Alternative Justifications and the Argument from Demystification in the English Law of Obligations

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Although legal judgments often appear complex, a dissenting judge occasionally adopts a simpler view of the case in the hope of reaching a clearer and more acceptable result. In such cases, judicial disagreement concerns alternative categorisations of the facts rather than the facts themselves and the dissenting judge may use an argument based on 'demystification'. The different judgments are reached by taking alternative views of the law. Legal adjudication thus appears to involve a choice between different available perspectives. To the extent that the result depends on the view taken of the facts, rather than the facts themselves, legal judgments cannot be said to be true or false, though they may be insincere. Such insincerity is sometimes clearly apparent. As in other fields of public life, it may constitute the normal case. Yet, in the common law, the reasoning given, rather than the result, is fundamental to the operation of the rule of precedent. Paradoxically, on occasion, the divergence between the justification proposed and the judge's true motivation may make a positive contribution to the development of the law.

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1 Introduction: rhetorical simplicity in legal argumentation

Judicial opinions have acquired a reputation for complexity. The erudite and learned approach is often found persuasive in legal debate,

not just because logical demonstration is a powerful form of argument but also because of its reassuring impression of expertise. However, the purely formal approach remains problematic where (as always) the result depends on value judgments rather than on objective truth or falsity. Even where valid logical arguments are available, they are rarely convincing on their own. Being essentially tautological, they cannot create new knowledge or impose new beliefs. As Lewis Carroll (1895) convincingly showed, no one can be obliged to believe the logical implications of even of valid propositions.[1]

Indeed, the law cannot always be strictly applied, and sometimes appears absurd when taken to its logical conclusion. For this reason, judges inevitably resort to rhetorical arguments in addition to formal analysis. The claim of the American judge, Justice Holmes (1881, p. 1), according to which "[t]he life blood of the law is not logic but common sense", is often cited even in English cases in order to justify a departure from strict logic.

Legal judgments are prototypical examples of argumentative texts. It would be wrong, however, to analyse them in terms of dialectics. In the legal field, once the arguments have been made before the court, there is no further opportunity for collaborative debate, in the hope of reaching an ideal conclusion, acceptable to all. If the parties are not satisfied, their only option is to appeal to a higher court.

This point is especially clear in the English common law system. Even in the higher courts, where a panel of judges is likely to hear a case, they will normally give their opinions individually. Although they may participate in informal discussions with their colleagues, they are under no obligation to do so. Indeed, when they do defer to others' opinions, they commonly say so explicitly in their judgments, stating for example that they have "had the advantage of reading in draft" the speech prepared by their "noble and learned friend". Their individual judgments must therefore be seen as *a posteriori* justifications of decisions which have already been made, rather than as a basis for negotiation or discussion.2

1 Logic would take you by the throat and *force* you to do it!" (Carroll, 1895, p. 279)

2 The practice is somewhat different in the civil law countries, where the judges are normally required to prepare a unanimous judgment, and where dissenting opinions are rarely published. Nor is it true to the same extent in the US Supreme Court, where a majority judgment,

Nevertheless, the judges are typically aware of opposing arguments and able to give sympathetic presentations of them. This explains how they are apparently able to adopt diverse points of view simultaneously, in a way which, taken out of context, may appear contradictory. In *A (FC) v Secretary of the Home Department* (2005), for example, Lord Bingham said:

> "[...] is not a negligible argument, and a majority of the Court of Appeal broadly accepted it. There are, however, in my opinion, a number of reasons why it must be rejected. (*A (FC) v Sec Home Dept* HL 2005, *per* Lord Bingham)]

In *Jones v Whalley* (2006), the same judge said, in rejecting a strong argument:

> "I see very considerable force in this argument [...] I would not, therefore, reject this argument. But nor do I think the House should in this appeal accept it, for reasons which I find, cumulatively, to be compelling." (*Jones v Whalley* HL 2006, *per* Lord Bingham)

The sometimes elaborate justifications given by the judges may thus be analysed as trace evidence of internal argumentation within the mind of the individual judge. Common law judges should not therefore be seen as embodying contradictory views, even where they obtain diametrically opposed results.[3] Judicial reasoning is more a matter of balance between opposing arguments.

In this sense, judicial disagreement does not depend merely on the analysis of agreed facts. Not only may the judges analyse the facts differently, so as to tell different 'stories of the case' (Llewellyn, 1930, p. 28), they may also adopt different conceptions of the facts themselves. The justifications given then depend not on empirical observations, but on the view taken of the law. Arguments based on

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established through confidential discussion, frequently attempts to refute the counter-arguments made in dissenting opinions. Even the English tradition may be changing, as since the creation of the United Kingdom Supreme Court, there has been a tendency for a greater proportion of judgments to be prepared in collaboration and co-signed than was the case in the old House of Lords.

3 The US case of *Texas v Johnson* ((1989) is exceptional in this respect, as Justice Brennan and Renquist CJ. do appear to have been arguing at cross-purposes.

alternative conceptions of the facts are surprisingly common, but have attracted little attention either from rhetoricians or legal theorists.

The simplest manifestation of this phenomenon occurs when a dissenting judge explicitly adopts a different conception of the facts in order to reach a different, more acceptable conclusion. In such cases he may be said to be using an argument from 'demystification' or, to use a variant on the terminology of John Locke (1690, B4, Ch. 17, s.19-22), the *argumentum ad demistificationem*).[4] In this case, for the purpose of refutation, the judge adopts a simpler view of the law, a view which may be defended through a variety of rhetorical devices. For the purpose of exposition it is therefore convenient to introduce the problem of alternative justification through the analysis of three celebrated cases in the English law of obligations.

2 Legal argument and alternative conceptions of the law

The celebrated cases taken as examples here combine features of the law of tort and of contract, to the extent that the judges disagreed amongst themselves about which area of law should apply. In each case, one judge found the questions raised needlessly complex and the result unsatisfactory. In order to reach a more acceptable solution, he preferred to adopt a simpler basis for the ruling. In *Lumley v Gye* and in *Olley v Marlborough Court*, facts originally considered in terms of tort were re-analysed in contract, while *Candler v Crane Christmas* the argument concerned the possibility of recovery for economic loss following negligent statements acted on by third parties.

2.1 *Lumley v Gye* (1853)[5]

Lumley, a well-known concert promoter, had persuaded the celebrated soprano Johanna Wagner to sing exclusively at his theatre for the entire season. The plaintiff, Gye, a rival promoter, maliciously persuaded her to break this contract, thus causing Lumley financial loss. The previous year, in *Lumley v Wagner* (1852), Lumley had failed to obtain an

4 Hart's (1973) discussion of "demystification" is less concerned with rhetoric or argumentation than with Jeremy Bentham's propositions for the clarification of the overly complex vocabulary of the law.

5 Full case references are given later in a separate section.

injunction for specific performance against the singer, and now hoped instead to obtain compensation from Gye. Although the judges agreed that Gye was morally blameworthy, it was difficult to see on what legal grounds he could be made liable for the financial loss. The theoretical point was therefore whether a malicious intent could make illegal an act which was otherwise legal, or alternatively whether the act of procuring a breach of contract should in itself be considered as a civil wrong.

According to the report, the case was originally argued before the court by the lawyers in terms of 'action on the case' the precursor of the modern law of tort. It raised questions of great complexity, involving anomalous statutes of doubtful applicability, and exceptions created by the common law. The first question to be decided was whether a 14th century statute, the *Statute of Labourers* (1348),[6] was applicable. This statute, adopted after the great plague, was originally directed to menial labourers, who were then in short supply, and functioned as a type of primitive wage-freeze. Its re-interpretation by judges of the late 19th century concerned both the scope of the Statute, and the definition of the master-servant relation.

The majority of the judges took the conventional view that the law should provide a remedy for all wrongs. Wightman J noted, referring to recent common law precedents, that the law now applied not just to agricultural labourers, but also to other workers in trade and industry.[7] He also mentioned those in domestic service.[8] Erle J suggested that the statute should now be interpreted to include theatrical performers, like

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6 "Many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness, than by labour to get their living; we considering the grievous incommodities, which of the lack especially of ploughmen and such labourers may hereafter come, have ordained. [...] that every person within the age of sixty, not living in merchandise, nor exercising any craft, nor having of his own whereof he may live, nor proper land which he may till himself, [shall] serve whoever might require him at such wages as were paid in the twentieth year of the King's reign or five or six other years before." (Preamble, *Statute of Labourers* 1348)

7 "[...] the remedies given by the common law are not in terms limited to any description of servant or service. The more modern cases give instances, and contain dicta of Judges, which appear to warrant a more extended application of the right of action for procuring a servant to leave his employment than that contended for by the defendant." (*Lumley v Gye* 1853, *per* Wightman J)

8 Readers of P.G. Wodehouse will remember how difficult it was for English landed gentry to secure the services of reliable servants, especially gifted cooks and chefs. The problem also gave rise to cases in defamation (see *Sim v Stretch*, 1936).

Miss Wagner; in his opinion, once it was established that a contractual right had been violated, the nature of the service contracted for should be immaterial.

In dissent, Coleridge J preferred to take a simpler view, in accordance with elementary logic, even though this led him to the conclusion that the common law was unable to provide a suitable remedy. He adopted a different characterisation of the facts, arguing that the case did not depend on a new form of tort but could be disposed of under the elementary rules of contract. Although his language is far from simple, whether on the level of terminology or of syntax, his argument is one of demystification.

Coleridge J started by reducing the question to its constituent parts, and by analysing the resulting disjunctive propositions. For Lumley to succeed, it must be true either that procuring a breach is always actionable, in whatever field, or alternatively that the precedents applying to domestic servants could be extended to opera singers:

> "In order to maintain this action, one of two propositions must be maintained; either that an action will lie against any one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action, for seducing a servant from the master or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of Johanna Wagner." (*Lumley v Gye* 1853, *per* Coleridge J)

In the judge's opinion, neither of these propositions was acceptable. The first was clearly in contradiction with the basic rule of contract which excludes actions by third parties. The second, purporting to extend the application of the old statute to new categories of employees, including opera singers, must also be rejected. In its preamble, the statute referred specifically to "the lack especially of ploughmen and labourers". In this context, the word 'servant', therefore, could only be understood as referring to manual workers.

In order to reinforce his point, Coleridge J also made use of other forms of rhetorical argument. In a classic example of the argument

from ignorance,[9] he affirmed that his own ignorance of any exceptions to the general rule was evidence that there were no such exceptions in the books.[10] He also used the argument from the absurd, suggesting that the proposed extension to the rule would lead to the absurd conclusion that, once a great artist like Joshua Reynolds had accepted a commission to paint a portrait, he would be considered a mere servant until the task was completed. From a practical point of view, it would also be difficult if not impossible for the judges to decide exactly why a party decided to abandon his contractual obligations.[11]

Coleridge J further invoked the slippery slope argument, insisting that it would be wrong to take the dangerous first step of declaring hitherto lawful acts unlawful, simply in order to obtain the desired result in this particular case; to create new remedies not provided for by the existing law would be to resort to judicial legislation and to risk weakening the institution itself.[12]

His reasoning is convincing precisely because it is simple and direct, and because his conclusion follows inevitably from his premises. He failed, however, to convince the majority, who found for the plaintiff. Coleridge's prescient prediction of regrettable and unfortunate consequences was soon confirmed in *Allen v Flood* (1895-9).

In *Allen v Flood*, an employment dispute, strict union rules prevented boilermakers from working with the non-unionist woodworkers Flood and Taylor. In order to preserve good relations with the boilermakers' union, the employer dismissed the two woodworkers, by the simple - and perfectly legal - device of refusing to

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9 Or the argument *ad ignorantiam* (Locke, 1690: B4, Ch. 17, s. 20).

10 "None of this reasoning applies to the case of a breach of contract : if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it." (*Lumley v Gye* 1853, *per* Coleridge J)

11 "There would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act." (*Lumley v Gye* 1853, *per* Coleridge J)

12 "It seems to me wiser to ascertain the powers of the instrument with which you work, and employ it only on subjects to which they are equal and suited; and that, if you go beyond this, you strain and weaken it, and attain but imperfect and unsatisfactory, often only unjust, results. But, whether this be so or not, we are limited by the principles and analogies which we find laid down for us, and are to declare, not to make, the rule of law." (*Lumley v Gye* 1853, *per* Coleridge J)

renew their contracts. There was no evidence of conspiracy, intimidation or coercion, and therefore no legal grounds for action against the employer. Instead, the newly redundant workers claimed, following *Lumley*, that Allen, representing the boilermakers' union, had acted maliciously in inducing the employer to discharge them from their employment.

The Court of Appeal followed the authority of *Lumley*. However, by a majority of 6-3, the House of Lords overruled. Lord Herschell considered that the union could not be held liable for the actions of the employer, especially as these actions were not illegal in any case. Like Coleridge J in the earlier case, he considered that any other decision would lead to unfortunate consequences.[13]

The question arises frequently in the law today, especially in cases where a trade union organises a strike, yet the rule remains of doubtful application.

However, Lord Halsbury, dissenting, continued to claim that the common law should provide a remedy for all wrongful acts. He succeeded in imposing his point of view a short time later in *Quinn v Leathem* (1901), in which the principle stated in *Allen v Flood* was rejected and *Lumley v Gye* reinstated. Lord Halsbury accepted that he was bound by the authoritative decision of the House of Lords in *Allen v Flood*; however, like the Tortoise in Carroll (1895), he continued to reject the logical implications of that ruling, on the grounds that the law was not a logical code.[14] For this reason, while admitting that it was difficult to "resist the Chief Baron's inflexible logic", he simply refused to follow it: "I cannot concur."

In spite of Lord Coleridge's proposal for common sense solution following the ordinary rules of contract, the majority in *Lumley v Gye* preferred a more complex solution, based on the law of tort. As predicted by Lord Coleridge himself, this resulted in new problems when similar questions came to be decided in the later cases, for example in *Allen v Flood* or *Quinn v Leathem*.

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13 "I regard the decision under appeal as one absolutely novel, and which can only be supported by affirming propositions far-reaching in their consequences and in my opinion dangerous and unsound." (*Allen v Flood* HL, *per* Lord Herschell)

14 "[A] case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." (*Quinn v Leathem* HL 1901, *per* Lord Halsbury)

2.2 *Candler v Crane Christmas* (1951)

Candler was originally presented as a contract case, in which the plaintiff was refused relief because as a third party, he had no contractual rights. Even if the facts revealed negligence, as it was a case of purely economic loss, the plaintiff would still be denied relief. Denning LJ treated the case as one of tortious negligence, using common sense arguments in an attempt to reject certain well-established precedents and to impose a more natural intuition of justice. His judgment is all the more convincing as it is expressed in remarkably clear and simple language.

A clerk working for the accountancy firm Crane Christmas prepared the accounts for a client company, according to instructions, knowing that they would be shown to potential investors. The results were misleading. The plaintiff, Candler, invested £2,000, only to lose all his money shortly afterwards, when the company went into liquidation. He attempted to claim compensation from the accountants.

Following the nineteenth century precedents of *Derry v Peek* (1889) and *Le Lievre v Gould* (1893), no remedy was available for economic loss caused by negligent statements acted on by third parties. Recovery was only allowed if the statement complained of was not just negligent but actually fraudulent. Denning LJ argued that these precedents had been wrongly interpreted and should no longer be accepted as part of the law.

Denning LJ made his conclusion clear even before stating the facts of the case, presenting the basic question as rhetorical, so that the answer followed naturally: "I come now to the great question in the case: Did the defendants owe a duty of care to the plaintiff? If the matter were free from authority, I should have said they clearly did owe a duty of care to him". His view was that any interpretation of the law which failed to achieve a just result must be mistaken.

He presented the failures of the company with exemplary clarity: the accounts gave an "altogether false picture of the position of the company; [...] there was no verification whatever by the defendants of the information which they were given [...] The defendants had entirely failed to use proper care and skill in the preparation and presentation of the accounts."

The accounts as presented by the junior clerk were clearly misleading in that they claimed as company assets freehold cottages which in fact belonged to the owner-director in his personal capacity, as well as leasehold buildings for which the leases had been forfeited for non-payment of rent. Denning LJ defended the concept of vicarious liability in particularly clear terms, concluding that the firm of accountants should be held liable for the actions of its employee.[15]

Knowing that the other judges considered themselves bound by authority to come to the opposite conclusion, Denning LJ simply affirmed that their view was mistaken. Two "cardinal errors" were involved. The first was that of Bowen LJ in *Le Lievre v Gould,* who had remarked that "the law of England [...] does not consider that what a man writes on paper is like a gun or other dangerous instrument". According to Denning, that principle had already been overruled (in *Donoghue v Stevenson,* 1932).

The second error concerned the supposed misinterpretation of *Derry v Peek* (1889). Denning could not accept that where damage was caused by negligent statements, such negligence should not give rise to legal action. The mere fact that no such action had previously been allowed should not prevent the court from doing justice in the new case.

His strongly argued opinion was nevertheless rejected by the majority, who preferred to follow the existing law. Asquith LJ accepted without question the authority of *Le Lievre v Gould*, which Denning had denied,[16] and considered that certainty in the law was more important than justice in the individual case.

On the rhetorical level, like both Coleridge J and Lord Herschell in the cases discussed above, Asquith LJ also used a slippery slope argument. He pointed out that the introduction of a new rule would lead inevitably to unfortunate and sometimes absurd consequences. If

15 "Practical good sense demands that, even though the master is not at fault himself, he should be responsible if the servant conducts himself in a way which is injurious to others. He takes the benefits of the servant's rightful acts and should bear the burden of his wrongful ones, and he is, as a rule, the only one who has the means to pay". (*Candler v Crane Christmas* 1951, *per* Denning LJ)

16 "[The defendants] rely in support of this contention on *Le Lievre v Gould*, a decision binding on this court. I agree with the learned judge in considering that authority to be conclusive in their favour unless it can be shown to have been overruled or to be distinguishable." (*Candler v Crane Christmas* 1951, *per* Asquith LJ)

liability for negligent statements was extended as proposed to allow claims by third parties, then a marine hydrographer who carelessly omitted to indicate on his map the existence of a reef would be potentially liable to the owners of the 'Queen Mary', if that ocean liner should come aground, for millions of pounds.

Denning had replied in advance to a similar argument proposed by the American judge Cardozo CJ, according to which an accountant could not be liable to third parties because he would then be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultra Marine Corp v Touche* 1931, *per* Cardozo CJ). His opinion was that this result could be avoided by the good sense of the judges, who would be able to limit the damages to what was reasonable in the particular circumstances. More aggressively, in the course of his judgment, Denning LJ suggested that those who persisted in slavishly following outdated precedents instead of taking the bold step of rejecting them should be considered as "timorous souls", reluctant to allow improvements in the law.[17] In giving his subsequent judgment, Asquith LJ stoically accepted this accusation of timidity, thus creating a rare impression of judicial dialogue.[18]

Denning LJ's demystification argument appeared persuasive not just because it was expressed in simple language but also because it cut through the purely technical problems and appealed directly to common sense. However, it failed to convince the majority. His opinion was nevertheless approved some years later by Lord Devlin in *Hedley Byrne Co v Heller & Partners* (1964).[19] In the new case, in 1964, the House of Lords accepted the view first expressed by Lord Denning in

17 "On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed." (*Candler v Crane Christmas* 1951, *per* Denning LJ)

18 "I am not concerned with defending the existing state of the law or contending that it is strictly logical. It clearly is not - but I am merely recording what I think it is. If this relegates me to the company of 'timorous souls', I must face that consequence with such fortitude as I can command." (*Candler v Crane Christmas* CA 1951, *per* Asquith LJ)

19 "I am prepared to adopt any one of your lordships' statements as showing the general rule; and I pay the same respect to the statement by Denning LJ in his dissenting judgment in *Candler v Crane, Christmas* about the circumstances in which he says a duty to use care in making a statement exists." (*Hedley Byrne Co v Heller & Partners* HL1964, *per* Lord Devlin)

his dissenting judgment in the Court of Appeal, thus discreetly departing from the old rule.

2.3 *Olley v Marlborough Court* (1948)

Like *Lumley v Gye*, *Olley* was concerned with the interpretation of old statutes. The case was argued by the parties in terms of tortious negligence. The question raised was that of liability for the loss of Violet Olley's belongings, including a fur coat, a hatbox and some jewellery valued at £50, stolen from her hotel room on 7 November, 1945. The hotel managers had been negligent in not keeping a closer watch over the room keys. On the other hand, the problem would not have arisen if Mr and Mrs Olley had availed themselves of the safe deposit box offered by the hotel as a service to clients.

The question was complicated by the fact that according to the existing law, the result depended on whether the establishment should be considered a common law inn or as a simple boarding house. If Marlborough Court was a common law inn, then the *Innkeeper's Liability Act* (1863) applied, and liability would be limited.

The *Innkeepers Liability Act* was passed at a time of horse-drawn transport, when travellers were frequently obliged to interrupt their journeys overnight. Innkeepers were required to display a notice informing clients that the inn was liable for "loss of or injury to horses or other live animals or any gear appertaining thereto, or any carriage". However, liability for other property was limited to £30, which now seems very low. An exception applied in cases of "wilful act, default, or neglect" on the part of the innkeeper, in which case the limit on liability would not apply.

Although the owner-managers displayed the notice imposed by the Act of 1863, they nevertheless denied that they were operating a common law inn, claiming that they were in fact running a private hotel. They preferred to rely on another notice displayed behind the door in the individual rooms, according to which: "The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained." If this notice succeeded in excluding liability altogether, then the question of limitation was no longer relevant.

In the Court of Appeal, Bucknell LJ pointed out that the two notices displayed were in contradiction with each other, and that guests would find it difficult to reach a clear understanding of their rights and obligations. Singleton LJ, concurring, considered it unnecessary to take a decision as to whether or not the hotel was a common law inn, as once negligence had been proved, the proprietors would be liable for the loss in any case. The question nevertheless remained as to whether the notice behind the bedroom door succeeded in avoiding liability for negligence. Singleton LJ found this question difficult: "But there ought to be some certainty in a matter of this kind, and there is none." Nevertheless, the court confirmed the order for payment of £329 2s.0d. by the hotel.

Denning LJ, speaking last, concurred in the result, but proposed much simpler reasoning. In his view, the case did not depend on liability in tort, but could be disposed of under the basic rules of contract. On this view, it was unnecessary to decide whether Marlborough Court was a common-law inn or a private hotel, or indeed to prove negligence at all.

He admitted that the couple could hardly deny having read the notice displayed in their room, as they had taken up residence in May 1945, six months before the theft took place. However, this made no difference. In contract, no clause can be introduced after the agreement has been made. It followed that the exclusion clause would only be valid if it had been properly communicated at that time. Here, the agreement was originally made in the reception office before the couple saw the notice in their room upstairs. The notice therefore afforded no protection to the owner-managers. That was enough to dispose of the case. The complex questions raised on the subject of tortuous liability could simply be ignored.

Denning's argument in *Olley v Marlborough Court* was given in terms of contract rather than tort, and was based on failure of communication. However, even if it is accepted that the exclusion clause behind the bedroom door could only be valid if the couple were aware of it before the date of the contract, rather than before the date of the theft, it could nevertheless be argued that the contract had been tacitly renewed, probably weekly, over the previous six months. If the exclusion clause had not been properly communicated the first time an

agreement was made, the couple would naturally have been aware of it on the subsequent occasions.

However, as Denning LJ's was a concurring judgment, it made no different to the result of the instant case. He may have seen *Olley v Marlborough Court* primarily as an opportunity to clarify legal policy regarding exclusion clauses in general. Indeed, if the general principle applied even in such extreme circumstances, must be considered as a rule of law, no longer subject to judicial discretion. Because of this, it is now more difficult for unscrupulous companies to impose unfair contractual terms on consumers. As well as helping to establish the result of the particular case, Denning's alternative justification thus had the effect of deciding the law itself as it would apply subsequently. His judgment in *Olley v Marlborough Court* is now cited as a landmark case in contract law.

3 *Alternative justifications and constructive insincerity*

The examples discussed above examples show that different judges may take different views of the facts in order to analyse the case under a different area of law. Where a simpler view is taken, in order to refute a more complex approach which has led to an unsatisfactory result, this gives rise to a specific form of argumentation, here called 'demystification'. However, this is merely a particular case of a more general phenomenon, which arises wherever the legal debate concerns the rule to be applied and the result depends on the perspective adopted.

Such alternative categorisations of the facts are surprisingly common in legal opinions. The phenomenon may be observed not just in English but also in contemporary American cases, for example in the recent Supreme Court case of *Sorrell v IMS Health* (2011). In this case, Vermont's "prescription confidentiality" law, prohibiting the use of records of confidential medical prescriptions for marketing purposes, was struck down by the US Supreme Court. The majority argued that such a prohibition was an unacceptable restriction on free speech. Justice Breyer, dissenting, considered on the contrary that it was merely an instance of justifiable commercial regulation. It will be remarked that the alternative conceptions of the facts presented by the different judges cannot be explained in terms of rhetorical simplicity.

A further problem is raised by the fact that each individual judge must be assumed to be potentially aware of the different available conceptions of the facts. Adjudication must then be taken to involve a choice between alternative conceptions of the applicable law, which may not have been explicitly introduced. However, once it is admitted that a plurality of justifications is possible, then it is clear that the reasoning presented in the final judgment given need not necessarily correspond to the true motivation. If the judge is conscious of making a deliberate choice among the available viewpoints, then his judgment may not always be sincere. Nevertheless, as it depends on the conception of the law adopted, the justification proposed cannot be rejected as false or invalid.

The availability of alternative conceptions of the facts is in itself unsurprising as, contrary to popular assumption, 'facts' are strange entities which are not directly observable. Indeed, no one has ever seen a fact. As Austin (1961) pointed out, although they are normally classified as empirical, facts are not like handkerchiefs, and cannot be put in your pocket. Even in physics, the facts to be explained are normally defined relative to a dominant scientific paradigm (Kuhn, 1962). By questioning the distinction between analytic and synthetic statements, Quine (1951) showed more generally that meaning, and therefore thought itself, was theory-laden. All reasoning must therefore depend to some extent on the categorisation of the facts under consideration. However, this gives rise to a potential lack of identity between the given justification and the original motivation.

This problem is clearly apparent in many areas of public life. Indeed, the problem is so common that it may constitute the normal case. If so, the concept of an idealised "deliberative discourse", proposed by Habermas (1996, p. 4) as a prerequisite for dialectic analysis, may be so unreal as to have no genuine function in public debate.[20] Indeed, in ordinary, everyday situations, when required to give retrospective justifications, speakers are rarely sincere. On the

20 "[Communicative reason] has a normative content only insofar as the communicatively acting individuals must commit themselves to pragmatic presuppositions of a counterfactual sort. That is, they must undertake certain idealizations - for example, ascribe identical meanings to expressions, connect utterances with context-transcending validity claims, and assume that addressees are accountable, that is, autonomous and sincere with both themselves and others." (Habermas, 1996, p. 4).

contrary, their justifications are normally rationalised, usually to the advantage of the speaker. In politics, justifications often amount to no more than a pretext put out for public consumption. Examples may be multiplied. President Sarkozy of France justified his sudden 2008 decision to discontinue advertising on public service television by reference to the improved quality of the viewing experience. However, many suspect that his real purpose was to increase revenue for the private stations, owned and run by his rich supporters. His 2011 decision to increase tax on fizzy drinks was presented by his government as motivated by concern for the nation's health; however it seemed clear to taxpayers that his main purpose was to maximise revenue. More seriously, Tony Blair, former Prime Minister of the United Kingdom, unguardedly let slip in a television interview (with Fern Brittan) that if it had been discovered before the event that Saddam had no weapons of mass destruction, he would still have thought it right to invade Irak - he would simply have found a different justification for public consumption.[21]

In situations like this, the justification proposed cannot be said to be true or false, and cannot therefore be easily refuted. This problem is sometimes mentioned explicitly. After the referendum in which the Irish rejected the proposed European Constitution (or Constitutional Treaty), it was proposed, for example, by members of the House of Lords in London, to abandon the process of ratification in the United Kingdom. To the objection that the Irish referendum was a mere pretext, suggested by those who had intended to vote against ratification in any case, Lord Howell replied in a BBC interview: "It may be a pretext but it is also true".

A similar problem occurs in legal judgments. In its simplest manifestation, this may be illustrated by reference to the "hunch theory" of law, according to which cases are often decided initially by intuition (Llewellyn, 1930, p. 98). Those who subscribe to this view of adjudication see the judgment as an *a posteriori* legal justification for a

21 Q (F. Brittan): "If you had known then that there were no WMDs, would you still have gone on?" A (T. Blair): "I would still have thought it right to remove him. I mean, obviously you would have had to use ... um, deploy different arguments, about the nature of the threat, but I find it quite ... I mean I've been out there for so many years..." (T. Blair interview, BBC1, 11/12/2009)

decision originally based on the judge's intuitive notion of justice. However, in this case, the technical justification proposed may include reasons which the judge did not have in mind when he made his original decision. Conversely, if, for rhetorical reasons, he prefers to present a simplified, and therefore more persuasive version of a complex legal argument, then this may not correspond to the true legal grounds on which the decision was based. In either case, it is possible to distinguish between the justification given and the true reason for the decision. Clearly, where there is no agreement on the nature of the facts under discussion, or on the question to be asked, the alternative viewpoints proposed may potentially affect the result of the case. Yet it is fundamental to the rule of precedent that the judge's reasoning is more important than the result of the particular case.

The fact that no legal justifications can be totally objective may go some way to providing a partial theoretical explanation for persistent suspicions of unconscious bias on the part of judges. There are many cases in which such suspicions appear legitimate It is common, for example, for a judge to claim that he is bound to come to a particular decision, which others may find regrettable. He may claim to find it regrettable himself. Yet the very fact that he feels obliged to insist on this point means that it is unlikely to be true. His choice of perspective in such cases is likely to be constrained not by the law, but rather by convenience. One such case is Lord Mansfield's judgment in the manifestly political case of *R v Wilkes* (1770), when, in the face of a popular uprising (explicitly mentioned in the judgment itself), he found an excuse to reverse an earlier declaration of "outlawry". He denied that the problem raised was anything other than a purely technical question of law, and claimed that he was objectively bound to reach that particular result. Yet his justification was highly artificial, being based on forgotten, irrelevant and unpersuasive precedents.[22] Assuming the judge did not tailor his conclusion to the popular will, it is more likely that this was simply a pretext in order to avoid a direct declaration that the earlier decision was taken in error. Lord Mansfield must have been

22 "I beg to be understood, that I ground my opinion singly upon the authority of the cases adjudged; which, as they are on the favourable side, in a criminal case highly penal, I think ought not to be departed from : and therefore I am bound to say that, for want of these technical words, the outlawry ought to be reversed." (*R v Wilkes*, 1770, *per* Lord Mansfield)

naturally reluctant to overrule a decision which had been taken in deference to the King himself.

Numerous more recent examples may be proposed. *Bromley LBC v GLC* (1982) also concerned a political question. Ken Livingston, the newly elected Mayor of London, had promised to reduce the cost of underground transport by 50%. Mrs Thatcher attempted to prevent the adoption of this policy by reducing funding from central government. (In order to prevent control of the city by the Labour party, she later abolished the Greater London Council altogether.) The new mayor hoped nevertheless to raise the necessary funds from local taxation. This went against the interests of those living in the richer suburbs, including Bromley, whose inhabitants rarely travelled on the underground. In the subsequent judicial procedure, the Court of Appeal, whilst claiming to be impartial, ignored any possible external benefits to the city, and held that because the new Mayor was obliged to ensure that the Underground network was run in a "businesslike" manner, he did not have the right to keep his campaign promise.[23] This decision was confirmed, again unanimously, by the House of Lords. Although there was no relevant precedent, both Courts claimed, unconvincingly, that politics was irrelevant to the decision, that the law was clear and that they therefore had no choice in the matter.[24] Even assuming the judges were not influenced by the fact that they themselves did not habitually travel on the tube, and were therefore unlikely to benefit from the measure. it is nevertheless difficult to refute the suggestion that they were instinctively opposed to this socialist and egalitarian policy.

23 "In giving such weight to the manifesto, I think the majority of the council were under a complete misconception. A manifesto issued by a political party - in order to get votes - is not to be taken as gospel. It is not to be regarded as a bond, signed, sealed and delivered. ... My conclusion is that the actions here of the G.L.C. went beyond their statutory powers and are null and void". (*Bromley LBC v GLC* 1982, *per* Denning LJ)

24 "Accordingly, I accept the Bromley submission that the Act requires that fares be charged at a level which will, so far as practicable, avoid deficit. I do not discuss the difficult problem of what is meant by 'so far as practicable.' For it is plain that the 25 per cent. overall reduction was adopted not because any higher fare level was impracticable but as an object of social and transport policy. It was not a reluctant yielding to economic necessity but a policy preference. In so doing the G.L.C. abandoned business principles. That was a breach of duty owed to the ratepayers and wrong in law." (*Bromley LBC v GLC* 1982, *per* Lord Scarman)

In *Mandla v Dowell Lee* (1983) a unanimous Court of Appeal found, in a case of indirect discrimination, that the terms of the *Race Relations Act* (1976) did not provide any protection to Sikhs, as this was a religion rather than a racial or ethnic group and, as the judges supposed, there was no relation between religious and racial discrimination. It was claimed, on shaky etymological grounds, notably concerning the meaning and origin of the word 'ethnic', that there was no alternative to this decision. Lord Denning went so far as to regret that the Commission for Racial Equality had brought the case in the first place.[25] Yet, although none of the judges could be accused of racism, it is probable that they were instinctively opposed to any extension of the RRA which would allow turbans to be worn instead of conventional school uniforms. Some support for this view may be derived from the fact that, when the case was heard on appeal the following year, the House of Lords, again unanimously, came to the opposite conclusion.

In many cases, some form of unconscious bias appears inevitable, leading to a divergence between the legal justification proposed and the true reason for the decision. However, this may be to the advantage of the legal institution. Given that the judge's personal preferences cannot be excluded, it would be unfortunate if they were stated explicitly in the form of binding precedents, and become decisive in subsequent adjudication. An unquestioning insistence on sincerity for its own sake would in such circumstances be detrimental to the rule of law. A case in point is *Hadley v Baxendale* (1854), in which the contradiction between the justification and the result appears particularly clearly.

Hadley is cited in modern textbooks as authority for the rule of reasonable foreseeability governing the measurement of damages payable for breach of contract. However, as generations of students have been too polite to notice,[26] that rule was not followed in the case itself. It was admitted in evidence, and it is clearly stated in the report, that the carrier, Pickford's, had been explicitly informed of the lack of a

25 "Even though the discrimination may be unfair or unreasonable, there is nothing unlawful in it ... I cannot pass from this case without expressing some regret that the Commission for Racial Equality thought it right to take up this case against the headmaster." *Mandla v Dowell Lee* CA 1982, *per* Denning LJ)

26 Scalia (1977, p. 6) had no such scruples.

replacement for the crank-shaft taken for repair. The risk of loss of profit was therefore not just foreseeable but actually known. If the judges had respected their own rule, they would therefore have reached the opposite result, and the miller, Hadley, would have won the case. Further suspicions are aroused by the fact that Baron Parke, an acknowledged expert in cases involving common carriers, and therefore a principal contributor to this particular decision, must have known Baxendale, at least by reputation. Baron Parke's brother was Baxendale's predecessor as manager of Pickfords Movers (Danzig 1975, p. 267, n 72).

An official judgment drafted to justify the actual result, although possibly more sincere, would have been unfortunate for the development of the law.

4 **Conclusion**

The result of the case frequently depends on the legal categorisation of the facts. In the law, as in other fields, the facts can only be defined relative to the view taken of the applicable law. Where the different theories of the case are introduced explicitly into the judgments, this gives rise to a specific form of legal argumentation, often based on rhetorical simplicity. In using an argument from demystification, one judge attempts to refute a complex conception of the case, which he sees as leading to an unsatisfactory result or possibly to logical contradiction, by adopting an alternative view. He proposes a simpler solution which corresponds better to his intuition of justice. It is notable that, while the reasoning and logical structure of his judgment may be clearer and more convincing than those of his opponents, the same need not be true of language used, either on the level of syntax or of vocabulary. In *Lumley v Gye* (1853), Coleridge J used a demystification argument whilst preserving a certain complexity of style. Other judges, however, including notably Lord Denning in *Candler v Crane Christmas* (1951) and in *Olley v Marlborough Court* (1948), are celebrated for their clarity of expression.

Even where competing views of the case do not figure explicitly in the judgment, they may nevertheless play an important role in the thought processes of the individual judges. Their availability in any

given case means that adjudication always requires a choice between the conflicting views, even where these remain implicit.

The fact that different viewpoints can be adopted in a single case shows that there is always room for disagreement and debate concerning the legal characterisation of the facts. Indeed, the availability of alternative conceptions is a source of indeterminacy in law. As the 'facts' depend on alternative conceptions, they cannot be the basic starting point of any analysis. Even in France, where the "categorisation" of the facts (or 'qualification des faits') is a fundamental part of legal training, such problems remain fundamental (see Cayla, 1993 and Rigaux, 1999). However, disagreement amongst judges on this point is rarely disclosed in French judgments ('arrêts'), partly because dissenting judgments are rarely published, and partly because such fundamental decisions are in any case unlikely to be reconsidered during the procedure.

As in other fields where decisions are justified retrospectively, the justification need may not necessarily correspond to the true reason for the decision. Yet, because alternative justifications depend on different conceptions of the facts, rather than the facts themselves, they cannot be evaluated as true or false, although they may be insincere. This means that there can be no clear distinction between a legal justification and a mere pretext. However, there is a sense in which insincerity may have a positive effect. Given that personal bias can never be totally eliminated, it is preferable for judgments to be motivated in conformity with the best interests of the law, even in cases where the actual decision may have been arrived at in a questionable way. This conclusion is relevant both to our understanding of legal judgments and to the development of the law.

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