfish and malicious, knave and criminal, coarse and brutal, repulsive and obscene, in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking

to man's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds it way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce: all the nameless catalogue of indecencies, *la chronique scandaleuse* of all the vices and all the infirmities of all society, with which the profession has to deal, and which go towards filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men. We hold in too high reverence the sex without which, as is truly and beautifully written, *le commencement de la vie est san secours, le millieu sans plaisir, et le fin sans consolation,* voluntarily to commit it to such studies and such occupations. *Non tali auxilio nec defensoribus istis,* would juridical contests be upheld. Reverence for all womanhood would suffer in the public spectacle of women so instructed and so engaged. This motion gives appropriate evidence of this truth. No modest woman could read without pain and self abasement, no woman could so overcome the instincts of sex as publicly to discuss, the case which we had occasion to cite [previously]. And when counsel was arguing for this lady that the word, person, in § 32 ch. 37, would subject woman to prosecution for paternity of a bastard, and in secs. 39, 40, ch. 164, to prosecution for rape. Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety. If, as counsel threatened, these things are to come, we will take no voluntary part in bringing them about.

By the Court—The motion is denied.

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*And five score years came to pass and the tribunals and the lawgivers and man who walked the field and town no longer had the fear in the heart that had made them tremble and shake as a quaking aspen. They no longer feared woman; woman who now, too,*

*walked head high in the forest and in the field and in the town; woman who now had wreaked profound change in the cultures and practices from which the solons and the soothsayers drew analogies; woman who now served as solon and soothsayer as well as judge herself.*

New ideas and new legal precepts are perpetually emerging, but the emergence is slow as our parables tell us—sometimes five score years as the subsequent cases disclose. As Munroe Smith stated, “The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice.” Societal fear and outdated understandings (in the words of the parable, “customs and practices”) that informed the legal precepts defining the role of women in the home and the workplace have been largely rejected today. Rules that continued to work injustices against women have been replaced by new community values, social mores and corresponding legal precepts about the role of gender in a modern society.

# Eslinger v. Thomas
# 476 F.2d 225, 227 (4th Cir. 1973)

The South Carolina Senate adopted Resolution S.525, establishing new classifications and duties of part-time employees formerly known as pages. Under this resolution, females may be employed as "clerical assistants" and "committee attendants," but not at "Senate pages."

When we apply the [proper] test… we are compelled to conclude that S.525 denied equal protection. The "public image" of the South Carolina Senate and of its members is obviously a proper subject of state concern. Apparently, the South Carolina Senate felt that certain functions performed by pages on behalf of senators, e.g., running personal errands, driving senators about in their autos, packing their bags in hotel rooms, cashing personal checks for senators, etc., were "not suitable under existing circumstances for young ladies and may give rise to the appearance of impropriety."… In their brief, defendants argue that "[i]n placing this restriction upon female pages, the Senate is merely attempting to avoid placing one of its employees in a conceivably damaging position, protecting itself from appearing to the public that an innocent relationship is not so innocent, and maintaining as much public confidence while conducting the business of the people of South Carolina as possible."

We find this rationale unconvincing. It rests upon the implied premise, which we think false, that on the one hand, the female is viewed as a pure, delicate and vulnerable creature who must be protected from exposure to criminal influences; and on the other, as a brazen temptress, from whose seductive blandishments the innocent male must be protected. Every woman is either Eve or Little Eva—and either way, she loses …. We have only to look at our own female secretaries and female law clerks to conclude than an intimate business relationship, including traveling on circuit, between persons of different sex presents no "appearance of impropriety" in the current age, graduated as we are from Victorian attitudes. We

note also that South Carolina has had female senators. While the record does not reflect their ages, the association of female senator with male page has not given rise to a sufficient "appearance of impropriety" to require legislative regulation which is the reverse of S.525. In short, present societal attitudes reject the notion that in most forms of business endeavor free association between the sexes is to be limited, regulated and restricted because of a difference in sex.

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The 1973 *Eslinger* case shows how far we have come since the former reprehensible treatment of women by the highest courts of the states. The Wisconsin and North Carolina cases have been set forth as recorded examples of the plight of women as recent as the era of our great-grandparents. Those cases purport to draw analogies—improper, to be sure—from the set of mores allegedly present in nineteenth-century communities. It is worthwhile to keep these cases in mind if for no other reason than as a reminder, or perhaps an impetus, to say, "Never again!" In 1996, the Supreme Court held that states could not constitutionally exclude women from educational opportunities at what have traditionally been state-supported all-male military institutions.[17] This ruling came in the midst of contentious debates that challenged what were for many age-old attitudes and fundamental understandings about the role of women, the military and higher education in our society. Notwithstanding the formidable traditions of all-male military institutions in our society, the Court retested those traditions and, in light of the continued injustice to women many believed resulted from rules upholding those traditions, found that state support of such a tradition violates the Equal Protection Clause. The Court reached its conclusion in part by considering analogies to historical struggles of women entering higher education institutions, other single-gender educational facilities, male-only bartender licensing policies, property laws now held to bias women and, of particular relevance here, prior legal challenges to policies excluding women from the practices of medicine and the law. *Eslinger* is a modern day epitome of effective use of analogy and inductive reasoning by

counsel and the Court to facilitate the emergence of new ideas and legal principles.

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1. As previously explained in Chapter 3, this book concentrates on legal reasoning, a limited area in the general cosmos of reasoning. In general deductive reasoning, one can deduce from the general to the general, but in the law we use deductive reasoning to favor or attack a "particular," not a "universal." In the law, the particular is a litigant, a witness or a participant in a transaction. We consider also induced generalization and analogy as aspects of inductive reasoning because the beginning point for analysis is the same.

2. Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969 (3d Cir. 1979).

3. Edward H. Levi, Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 504 (1948).

4. Traynor v. Turnage, 485 U.S. 535 (1988).

5. *See* John Stuart Mill, A System of Logic Ratiocinative and Inductive 98-142 (8th ed. 1916).

6. Irving M. Copi & Keith Burgess-Jackson, Informal Logic 166 (3d ed. 1996).

7. John Locke, The Conduct of Understanding (1690).

8. Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L. J. 161, 179 (1930).

9. Benjamin N. Cardozo, The Nature of the Judicial Process 22-23 (1921).

10. John H. Wigmore, Wigmore's Code of the Rules of Evidence in Trials at Law 118 (3d ed. 1942).

11. 217 N.Y. 382, 111 N.E. 1050 (1916).

12. 6 N.Y. 397 (1852).

13. Jeffrey G. Murphy, Law Logic, 77 Ethics 193, 197 (1966).

14. W. Stanley Jevons, Elementary Lessons in Logic: Deductive and Inductive 208 (1965).

15. *See e.g.,* John Dewey, How We Think 30-33 (1933).

16. Munroe Smith, Jurisprudence 21 (1909).

17. United States v. Virginia, 116 S.Ct. 2264 (1996); Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995).

# Chapter 7
# THE PARADIGMATIC COMMON-LAW CASE

This chapter discusses how theoretical concepts of issue-identification and the processes of inductive and deductive reasoning apply to a live case. The opinion of Lord Diplock in the House of Lords in Dorset Yacht Co. v. Home Office[1] is used to illustrate these concepts. The case was one of first impression in the Court of Appeal and the House of Lords. Seven Borstal boys (British juvenile detention residents) were working on an island under the control and supervision of three officers from the Home Office. During the night, the boys left the island, boarded, cast adrift and damaged the plaintiffs' yacht, which was moored offshore. The plaintiffs brought an action for damages against the Home Office which charged negligence. They alleged that the officers, knowing of the boys' criminal records and records of previous escapes from Borstal institutions, and knowing that crafts such as the plaintiffs' yacht were moored offshore, had failed to exercise effective control and supervision of the boys. The Home Office conceded that they were vicariously liable for the torts of their servants (the officers), but denied that they, or their servants or agents, owed the plaintiffs any duty of care with respect to the detention, supervision or control of the boys.

Lord Diplock stated the issue:

> Is any duty of care to prevent the escape of a Borstal trainee from custody owed by the Home Office to persons whose property would be likely to be damaged by the tortious acts of the Borstal trainee if he escaped?

*Lord Diplock (a good friend of happy memory whom I first knew as Sir Kenneth when he was a justice of the Law Courts) then explained that the first task of the court was to decide among several competing legal precepts. He noted that this was a case of first*

*impression and that some subjective input, a value judgment, would go into the decision of choosing between the two legal precepts: denying or extending liability.*

This is the first time that this specific question has been posed at a higher judicial level than that of a county court. Your Lordships in answering it will be performing [the] judicial function of deciding whether the English law of civil wrongs should be extended to impose legal liability to make reparation for the loss caused to another by conduct of a kind which has not hitherto been recognized by the courts as entailing any such liability.

This function, which judges hesitate to acknowledge as lawmaking, plays at most a minor role in the decision of the great majority of cases, and little conscious thought has been given to analysing its methodology. Outstanding exceptions are to be found in the speeches of Lord Atkin in Donoghue v. Stevenson and of Lord Devlin in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. It was because the former was the first authoritative attempt at such an analysis that it has had so seminal an effect upon the modern development of the law of negligence.

It will be apparent that I agree with the Master of the Rolls that what we are concerned with in this appeal "is at bottom a matter of public policy which we as judges, must resolve." He cited in support Lord Pearce's dictum in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465, 536:

> How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others.

The reference in this passage to "the courts" in the plural is significant, for as Lord Devlin in the Court of Appeals had put it:

> As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight.

*In the next section, Lord Diplock combines the processes of enumeration and analogy to justify the court's use of public interest in a negligence case. He also describes how the process of inductive reasoning is used to arrive at the major premise.*

The justification of the courts' role in giving the effect of law to the judges' conception of the public interest in the field of negligence is based upon the cumulative experience of the judiciary of the actual consequences of lack of care in particular instances. And 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 relationships 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. But 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.

*A generalization "based on the cumulative experience of the judiciary," is simply an elegant way of describing an enumeration of instances. And "seeking … to identify the relevant characteristics that are common [among cases]" is no more than analogy. You will also note that the process described in the paragraph above is a classic description of inductive reasoning.*

*As we read on, Lord Diplock will carefully craft the logical form that the preliminary conclusion will take. This is very important because the* conclusion *of the inductive reasoning process will become the* major premise *of the subsequent deductive reasoning process.*

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 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.

*Note well the presence of the elements we discussed in the anatomy of the Socrates-is-a-man syllogism. The subject (middle term) of the proposition is distributed because it encompasses all. ("In* all *cases where the conduct, etc.") The proposition is affirmative. The major premise is thus both categorical and distributed.*

*In the next excerpt Lord Diplock explains that because the present case is lacking at least one of the characteristics, A, B, C or D, etc., a reasoned judgment must be made by the House of Lords, a judgment that goes beyond the formal logical structure of any argument. It is a value judgment informed by the judges' concept of public policy: Do we hold the line on liability here, or, do we redefine the characteristics in more general terms, so as to extend the law of liability beyond what has gone before.*

*To preserve the logical form in the process of analogy, however, it is necessary to exclude those cases not relevant to the case at bar. This is extremely critical because (if you will pardon an Aldisert aphorism that has become a cliché to my students and colleagues): "We must separate that which is important from that which is merely interesting." You will note how the emphasis is now on* relevant *resemblances:*

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 lack 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 of 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. The cases which are landmarks in the common law, such as Lickbarrow v. Mason (1787) 2 Term Rep. 63, Rylands v. Fletcher (1868) L.R. 3 H.L. 330, Indermaur v. Dames (1866) L.R. 1 C.P. 274, Donoghue v. Stevenson [1932] A.C. 562, to mention but a few, are instances of cases where the cumulative experience of judges has led to a restatement in wide general terms of characteristics of conduct and relationships which give rise to legal liability.

Inherent in this methodology, however, is a practical limitation which is imposed by the sheer volume of reported cases. The initial selection of previous cases to be analysed will itself eliminate from the analysis those in which the conduct or relationship involved possessed characteristics which are obviously absent in the case for decision.

*Lord Diplock then restates the conclusion previously reached by inductive reasoning, which now becomes the major premise of the formulation of the deductive syllogism.*

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.

*A survey of cases then followed (about which more later). His research completed, Lord Diplock stated:*

The result of the survey of previous authorities can be summarized in the words of Dixon, J. in Smith v. Leurs, 70 C.L.R. 256, 262:

> The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature.

From the previous decisions of the English courts, in particular those in Ellis v. Home Office [1953] 2 All E.R. 149 and D'Arcy v. Prison Commissioners, "The Times," November 17, 1955, which I accept as correct, it is possible to arrive by induction at an established proposition of law as respects one of those special relations, viz.:

> A is responsible for damage caused to the person or property of B by the tortious act of C (a person responsible in law for his own acts) where the relationship between A and C has the characteristics (1) that A has the legal right to detain C in penal custody and to control his acts while in custody; (2) that A is actually exercising his legal right of custody of C at the time of C's tortious act and (3) that A if he had taken reasonable care in the exercise of his right of custody could have prevented C from doing the tortious act which caused damage to the person or property of B; and where also the relationship between A and B has the characteristics (4) that at the time of C's tortious act A has the legal right to control the situation of B or his property as respects physical proximity to C and (5) that A can reasonably foresee that B is likely to sustain damage to his person or property if A does not take reasonable care to prevent C from doing tortious acts of the kind which he did.

Upon the facts which your Lordships are required to assume for the purposes of the present appeal the relationship between the

defendant, A, and the Borstal trainee, C, did possess characteristics (1) and (3) but did not possess characteristic (2), while the relationship between the defendant, A, and the plaintiff, B, did possess characteristic (5) but did not possess characteristic (4).

What your Lordships have to decide as respects each of the relationships is whether the missing characteristic is essential to the existence of the duty or whether the facts assumed for the purposes of this appeal disclose some other characteristic which if substituted for that which is missing would produce a new proposition of law which *ought* to be true.

Lord Diplock then decided:

I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture.

*The major premise thus being narrowed and restated through an analysis of the relevant cases, Lord Diplock proceeded to set out the framework for determining the minor premise:*

If, therefore, it can be established at the trial of this action (1) that the Borstal officers in failing to take precautions to prevent the trainees from escaping were acting in breach of their instructions and not in bona fide exercise of a discretion delegated to them by the Home Office as to the degree of control to be adopted and (2) that it was reasonably foreseeable by the officers that if these particular trainees did escape they would be likely to appropriate a boat moored in the vicinity of Brownsea Island for the purpose of eluding immediate pursuit and to cause damage to it, the Borstal officers would be in breach of a duty of care owed to the plaintiff and the plaintiff would, in my view, have a cause of action against the Home Office as vicariously liable for the “negligence” of the Borstal officers.

# AN ANALYSIS OF LORD DIPLOCK'S PREMISES

The minor premise then becomes obvious:

Minor Term  Middle Term

The Borstal officers did or did not act as described in (1) and (2).

As does the conclusion:

Minor Term  Major Term

Therefore, the Borstal officers are or are not liable.

# LORD DIPLOCK'S METHOD OF ANALOGY

It may be useful now to summarize the facts considered by Lord Diplock when he utilized the method of analogy. His inquiry was decided into two stages. The first was to decide if the plaintiffs' interpretation of the leading case of Donoghue v. Stevenson[2] was correct.

In *Donoghue* Lord Atkin had warned, "it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary." Lord Diplock pointed out that the plaintiff, Dorset Yacht Co., disregarded the warning by seeking "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.'":

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Lord Diplock explained that this aphorism is to be "[u]sed as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care," but "misused as a universal it is manifestly false." He went on to demonstrate that in English law there are many instances in which no legal liability would be incurred where an act or omission by one party causes loss or damage to another, even though that loss or damage might have been anticipated. His examples included:

> You may cause loss to a tradesman by withdrawing your patronage even though the goods supplied are entirely satisfactory;

> You may damage your neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to yourself;
>
> You need not warn him of a risk of physical danger to which he is about to expose himself unless there is a special relationship between the two of you such as that of occupier of land and visitor;
>
> You may watch your neighbour's goods being ruined by a thunderstorm though the slightest effort on your part could protect them from the rain and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee.

Lord Diplock then noted that the propositions of law in *Donoghue* were not applied in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., which involved careless words rather than careless deeds. He proceeded to formulate the inquiry for stage two of his analysis:

> In the present appeal, too, the conduct of the defendant which is called in question differs from the kind of conduct discussed in Donoghue v. Stevenson in at least two special characteristics. First, the actual damage sustained by the plaintiff was the direct consequence of a tortious act done with conscious volition by a third party responsible in law for his own acts and this act was interposed between the act of the defendant complained of and the sustention of damage by the plaintiff. Secondly, there are two separate "neighbour relationships" of the defendant involved, a relationship with the plaintiff and a relationship with the third party. These are capable of giving rise to conflicting duties of care.
>
> This appeal, therefore, also raises the lawyer's question: "Am I my brother's keeper?" A question which may also receive restricted reply.

> I start, therefore, with an examination of the previous cases in which both or one of these special characteristics are present.

It bears mention that here Lord Diplock had to make a value judgment as to what facts are really relevant, that is to say, what are the relevant resemblances in the facts and the relevant differences.

| | |
|---|---|
| Case 1, 2 | (Ellis v. Home Office & D'Arcy v. Prison Commissioners) The legal custodian of a prisoner detained in a prison owed a duty of care to prevent that prisoner from injuring another. Difference from the case at bar: the prisoner was in actual custody of the defendant, giving the custodian a continuing power of physical control over the acts of the prisoner. Lord Diplock: "But I do not think that, save as a deliberate policy decision, any proposition of law based on the decisions in these two cases would be wide enough to extend to a duty to take reasonable care to prevent the escape of a prisoner from actual physical custody and control owed to a person whose property is situated outside the prison premises and is damaged by the tortious act of the prisoner *after his escape."* |
| Case 3 | New York and California cases. Lord Diplock did not find them helpful because American law was developing differently from that in England. |
| Case 4 | Damage to plaintiff by mental patient released on a visit. Doctors were sued. Jury found for plaintiff. |
| Case 5 | Four-year-old child ran out into the highway from a school maintained by defendant and caused an accident to a |

driver trying to avoid him. Defendant held liable for not taking reasonable care to keep the gate shut.
Lord Diplock: Cases 4 and 5 do not control because the acts were not committed by mature responsible human beings.

# LORD DIPLOCK'S CONCLUSION

From the previous decisions, particularly cases 1 and 2 above, Lord Diplock concluded it is possible to arrive by induction at an established proposition of law as respects special relations which give rise to a duty in one man to control another to prevent his doing damage to a third. Because the relationship in the Borstal boys case did not exactly match that in the prior cases, Lord Diplock had to decide whether the resemblances were sufficient or the differences significant. By examining several overarching common-law principles relating to the acts of public authorities, he was able to show how the resemblances outweighed the differences.

> So to hold would be a rational extension of the relationship between the custodian and the person sustaining the damage which was accepted in Ellis v. Home Office (1953) 2 All E.R. 149 and D'Arcy v. Prison Commissioners, "The Times," November 17, 1955, as giving rise to a duty of care on the part of the custodian to exercise reasonable care in controlling his detainee. In those two cases the custodian had a legal right to control the physical proximity of the person or property sustaining the damage to the detainee who caused it. The extended relationship substitutes for the right to control the knowledge which the custodian possessed or ought to have possessed that physical proximity in fact existed.

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1. 1970 App. Cas. 1004, 1057-1071 (Lord Diplock). All quotations in this chapter are excerpted from Lord Diplock's opinion in *Dorset Yacht Co.*

2. 1932 App. Cas. 562, 589.

# Chapter 8
# THE SOCRATIC METHOD

We can now discuss the Socratic method of teaching law. The bane of all law students, the method is especially wrenching during the first year. It is a confusing experience because most students do not know what the professor is driving at. The answer is simple. The professor is giving the student a double-barreled learning exercise—teaching the fundamentals of substantive law, to be sure, but doing it in such a way that the student is exposed to daily drills in legal logic. Let's face it, the system causes frustration, insecurity, embarrassment and many unpleasant hours.

This book has been designed to eliminate some of the bewilderment and help students to understand the nature of the Socratic beast. And, lest lawyers might say at this point, "That stuff is all behind me—I need read no further," we must emphasize that the Socratic method is utilized every day by thinking lawyers to analyze written and oral arguments, by senior partners in discussing young associates' memoranda and, especially, by judges who use the method on lawyers. It is not an exaggeration to say that many lawyers appear as befuddled as first-year law students when judges use the Socratic method in open court to test the soundness of oral argument. Judges use the method for two purposes—to clarify arguments that appear muddled in the briefs or as offered in court, and in multi-judge courts, as a sort of internal advocacy by which a judge may inform colleagues of his or her views on a case. The failure of many lawyers to be prepared for piercing questions has led me to state often, "Cases are not won in oral argument, they are only lost there."

The Socratic method may be defined as a dialectical method of teaching or discussion made popular by Socrates. It involves asking questions that guide the answerer to a logical conclusion. It is the art

or practice of forcing arguments to be examined with an unrelenting logical process in order to test their soundness and validity.

The Socratic method follows a specific ritual in today's law schools. The centerpieces are previously assigned cases from in casebooks covering a specific legal discipline, e.g., contracts, torts, crimes, property, constitutional law, civil procedure. These cases consist of excerpts from publicly recorded opinions of a court—usually an appellate court, but sometimes a trial court. Prior to class, the student is required to read each assigned case and be familiar with (a) the facts, (b) the issue posed for decision, (c) the conclusion and (d) the reasons stated to support the conclusion. Comments supplementing the leading case and references to other cases are often included in the casebook. It is critical for the student to read the case in advance and to outline (to brief) its elements. It is also important to consider each case in conjunction with other cases in the present or past assignments. Otherwise, the student will be lost in the discussion. The cases are selected by the book's author for their excellent reasoning content; yet sometimes, for the exact opposite, as examples of poor reasoning.

Preparing for class is only a threshold endeavor. It is simply the beginning point of the lesson. The professor takes off from there and seeks to draw from the students whether the reasoning stated in the case is sound or unsound. The professor does this by posing questions, not only to the student called upon to recite, but to other students as well. The professor will be prepared to follow up each answer with further questions. The students soon understand that there is usually no quick "yes/no" answer in the law. The professor will introduce hypothetical fact situations that differ from those in the assigned case and inquire whether added or subtracted facts would make a difference in the result. This is an exercise in analogy, designed to sharpen the students' perception by requiring them to evaluate resemblances and differences in the fact patterns of the compared cases. Students are constantly tossed in an unrelenting sea change of analogy. They are then required to understand and evaluate stated reasons in the deductive syllogism to evaluate whether the particular rationale supporting the case can legitimately support the same result in other fact patterns, and if so, why. An

understanding of the principles of deduction and induction will significantly assist the student in this daily exercise. To lack this understanding is to be substantially, if not totally, disadvantaged.

Aside from understanding logical form, the student must be able to perceive the relative truth or falsity of legal propositions to determine if there is any material fallacy of content (of which more later) in both the case and the hypothetical posed by the instructor, and here is where advance study of the substantive law is critical. The student's knowledge of legal propositions comes from previous cases studied, because the case books are arranged to show the development of the relevant legal precepts.

With an understanding both of rudimentary substantive law and rules of logic, the student should be able to grasp the sense of the professor's questions if the student knows (a) the truth or falsity of the premises (reflected in the study of legal precepts and supporting rationales), (b) the rules of deduction and induction and (c) how to spot material resemblances and differences in fact situations put by the professor in the questions. Reduced to its essence, the study of law is twofold: to learn the high points of substantive and procedural law, subject by subject, and to develop logical skills to solve problems.

# PREPARING FOR THE SOCRATIC METHOD

As a present or prospective law student, if you have yet to be confronted with or assaulted by the Socratic method, the following pointers may be useful in meeting head-on this method of thought-instruction commonly used by law professors. We start with some basics of preparation and then proceed to the Socratic method in practice.

- First, read through the whole assignment without getting bogged down in the intricacies of each case. Merely identify the parties and the issues presented and a run-through of the reasoning. Perhaps, look up some terms in Black's dictionary if they are new to you. Do not brief any case yet. After giving the assignment the once over, read each case again, but this time very carefully. You are still not ready for briefing. Read the case carefully and follow an informal check list of which the following is an example.
- *Your reading check list:*

  What did the plaintiff ask for at trial and on what grounds?

  What position did the defendant take?

  How did the trial judge decide the case?

  Who took the appeal and on what grounds?

  What is the question or issue in the case?

  What are the relevant facts?

  What is the court's decision?

  What are the stated grounds for the decision?

  What is the rule of law of the case? (Recall the definition of a legal rule in Chapter 2: A specific legal consequence attached to a detailed set of facts.)

  Does the case follow or depart from precedent?

  What practical consequences are likely to result if the case is followed?

Do you think that the decision is reasonable? (Recall our earlier definition of reasonable in Chapter 3: “fair, just and sound.”)

Could the decision have gone the other way if the lawyer had emphasized different facts or relied on different precepts or cases?

How would you have presented the case had you been the losing party?[1]

- Before you start briefing the case, understand the subject matter of the assignment. Cases (and supplementary notes and comments) are put there by the casebook author for a specific purpose. They are there for several reasons. Ask yourself why they are there. Do the individual cases demonstrate developments in the law or divergent points of view? Or is a case included because the opinion writer has chosen to summarize existing case law? “No case is an island.” It must considered always in relation to others. Know the cases individually, to be sure, but it is critical that you know the context and why it is there.
- Now brief the case. The technique has not changed since the author attended law school almost 60 years ago:

  *Procedural posture/action:* States form of action (damages, injunctive, declaratory judgment). What went on in trial court? Jury verdict? Summary judgment?

  *Relevant facts:* This section becomes smaller as the student gains experience. Keep in mind always the definition of the rule of law, and keep to the adjudicative facts, i.e., those material to the disposition. You are assisted in determining what facts are material by reading all the cases in your assignment before starting to brief the individual cases. And by understanding the facts you are preparing for the questions the professor will put to you in class.

  *The issue:* The issue and the rule/holding are interrelated. Issues should be stated so that the holding could be expressed as a “yes” or a “no.” To prepare for Socratic

permutations, it might be well to practice expressing the issue in narrow and broad terms. The narrow approach is the safer for class room discussions: *e.g.,* “Are maps consisting of lines drawn of preexisting 1:24,000-scale USGS maps depicting the proposed location of a natural gas pipeline copyrightable under the Copyright Act of 1976?” The broader stated issue should suggest the most expansive rule of law possible under the facts: *e.g.* “Are maps depicting cross-country construction projects copyrightable under the Copyright Act of 1976?” To teach argumentation technique, professors often push students to state rules broadly and then challenge the formulation.

*Holding:* Yes or no.

*Rule of law:* Affirmative declaratory statement of stated issue keeping in mind the definition of a legal rule discussed in Chapter 2.

*Rationale:* This should be stated in categorical syllogistic style. Be sure to understand how the major premise was formed. The rationale is very important in understanding the progression of the law in the overall assignment.

*Policy:* Glean the policy considerations underlying the rationale; *e.g.,* The copyright laws were designed to encourage creativity while fostering competition. Thus, any author may copyright the expression of an idea fixed in a tangible form, but not the idea itself regardless of the form it takes. *Identifying the policy may be very important because the professor will ask about it, perhaps several times during the class period.*

- Reread all your briefs in the assignment immediately before class.
- *Class discussion:* Your preparation for the Socratic method discussion has concentrated on three considerations:
  - A case has little significance in itself.
  - The importance of a case derives from its relationship to other cases in the continuous process of decision-making.

- Ask yourself continuously how each case is related to the others.
  Know the rule of law in each case, but most important to the Socratic method, know the distinguishing facts of each case. Sounds like common sense, but to be able to reason and analyze logically, students must first weed out tangential matters and weed in key facts and relevant rules of law in each case.

- *Think inductively!* With a grasp of the details of the case in isolation, put the case in context. Your professor may urge a generalization on you. Think before you reply. Don't be afraid to take the cautious road: "I'm not prepared to say that there should be a general rule, but I am confident that analogizing from the case under discussion to your hypothetical, we need not establish a general rule. We only need to decide if the rule of the case applies to the facts in the hypo." Avoid the fallacy of hasty generalizations and inform your professor of your attempt to do so, while acknowledging the need to engage in some generalizing. Remember the twin facets of inductive reasoning: induced generalization and analogy. Inductive reasoning grounds a lawyer's reliance on precedent. Look at the holdings in cases already read. Identify relevant resemblances, relevant distinctions and irrelevant red herrings. Remember that similar facts generally must be treated similarly. Tell your professor how or why by analogizing the holdings in previous cases apply or do not apply to the hypothetical. Or if the policy considerations are so profound, a general rule should apply to all cases similarly situated. Remember always the difference between induced generalizations and analogies set forth in Chapter 6.
- *In preparing for class always anticipate the hypothetical!* Slightly alter selected facts in your case to determine whether a new perspective, a different rule of law or result are required.
- *Think deductively!* When your professor hypothetically changes a fact in the case under discussion or in a previous case, will the holding and rule of law still apply? To blurt out a conclusion is not enough. You must marshal arguments why the same

conclusion will apply and why not. (It may be a good idea to articulate these arguments before you announce your conclusion.) Think of the major premise that should control. In all cases in which "X" set of facts appeared, courts applied "Y" rule of law and drew "Z" conclusion. Tell your professor how this case fits your premise and how you deduce your conclusion. This case does have "X" set of facts; therefore, the court should apply "Y" rule of law and conclude "Z." Or the modification, the "A" set of facts in the professor's hypothetical closely resemble "X" set of facts and the same conclusion should result, or the "A" set of facts are remarkably dissimilar, and a different conclusion should result.

- When in doubt and often even when certain about the correct answer to the professor's question, just say: "It depends." Remember, unlike science and math, the law involves a substantially influential element of uncertainty and few, if any, absolute truths. The answer to your professor's hypothetical questions posed in the Socratic method will depend upon choices (i.e., which major premise the attorneys, judge or jury adopt), value judgments (i.e., Is society, or are the courts, prepared to impose tort liability in strict-products liability cases on those most able to pay regardless of proof of wrongdoing?), personal biases in interpreting rules of law and identifying relevant facts (i.e., Is race a relevant fact in this case?). Of course, simply asserting, "It depends," will not relieve you of the pressure posed by your professor's question. Be prepared to discuss the variables upon which the outcome of your case may pivot.
- *Memorize the following and you won't go wrong in the Socratic method—as law student or lawyer:*

  1. Identify the categorical deductive syllogism used by the opinion writer—the major premise, the minor premise, conclusion.

  2. Where did the major premise come from? If not from a fat precedent, statute or constitutional clause, did it emerge

from inductive reasoning—induced generalization or analogy?

3. The subject of the minor premise is usually the facts found by the fact-finder. Is it identical to or properly a part of the class represented by the middle term (usually the subject) of the major premise? Here often you will be resorting to analogy. How do the resemblances in the material facts stack up? The differences?

- *A final word:* In law school, you can make it, and indeed do well, by studying alone. But you will probably do better by joining or organizing a study group. To be sure, the group experience is invaluable for review purposes, but getting your group in action early on will give you valuable practice and seasoning in the Socratic method in the group interaction. And here you can gain confidence before being exposed to the stage fright of first year classroom dialogue between you and the professor.

Good luck in preparing for the Socratic method. Remember, it does not stop in the classroom. It continues in law offices when defending your position to associates or partners. And *always* in the courtroom.

# SOCRATIC DIALOGUE (LAW SCHOOL STYLE)

A contracts to sell and B to buy 20 dressed hogs and 20 live hogs at stated prices for each quantity. A is to deliver the dressed hogs first and the live hogs 15 days later. B is to pay for each delivery within 30 days after it is made. If either party breaches the agreement, the other party is released from an obligation to perform.

| | |
|---|---|
| Socrates: | Assume A delivers the dressed hogs, but 15 days later refuses to deliver the live hogs. A demands payment for the dressed hogs 30 days after their delivery. Can A recover from B for the dressed hogs? |
| Student: | Yes, because B now has 20 hogs and should pay for them. |
| Socrates: | But A is in the wrong, isn't he? He won't deliver the live hogs. Why should he be able to recover for the dressed hogs? He's breached the agreement. Why should he get anything? |
| Student: | Because A delivered the dressed hogs. B should pay A the value of the dressed hogs. |
| Socrates: | But under the contract, if A breached, B doesn't have any obligation to perform. |
| Student: | A didn't totally breach. He just breached the part about the live hogs. |
| Socrates: | You're saying there's total breach, and there's partial breach—is that it? |
| Student: | Yes, it looks that way. |
| Socrates: | Then a person could just perform part of any contract and not suffer in any way. Only perform what he wants to perform and expect to get paid anyway. Like painting half a house. |

Student: But here it's as if there were two pieces of the contract. One for live hogs and one for dressed hogs. An agreed upon amount of money for an agreed upon amount of hogs of each kind. That's not like painting half a house.

Socrates: Assume B was to pay $5,000 for 20 dressed hogs and $5,000 for 20 live hogs. Now assume A delivered 10 dressed hogs and 10 live hogs. Can A recover $5,000 from B?

Student: No. It's not the same thing.

Socrates: Well, isn't A entitled to $2,500 for half the order of dressed hogs and $2,500 for half the order of live hogs? You just said we could parse out the contract. After all, it's $5,000 for 20 hogs. And money's money.

Student: But hogs aren't hogs. There's nothing in the contract about a grouping of 10 hogs. Maybe B can't use only 10 of either kind of hog. This kind of exchange wasn't agreed upon.

Socrates: But the other kind was?

Student: Yes, $5,000 for twenty of each kind. That was the agreed exchange.

Socrates: So how can we describe the agreed relationship between the $5,000 and 20 dressed hogs. They are agreed what?

Student: Equals.

Socrates: Equal? That's exactly the same. Can we be more precise?

Student: Equivalent. Agreed equivalents.

Socrates: Good. That's a legal concept. Now what if A did deliver the 10 hogs of each kind. There's no agreed equivalent of 10 hogs.

| | |
|---|---|
| | But B now has 20 hogs. Is she obliged to pay? Where do we stand under the contract? |
| Student: | A has really breached the contract this time. We don't know if each hog is worth $250 or if B was getting a special deal. We have no agreed equivalents. So, B has no obligation to pay. |
| Socrates: | No obligation to pay? A is out 20 hogs and has gotten no payment. Does A have no rights under the contract? |
| Student: | Probably not under the contract. But B still has a moral obligation to pay. |
| Socrates: | Moral obligation? Should the law enforce moral obligations? |
| Student: | I suppose not always. But here. |
| Socrates: | Then, where? How do we decide? |
| Student: | Well, B has received something that she didn't pay for. |
| Socrates: | She's been enriched. |
| Student: | Yes, but she hasn't paid for it. That's not fair. |
| Socrates: | If she doesn't pay, she's been unjustly enriched. Could we put it that way? |
| Student: | Yes. |
| Socrates: | Now let's assume A has delivered 19 dressed hogs to B. Must B pay? |
| Student: | We can't parse out their value. |
| Socrates: | Should we throw an entire contract out the window when one party has given 95% performance. Where would that leave us in the world of contract? |
| Student: | We could make B pay the $5,000, but then B has overpaid. |

| | |
|---|---|
| Socrates: | What could B do? |
| Student: | Sue A for the 20th hog. |
| Socrates: | How could we justify enforcing contracts on this basis? Can we formulate a theory? |
| Student: | Yes, we could say if someone has performed almost to the full extent of the contract, they have met their obligation enough to be entitled to their rights under the contract. But the other party will be entitled to damages for the missing degree of performance. |
| Socrates: | Suppose in the law we were to call this substantial performance. As a matter of fact, we do call it substantial performance. Where would we draw the line? 95%, 90%, 80% performance? What if A were to deliver 19 dressed hogs. Is that substantial performance? |
| Student: | Yes. It's almost everything B wanted. |
| Socrates: | What about 13 hogs? |
| Student: | Of course not. That's barely over half. |
| Socrates: | How about 16 hogs? |
| Student: | Well … |

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As can be seen, the Socratic method is to reach conclusions through an analytical discussion led by a dialectician. This enables the student to grasp the major precepts of a given legal discipline, while gaining exposure to the process used to arrive at these precepts. The open dialogue serves as a repetitive laboratory demonstration of how solutions to legal problems must be logically justifiable, and not reached by predetermined or ingrained belief, impression, hunch, instinct or impulse.

For our purposes, at this point of our study, the Socratic method vividly demonstrates how the logical components of reflective thinking are applied to particular cases. Reflective thinking makes us

look at links. It requires that we see a connection from the known to the unknown. We reach a conclusion in one set of facts by deciding what inferences may be drawn from other sets. We seek to determine whether legal consequences applicable on the facts of a previously decided case may or may not be applied to the facts before us. We experiment with inferences. We inquire as to the probability that certain consequences can and do follow from changing factual scenarios as tested by previous experience in human affairs.

Throughout the Socratic dialogue, without being conscious of labels, we employ aspects of inductive and deductive reasoning. To analyze different factual scenarios is to engage in inductive reasoning, a reasoning based on probabilities. The conclusion emerging from induction then serves as a premise—major or minor—in the deductive process that follows. If the premises are properly formulated, one conclusion must logically follow.

To be sure, our summary of the Socratic method is just that, a summary. All of the elements we have studied thus far appear at one time or another in the myriad versions of Socratic teaching that take place in each course, in each law school year, by each professor. And they also take place in every oral argument before a law and motion judge or appellate court and every interrogation by a senior partner to an associate who has written a memo.

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1. *See* Joseph O'Meara, An Introduction to Law and How to Study It, (University of Notre Dame 1973) *reprinted in* 51 Notre Dame Lawyer Supplement 1976.