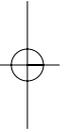
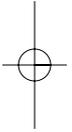


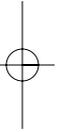
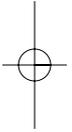


# Part I

## Legal Reasoning

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# Introduction

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Legal reasoning is at the heart of law. It is what lawyers do when they argue court cases. It is also what judges do when they decide cases. Most philosophical theories of legal reasoning – that is, philosophical explanations and justifications of legal reasoning, including those presented here – focus on what judges do or should be doing when they decide court cases.

How judges create and use precedents is the central focus of Edward H. Levi's essay, which is taken from his seminal book, *An Introduction to Legal Reasoning* (1949). For Levi, the basic pattern of legal reasoning is reasoning by example, or reasoning from case to case. It proceeds in three basic steps: similarity is seen between two cases, the rule of law inherent in the first case is articulated, and the rule is applied to the second case. Finding similarities or differences between cases, a function of judges, is central to this conception of legal reasoning. Law is a system of rules that are discovered in the process of finding similarity and difference. Rather than being unchanging, rules are dynamic, changing in meaning with each new application to a case. Reasoning by example explains how new ideas for the community enter the law, as well as how litigants participate in law-making – for new ideas enter the law through arguments made by individual litigants in particular cases. Not only is reasoning by example the basic pattern of legal reasoning in case law, but it also applies with

minor adjustments to the reasoning involved in statutory and constitutional interpretation.

In "Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed," Karl N. Llewellyn examines how judges interpret statutes. It is generally assumed that there is a "correct" way to read and construe a statute. Judges often use canons of statutory interpretation, which are used to help guide them in making a proper reading of the statute. Llewellyn argues that canons will not help a judge find a "correct" way to understand a statute. To illustrate his point, he made a chart in which he aligned canons by "Thrusts" and "Parries." As he shows, for each canon labeled as a "Thrust," there is an opposite canon that acted as a "Parry." Each canon, then, also had an opposite counterpart. From this Llewellyn, argues that "if a statute is to make sense, it must be read in light of some assumed purpose." To assume that a statute just merely declares a rule is "nonsense."

In "Formalism," Frederick Schauer defends the theory of legal formalism. Schauer's insight is that decision-making according to rules lies at the heart of formalism. Because there is much to be said in favor of decision-making according to rules, there is much, also, to commend in formalism. According to Schauer, the main objection to formalism is that it conceals the fact that, in deciding cases, judges make choices. This

is problematic because the legal system becomes unpredictable. In response, Schauer asks the reader to consider a legal system in which several conditions obtain. First, the meanings of legal rules are clear and settled. Second, the rules clearly apply in particular cases. Third, no escape routes exist. Fourth, no ways of creating escape routes exist. This kind of system, Schauer thinks, suggests a benign formalism – that is, a formalism that does not conceal judicial choices. This kind of system would display decision-making according to rules. What can be said on its behalf?

For one thing, one could predict the decisions made in such a system. But decision-making according to rules is predictable, Schauer argues, because of limited decisional jurisdiction. Decisional jurisdiction is the idea that the choices of decision-makers can be more or less restricted in scope. When one restricts decision-makers' scope of choice, one increases the predictability of their decisions by limiting the range of factors that can influence such decisions. A system with limited decisional jurisdiction is inherently more stable and conservative than one in which decision-makers have greater latitude of choice. A drawback of such a system is that it could tend toward rigidity and result in some absurd decisions. But formalism, Schauer claims, is not fundamentally about rigidity and absurdity. It is about power and its allocation. That formalism sometimes results in rigid and possibly absurd decisions might be offset by the fact that it requires modesty on the part of decision-makers. Formalism is less than optimal when it prevents wise judges from making good decisions, but it is beneficial when it prevents corrupt or foolish judges from abusing power. Schauer concludes his essay by arguing for a form of presumptive formalism.

In "Incompletely Theorized Agreements," Cass R. Sunstein argues that particular legal conclusions are and should be reached on the basis of incompletely theorized agreements. To explain what this means, Sunstein argues that one can identify several levels of abstraction in legal reasoning. At the most concrete or specific levels are particular conclusions of law – that is, the individual decisions that judges make. At the next level are low-level principles, such as the clear-and-present-danger rule. Mid-level

principles and generalizations, such as freedom of speech, are even more abstract. At the highest level of abstraction are general ethical theories, such as Kantianism and utilitarianism, or commitments to quite abstract values, such as equality or personal autonomy. Sunstein focuses on incompletely theorized agreements on particular outcomes that are accompanied by agreement on the low-level principles that account for them. His view is that even when judges and other participants in the legal and political system disagree on higher-level principles and theories, they can agree on particular conclusions and lower-level principles.

In the next essay, "Custom, *Opinio Juris*, and Consent," by Larry May, we look at legal reasoning and international law. Much legal reasoning begins with a reference to custom or to common law considerations. The references to custom are especially common and yet also problematic in international law. One specific part of custom, *opinio juris*, is of special theoretical interest. *Opinio juris* concerns a longstanding custom where the states act in conformity with the custom and explain their actions in terms of being legally or morally obligated. In this essay, Larry May offers a critique of the use of custom based on *opinio juris* in reasoning about international law. Standing alone, custom cannot supply the justification for the kind of universal norms that international legal reasoning needs. *Opinio juris*, though, can supply evidence that universal norms already exist. Custom can be grounded in the consent of states, but it cannot be the ground of universal norms without something other than consent, which can of course be withdrawn as easily as it can be granted. Along the way, May considers a wide range of examples of the use of *opinio juris* and custom in international law.

We conclude this section with *Lochner v. New York* (1905), which is an example of legal formalism in action. In this case, *Lochner*, the plaintiff, appealed a ruling by the New York Court of Appeals upholding his conviction by a lower court. The lower court convicted *Lochner* of a misdemeanor for violating New York's labor law by permitting and requiring an employee to work in his bakery for more than 60 hours in one week. Writing for a majority of the Supreme Court (five to four), Justice Rufus

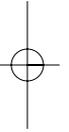
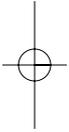


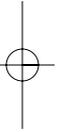
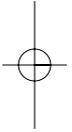
INTRODUCTION TO LEGAL REASONING

Peckham overruled the Court of Appeals' decision and struck down the labor law in question as a violation of the US Constitution. Central to Justice Peckham's disposition of the case is the bare assertion that the right to make business contracts is part of the liberty of the individual, which is protected by the Fourteenth Amendment. This assertion is bolstered by the subsidiary contentions that the freedom to make labor contracts extended to both parties, the employer and the employee, and that, in this case, there is no legitimate reason, such as public health concerns, for the state to restrict the hours of employment on which the parties agreed. Based on this reasoning, Justice Peckham concludes that New York's labor law is an unnecessary and unjustified

intrusion of the police power of the state into the liberty of the individual as guaranteed by the Fourteenth Amendment, and strikes it down as unconstitutional.

Justice Peckham took it to be true by definition that the meaning of the term "liberty" in the Fourteenth Amendment includes the right of employer and employee to make labor contracts without government intrusion. However, one might argue, following Justice Homes's dissent, that Justice Peckham chose an interpretation of the term liberty that supports his own favorite economic theory, laissez-faire, and used in this case to combat the emergence of the modern welfare state by attacking protective labor laws.





## 1

# An Introduction to Legal Reasoning

*Edward H. Levi*

## I

This is an attempt to describe generally the process of legal reasoning in the field of case law and in the interpretation of statutes and of the Constitution. It is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack.<sup>1</sup> In an important sense legal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible. The mechanism accepts the differences of view and ambiguities of words. It provides for the participation of the community in resolving the ambiguity by providing a forum for the discussion of policy in the gap of ambiguity. On serious controversial questions, it makes it possible to take the first step in the direction of what otherwise would be forbidden ends. The mechanism is indispensable to peace in a community.

The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are

these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. This is a method of reasoning necessary for the law, but it has characteristics which under other circumstances might be considered imperfections.

These characteristics become evident if the legal process is approached as though it were a method of applying general rules of law to diverse facts – in short, as though the doctrine of precedent meant that general rules, once properly determined, remained unchanged, and then were applied, albeit imperfectly, in later cases. If this were the doctrine, it would be disturbing to find that the rules change from case to case and are remade with each case. Yet this change in the rules is the indispensable dynamic quality of law. It occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.

The determination of similarity or difference is the function of each judge. Where case law is considered, and there is no statute, he is not bound by the statement of the rule of law made

Edward H. Levi, "An Introduction to Legal Reasoning," from *An Introduction to Legal Reasoning* (The University of Chicago Press, 1949), © 1949 by the University of Chicago Press. Reprinted with permission from the University of Chicago Press.

by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification. In arriving at his result he will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference. It is not alone that he could not see the law through the eyes of another, for he could at least try to do so. It is rather that the doctrine of dictum forces him to make his own decision.

Thus it cannot be said that the legal process is the application of known rules to diverse facts. Yet it is a system of rules; the rules are discovered in the process of determining similarity or difference. But if attention is directed toward the finding of similarity or difference, other peculiarities appear. The problem for the law is: When will it be just to treat different cases as though they were the same? A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in common brings into play the general rule. If this is really reasoning, then by common standards, thought of in terms of closed systems, it is imperfect unless some overall rule has announced that this common and ascertainable similarity is to be decisive. But no such fixed prior rule exists. It could be suggested that reasoning is not involved at all; that is, that no new insight is arrived at through a comparison of cases. But reasoning appears to be involved; the conclusion is arrived at through a process and was not immediately apparent. It seems better to say there is reasoning, but it is imperfect.

Therefore it appears that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them. But this kind of reasoning is open to the charge that it is

classifying things as equal when they are somewhat different, justifying the classification by rules made up as the reasoning or classification proceeds. In a sense all reasoning is of this type, but there is an additional requirement which compels the legal process to be this way. Not only do new situations arise, but in addition peoples' wants change. The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. And this is true even where legislation or a constitution is involved. The words used by the legislature or the constitutional convention must come to have new meanings. Furthermore, agreement on any other basis would be impossible. In this manner the laws come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case.

But attention must be paid to the process. A controversy as to whether the law is certain, unchanging, and expressed in rules, or uncertain, changing, and only a technique for deciding specific cases misses the point. It is both. Nor is it helpful to dispose of the process as a wonderful mystery possibly reflecting a higher law, by which the law can remain the same and yet change. The law forum is the most explicit demonstration of the mechanism required for a moving classification system. The folklore of law may choose to ignore the imperfections in legal reasoning, but the law forum itself has taken care of them.

What does the law forum require? It requires the presentation of competing examples. The forum protects the parties and the community by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged. In this sense the parties as well as the court participate in the law-making. In this sense, also, lawyers represent more than the litigants.

Reasoning by example in the law is a key to many things. It indicates in part the hold which the law process has over the litigants. They 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.

Reasoning by example shows the decisive role which the common ideas of the society and the distinctions made by experts can have in shaping the law. The movement of common or expert concepts into the law may be followed. The concept is suggested in arguing difference or similarity in a brief, but it wins no approval from the court. The idea achieves standing in the society. It is suggested again to a court. The court this time reinterprets the prior case and in doing so adopts the rejected idea. In subsequent cases, the idea is given further definition and is tied to other ideas which have been accepted by courts. It is now no longer the idea which was commonly held in the society. It becomes modified in subsequent cases. Ideas first rejected but which gradually have won acceptance now push what has become a legal category out of the system or convert it into something which may be its opposite. The process is one in which the ideas of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions. Erroneous ideas, of course, have played an enormous part in shaping the law. An idea, adopted by a court, is in a superior position to influence conduct and opinion in the community; judges, after all, are rulers. And the adoption of an idea by a court reflects the power structure in the community. But reasoning by example will operate to change the idea after it has been adopted.

Moreover, reasoning by example brings into focus important similarity and difference in the interpretation of case law, statutes, and the constitution of a nation. There is a striking similarity. It is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case. Fortunately or otherwise, ambiguity is inevitable in both statute and constitution as well as with case law. Hence reasoning by example operates with all three. But there are important differences. What a court says is dictum, but what a legislature says is a statute. The reference of the

reasoning changes. Interpretation of intention when dealing with a statute is the way of describing the attempt to compare cases on the basis of the standard thought to be common at the time the legislation was passed. While this is the attempt, it may not initially accomplish any different result than if the standard of the judge had been explicitly used. Nevertheless, the remarks of the judge are directed toward describing a category set up by the legislature. These remarks are different from ordinary dicta. They set the course of the statute, and later reasoning in subsequent cases is tied to them. As a consequence, courts are less free in applying a statute than in dealing with case law. The current rationale for this is the notion that the legislature has acquiesced by legislative silence in the prior, even though erroneous, interpretation of the court. But the change in reasoning where legislation is concerned seems an inevitable consequence of the division of function between court and legislature, and, paradoxically, a recognition also of the impossibility of determining legislative intent. The impairment of a court's freedom in interpreting legislation is reflected in frequent appeals to the constitution as a necessary justification for overruling cases even though these cases are thought to have interpreted the legislation erroneously.

Under the United States experience, contrary to what has sometimes been believed when a written constitution of a nation is involved, the court has greater freedom than it has with the application of a statute or case law. In case law, when a judge determines what the controlling similarity between the present and prior case is, the case is decided. The judge does not feel free to ignore the results of a great number of cases which he cannot explain under a remade rule. And in interpreting legislation, when the prior interpretation, even though erroneous, is determined after a comparison of facts to cover the case, the case is decided. But this is not true with a constitution. The constitution sets up the conflicting ideals of the community in certain ambiguous categories. These categories bring along with them satellite concepts covering the areas of ambiguity. It is with a set of these satellite concepts that reasoning by example must work. But no satellite concept, no matter how well developed, can prevent the court from

shifting its course, not only by realigning cases which impose certain restrictions, but by going beyond realignment back to the over-all ambiguous category written into the document. The constitution, in other words, permits the court to be inconsistent. The freedom is concealed either as a search for the intention of the framers or as a proper understanding of a living instrument, and sometimes as both. But this does not mean that reasoning by example has any less validity in this field.

## II

It may be objected that this analysis of legal reasoning places too much emphasis on the comparison of cases and too little on the legal concepts which are created. It is true that similarity is seen in terms of a word, and inability to find a ready word to express similarity or difference may prevent change in the law. The words which have been found in the past are much spoken of, have acquired a dignity of their own, and to a considerable measure control results. As Judge Cardozo suggested in speaking of metaphors, the word starts out to free thought and ends by enslaving it. The movement of concepts into and out of the law makes the point. If the society has begun to see certain significant similarities or differences, the comparison emerges with a word. When the word is finally accepted, it becomes a legal concept. Its meaning continues to change. But the comparison is not only between the instances which have been included under it and the actual case at hand, but also in terms of hypothetical instances which the word by itself suggests. Thus the connotation of the word for a time has a limiting influence – so much so that the reasoning may even appear to be simply deductive.

But it is not simply deductive. In the long run a circular motion can be seen. The first stage is the creation of the legal concept which is built up as cases are compared. The period is one in which the court fumbles for a phrase. Several phrases may be tried out; the misuse or misunderstanding of words itself may have an effect. The concept sounds like another, and the jump to the second is made. The second stage is the period when the concept is more or less

fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desired.

The process is likely to make judges and lawyers uncomfortable. It runs contrary to the pretense of the system. It seems inevitable, therefore, that as matters of kind vanish into matters of degree and then entirely new meanings turn up, there will be the attempt to escape to some overall rule which can be said to have always operated and which will make the reasoning look deductive. The rule will be useless. It will have to operate on a level where it has no meaning. Even when lip service is paid to it, care will be taken to say that it may be too wide or too narrow but that nevertheless it is a good rule. The statement of the rule is roughly analogous to the appeal to the meaning of a statute or of a constitution, but it has less of a function to perform. It is window dressing. Yet it can be very misleading. Particularly when a concept has broken down and reasoning by example is about to build another, textbook writers, well aware of the unreal aspect of old rules, will announce new ones, equally ambiguous and meaningless, forgetting that the legal process does not work with the rule but on a much lower level.

The movement of legal concepts in case law has frequently been shown by pointing to the breakdown of the so-called “inherently dangerous” rule. It is easy to do this because the opinion in *MacPherson v. Buick Motor Co.*<sup>2</sup> is the work of a judge acutely conscious of the legal process and articulate about it. But *MacPherson v. Buick* was only a part of a cyclical movement in which differences and similarities first rejected are then adopted and later cast aside. The description of the movement can serve as an example of case law. Roughly the problem has become: the potential liability of a seller of an article which causes injury to a person who did not buy the article from the seller. In recent times the three phases in the movement of the concepts used in handling this problem can be traced.

The first of these begins in 1816 and carries us to 1851. It begins with a loaded gun and ends with an exploding lamp. The loaded gun brought liability to its owner in the case of *Dixon v. Bell*.<sup>3</sup>

He had sent his thirteen- or fourteen-year-old servant girl to get the gun; in playing with the gun she had shot it off into the face of the plaintiff's son, who lost his right eye and two teeth. In holding that the plaintiff might recover, Lord Ellenborough attempted no classification of dangerous articles. He was content to describe the gun "as by this want of care . . . left in a state capable of doing mischief."<sup>4</sup> Thus the pattern begins with commodities mischievous through want of care.

The pattern becomes complicated in 1837 in the case of *Langridge v. Levy*,<sup>5</sup> where a plaintiff complained that the defendant had sold his father a defective gun for the use of himself and his sons. The gun had blown up in the plaintiff's hand. The court allowed recovery, apparently on the theory that the seller had falsely declared that the gun was safe when he knew it was defective and had sold the gun to the father knowing it was to be used by the plaintiff. It was therefore both a case of fraud and, in some sense, one of direct dealing between the seller and the plaintiff. The example used by the court was the case of a direct sale to the plaintiff, or where the instrument had been "placed in the hands of a third person for the purpose of being delivered to and then used by the plaintiff."<sup>6</sup> The direct dealing point is also emphasized by the statement of one of the judges during the argument to the effect that it would have helped the plaintiff's case if he had alleged that his father "was an unconscious agent in the transaction" because "the act of an unconscious agent is the act of the part who sets him in motion."<sup>7</sup>

In the argument of *Langridge v. Levy*, counsel for the defendant had pointed to a distinction between things "immediately dangerous or mischievous by the act of the defendant" and "such as may become so by some further act to be done to it."<sup>8</sup> They had urged what might be considered the pattern suggested by *Dixon v. Bell*. But the court rejected the use of any such distinction, although it remarked in passing that the gun was not "of itself dangerous, but . . . requires an act to be done, that is to be loaded, in order to make it so." It rejected not only the distinction but any category of dangerous articles, because it "should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such

instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever into whose hands they might happen to pass and who should be injured thereby."<sup>9</sup>

Nevertheless the category of dangerous articles and the distinction between things of a dangerous nature and those which become so if improperly constructed (which need not be the same as requiring a further act to be done to make it dangerous) were again urged before the court five years later in *Winterbottom v. Wright*.<sup>10</sup> The court refused to permit a coachman to recover against the defendant who had provided a defective coach under contract with the Postmaster General. The plaintiff had been driving the coach from Hartford to Holyhead when it broke down due to some latent defect; the plaintiff was thrown from his seat and lamed for life. He could not recover because to extend liability this far would lead to "absurd and outrageous consequences." The court refused to discuss whether the defective coach was a weapon of a dangerous nature, even though defendant's counsel seemed to be willing to acknowledge the existence of a special rule of liability for that category. And as for the application of *Langridge v. Levy*, in that case there was "distinct fraud" and the plaintiff "was really and substantially the party contracting." The court refused to find similarity under the fraud concept in the fact that the defendant had sold a coach as safe when he did not know it to be in good condition, or under the direct dealing concept in *Langridge v. Levy* in that "there was nothing to show that the defendant was aware even of the existence of the particular son who was injured" whereas here the coach "was necessarily to be driven by a coachman."<sup>11</sup> The further argument that the plaintiff had no opportunity of seeing that the coach was sound and secure was insufficient to bring liability.

But in 1851, in *Longmeid v. Holliday*,<sup>12</sup> the concept of things dangerous in themselves, twice urged before the court and rejected, finally won out. Longmeid had bought a lamp for the use of himself and his wife from Holliday, the defendant storekeeper, who called the lamp "Holliday's Patent Lamp" and had it put together by other persons from parts which he had purchased. When Eliza Longmeid, the wife and plaintiff, tried to light the lamp, it exploded; the naphtha ran over her and scorched and burned her. She

was not permitted to collect from the store-keeper. It had not been shown that the defendant knew the lamp was unfit and warranted it to be sound. And the lamp was not in its nature dangerous. In discussing those cases where a third person, not a party to a contract, might recover damages, the court said:

And it may be the same when any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun which he himself loaded, and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is *Dixon v. Bell*. But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous, — a carriage for instance, — but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it.<sup>13</sup>

Thus the doctrine of the distinction between things in their nature dangerous and those which become so by an unknown latent defect is announced as a way of explaining the difference between a loaded gun (which under the rule, however, is explained as a particular circumstance) and a defective lamp. As applied in the case, the doctrine describes the classification of the lamp as dangerous only through a latent defect and results in no liability. But a court could have found as much direct dealing in the purchase of a lamp for the use of the purchaser and his wife as in the case of the purchase of a gun for the use of the purchaser and his sons. Under the rule as stated a carriage is not in its nature dangerous.

The second phase of the development of the doctrine of dangerous articles is the period during which the rule as announced in the *Longmeid* case is applied. The phase begins with mislabeled poison and ends with a defective automobile. During this time also there is the inevitable attempt to soar above the cases and to find some

great overall rule which can classify the cases as though the pattern were really not a changing one.

It was the purchase of belladonna, erroneously marked as extract of dandelion, which, in *Thomas v. Winchester*<sup>14</sup> in 1852, produced the first application and restatement of the rule announced in the *Longmeid* case. The poison had been bought at the store of Dr. Foord, but it had been put into its jar and incorrectly labeled in the shop of the defendant Winchester — probably through the negligence of his employee. Mrs. Thomas, who used what she thought was the extract of dandelion, reacted by having “coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilatation of the pupils of the eye and derangement of mind.” She was allowed to recover against Winchester. The defendant’s negligence had “put human life in imminent danger.” No such imminent danger had existed in the *Winterbottom* case, the Court explained. This was more like the case of the loaded gun in *Dixon v. Bell*. The imminent danger category would not include a defective wagon but it did include the poison.

Looking back, one might say today that the category of things by their nature dangerous or imminently dangerous soon came to include a defective hair wash. At least in *George v. Skivington*<sup>15</sup> in 1869, a chemist who compounded a secret hair wash was liable to the wife of the purchaser for injuries caused by the wash. But the court went about its business without explicit regard for the imminently dangerous category. It thought that the imperfect hair was like the imperfect gun in the *Langridge* case. It chose to ignore the emphasis in the *Langridge* case on the purported fact that the seller there knew the gun was defective and lied. It said, “substitute the word ‘negligence’ for fraud and the analogy between *Langridge v. Levy* and this case is complete.” And as for the case of the defective lamp where there was no liability, that was different because negligence had not been found. In constructing a pattern for the cases, it appears that loaded guns, defective guns, poison, and now hair wash were in the imminently dangerous category. Defective wagons and lamps were outside.

The next year it became known that a defective balance wheel for a circular saw was not

imminently dangerous. The New York court stated: "Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle or the like. . . . Not so, however, an iron wheel, a few feet in diameter and a few inches in thickness although one part may be weaker than another. If the article is abused by too long use, or by applying too much weight or speed, an injury may occur, as it may from an ordinary carriage wheel, a wagon axle, or the common chair in which we sit."<sup>16</sup> While applying the imminently dangerous category to defeat liability, the New York court took occasion to give a somewhat new emphasis to *Thomas v. Winchester*. It found that "the decision in *Thomas v. Winchester* was based upon the idea that the negligent sale of poisons is both at common law and by statute an indictable offense." And certainly that could be argued. At any rate, three years later the New York court said its opinion in the balance-wheel case showed that *Thomas v. Winchester* would not result in liability in a case where a boiler blew up.<sup>17</sup> But the imminently dangerous category received a new member in 1882 when the builder of a ninety-foot scaffold to be used in painting the dome of the courthouse was held liable to the estate of an employee-painter who was killed when the ledger gave way.<sup>18</sup> Yet if a defective scaffold was in, the court followed tradition in announcing that a defective carriage would be out.

In England, a defective scaffold was also put in the category. The plaintiff in *Heaven v. Pender*<sup>19</sup> was a ship painter who was injured, while engaged in his work, due to the breaking of defective ropes which held his support outside the ship. He was allowed to recover against the dock owner who had supplied the support and ropes. But the majority of the judges decided the case on the rather narrow point that the necessary workmen were in effect invited by the dock owner to use the dock and appliances. That could have been the explanation also for the American scaffold case. The most noteworthy feature of *Heaven v. Pender*, however, was the flight of one of the judges, Lord Esher, at that time Brett, toward a rule above the legal categories which would classify the cases.

Brett thought recovery should be allowed because:

Whenever one person supplies goods or machinery, or the like for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing.<sup>20</sup>

This statement was concocted by Brett from two types of cases: first, the case where two drivers or two ships are approaching each other and due care is required toward each other, and second, where a man is invited into a shop or warehouse and the owner must use reasonable care "to keep his house or warehouse that it may not endanger the person or property of the person invited." Since these two different situations resulted in the same legal rule, or stated differently, since two general principles when applied resulted in the same legal rule, Brett thought there must be "some larger proposition which involves and covers both set of circumstances." This was because "the logic of inductive reasoning requires that where two propositions lead to exactly similar premises there must be a more remote and larger premise which embraces both of the major propositions." Brett's rule of ordinary care ran into some difficulty in looking back at the *Langridge* case and its insistence on both fraud and direct dealing. But Brett said of the *Langridge* case, "It is not, it cannot be accurately reported," and in any event the fact that recovery was allowed on the basis of fraud "in no way negatives the proposition that the action might have been supported on the ground of negligence without fraud."

The majority opinion in *Heaven v. Pender*, while proceeding on the invitee point, and while refusing to follow Brett in his flight, agrees that liability for negligence follows when the instrument is dangerous "as a gun" or when the instrument is in such a condition as to cause danger "not necessarily incident to the use of such an instrument" and no due warning is given. Approving this statement, the New York court in 1908 held that the question of a manufacturer's

negligence could be left to a jury where the plaintiff lost an eye due to the explosion of a bottle of aerated water.<sup>21</sup> The next year a defective coffee urn or boiler which blew up and killed a man was permitted to join the aerated bottle in the danger concept.<sup>22</sup> The coffee-urn case provided the occasion for explaining two of the names given the dangerous category. Given an “inherently dangerous” article, the court explained, a manufacturer becomes liable for negligent construction which, when added to its inherent characteristics, makes it “imminently dangerous.”

The categories by now were fairly well occupied. The dangerous concept had in it a loaded gun, possibly a defective gun, mislabeled poison, defective hair wash, scaffolds, a defective coffee urn, and a defective aerated bottle. The not-dangerous category, once referred to as only latently dangerous, had in it a defective carriage, a bursting lamp, a defective balance wheel for a circular saw, and a defective boiler. Perhaps it is not too surprising to find a defective soldering lamp in *Blacker v. Lake*<sup>23</sup> joining the not-dangerous class. But the English court, in the opinions of its two judges, experienced some difficulty. For the first judge there appears to have been no difficulty in classifying the soldering lamp as not dangerous. Yet the *Skivington* case caused trouble because it appeared to suggest that negligence could be substituted for fraud and perhaps liability would follow even though the article was not dangerous. But in that event the *Skivington* case should not be followed because it was in conflict with *Winterbottom v. Wright*. Accordingly, the soldering lamp not being dangerous, it was error to leave the question of negligence to the jury. The second judge suggested a more surprising realignment of the cases which threatened the whole danger category. He suggested that no recovery should be permitted even though the lamp fell into the class of things dangerous in themselves. The duty of the vendor in such a case, he pointed out, would be a duty to warn, but that duty is discharged if the nature of the article is obvious or known, as was true in this case. Indeed, the *Skivington* and *Thomas V. Winchester* cases were explainable on the very ground that the articles appeared harmless and their contents were unknown. One might almost say that recovery was permitted in those cases because the danger was only latent.

The period of the application of the doctrine of dangerous articles as set forth in the *Longmeid* case and adopted in *Thomas v. Winchester* may be thought to come to an end in 1915 with its application by a federal court – the Circuit Court of Appeals for the Second Circuit. This was the way the law looked to the court. “One who manufactures articles inherently dangerous, e.g. poisons, dynamite, gunpowder, torpedoes, bottles of water under gas pressure, is liable in tort to third parties which they injure, unless he has exercised reasonable care with reference to the articles manufactured. . . . On the other hand, one who manufactures articles dangerous only if defectively made, or installed, e.g., tables, chairs, pictures or mirrors hung on the walls, carriages, automobiles, and so on is not liable to third parties for injuries caused by them, except in cases of willful injury or fraud.”<sup>24</sup> Accordingly, the court denied recovery in a suit by the purchaser of a car from a dealer against the manufacturer when the front right wheel broke and the car turned over.

*MacPherson v. Buick*<sup>25</sup> begins the third phase of the life of the dangerous instrument concept. The New York Court of Appeals in 1916 had before it almost a repetition of the automobile case passed upon by the federal court the previous year. The plaintiff was driving his car, carrying a friend to the hospital, when the car suddenly collapsed due to a defective wheel. The plaintiff was seriously injured. The Buick Motor Company, the defendant, had sold the car to a retail dealer who in turn had sold it to the plaintiff. The defective wheel had been sold to the Buick company by the Imperial Wheel Company.

As was to be expected, counsel for the plaintiff urged that an automobile was “dangerous to a high degree.”<sup>26</sup> It was, in fact, similar to a locomotive. It was much more like a locomotive than like a wagon. “The machine is a fair rival for the Empire Express,” he said. “This is evidenced further by the fact that the person running an automobile must have a license of competency, equally with the locomotive engineer and by the legal restrictions imposed by law in the use of the automobile.” It was “almost childish to say that an automobile at rest is not dangerous. Neither is a locomotive with the fire drawn” nor a battery of coffee boilers nor a 42-centimeter gun.

The automobile, propelled by explosive gases, was “inherently dangerous.” The trial judge had charged the jury that “an automobile is not an inherently dangerous vehicle” but had said that they might find it “imminently dangerous if defective.”<sup>27</sup> As to the difference between the two phrases, counsel said there was no point “juggling over definitions. ‘Inherently’ means ‘inseparably.’ ‘Imminently’ means ‘threateningly.’” He did not comment on the request of the defendant that the judge charge the jury that recovery depended on the car being “eminently dangerous.”<sup>28</sup> Counsel did write, however, that he “was powerfully impressed with a remark of Lord Chief Justice Isaacs, on his recent visit to this country, to the effect that in England they were getting away from merely abstract forms and were seeking to administer justice in each individual case.”<sup>29</sup>

The New York Court of Appeals allowed recovery. Judge Cardozo recognized that “the foundations of this branch of the law . . . were laid in *Thomas v. Winchester*.” He said that some of the illustrations used in *Thomas v. Winchester* might be rejected today (having in mind no doubt the example of the defective carriage), but the principle of the case was the important thing. “There never has in this state been doubt or disavowal of the principle itself.” Even while remarking that “precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today,” he was quick to add the explanation: “The principle that the danger must be imminent does not change, but the things subject to the principle do change.” And in addition there were underlying principles. They were stated, more or less, Cardozo said, by Brett in *Heaven v. Pender*.

To be sure, Cardozo was not certain that this statement of underlying principles was an accurate exposition of the law of England. He thought “it may need some qualification even in our own state. Like most attempts at comprehensive definition, it may involve errors of inclusion and exclusion.” He thought, however, that “its tests and standards, at least in their underlying principles, with whatever qualifications may be called for as they are applied to varying conditions, are the tests and standards of our law.” He did not comment on the statement of Brett concerning *Thomas v. Winchester*

that it “goes a very long way. I doubt whether it does not go too far.”

As to the cases, Cardozo recognized that the early ones “suggest a narrow construction of the rule.” He had reference to the boiler and balance-wheel cases. But the way to set them aside had already been shown. They could be distinguished because there the manufacturer had either pointed out the defect or had known that his test was not the final one. The distinction was based upon a point unsuccessfully advanced by losing counsel in *Winterbottom v. Wright*. Other cases showed that it was not necessary to be destructive in order to be dangerous. “A large coffee urn . . . may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction.” And “what is true of the coffee urn is equally true of bottles of aerated water.” *Devlin v. Smith* was important too. “A scaffold,” Cardozo pointed out, “is not inherently a dangerous instrument.” He admitted that the scaffold and the coffee-urn cases may “have extended the rule of *Thomas v. Winchester*,” but “If so, this court is committed to the extension. The defendant argues that things inherently dangerous to life are poisons, explosives, deadly weapons, things whose normal function is to injure or destroy. But whatever the rule in *Thomas v. Winchester* may once have been, it has no longer that restricted meaning.”

He showed a certain impatience for what he called “verbal niceties.” He complained that “subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous.” As to this it was sufficient to say, “If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent.” The rule was: “If the nature of a thing is such that it is reasonably certain to place life and limb in peril, when negligently made, it is then a thing of danger.” But “there must be a knowledge of a danger not merely possible but probable.” Thus what was only latently dangerous in *Thomas v. Winchester* now became imminently dangerous or inherently dangerous, or, if verbal niceties are to be disregarded, just plain or probably dangerous.

Elsewhere in commenting on the case, Cardozo seems to make somewhat less of the matter of

principles. He wrote: "What, however, was the posture of affairs before the *Buick* case had been determined? Was there any law on the subject? A mass of judgments, more or less relevant, had been rendered by the same and other courts. A body of particulars existed in which an hypothesis might be reared. None the less, their implications were equivocal. . . . The things classified as dangerous have been steadily extended with a corresponding extension of the application of the remedy. . . . They have widened till they include a scaffold or an automobile or even pies and cakes when nails and other foreign substances have supplied ingredients not mentioned in the recipes of cook books." Cardozo described the legal process in connection with these cases as one in which "logic and utility still struggle for the mastery."<sup>30</sup> One can forgive Judge Cardozo for this language. It is traditional to think of logic as fighting with something. Sometimes it is thought of as fighting with history and experience.

In a reversal of itself, not so striking because the membership of the court was different, the same federal court hearing another appeal in the same case in which it had been decided that a defective automobile was not inherently dangerous now stated with new wisdom: "We cannot believe that the liability of a manufacturer of an automobile has any analogy to the liability of a manufacturer of 'tables, chairs, pictures, or mirrors hung on walls.' The analogy is rather that of a manufacturer of unwholesome food or of a poisonous drug."<sup>31</sup>

*MacPherson v. Buick* renamed and enlarged the danger category. It is usually thought to have brought the law into line with "social considerations."<sup>32</sup> But it did not remove the necessity for deciding cases. Later the New York courts were able to put into the category of things of danger or probably dangerous a defective bottle<sup>33</sup> and another coffee urn,<sup>34</sup> although one less terrifying than the coffee boiler of 1909. But for some reason or other, admission was denied to a defective automobile when the defect was a door handle which gave way, causing one of the doors to open with the result that the plaintiff was thrown through the door and under the car. The defective handle did not make the car a "thing of danger."<sup>35</sup> And if one is comparing cases and examples, it has to be admitted that a door

handle is less closely connected with those things which make a car like a locomotive than is the wheel on which it runs.

Nevertheless, a new freedom follows from *MacPherson v. Buick*. Under it, as the Massachusetts court has said, the exception in favor of liability for negligence where the instrument is probably dangerous has swallowed up the purported rule that "a manufacturer or supplier is never liable for negligence to a remote vendee."<sup>36</sup> The exception now seems to have the same certainty the rule once had. The exception is now a general principle of liability which can be stated nicely in the Restatement, and text writers can criticize courts for not applying what is now an obvious rule of liability.<sup>37</sup>

A somewhat similar development has occurred in England. In *Donoghue v. Stevenson*<sup>38</sup> in 1932, the manufacturer of a bottle of ginger beer was held liable to the plaintiff who had purchased the bottle through a friend at a café. The bottle contained the decomposed remains of a snail. The opinions of the majority judges stressed the close and almost direct relationship between the manufacturer and the remote vendee. The control of the manufacturer of this type of article was thought to be "effective until the article reaches the consumer. . . . A manufacturer puts up an article of food in containers which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer." Lord Atkin, while stating that Brett's rule in *Heaven v. Pender* was too broad, found that the moral rule requiring the love of one's neighbour in law was translated into the injunction "you must not injure your neighbour." The question then was: "Who is my neighbour?" The practical rule evolved was of persons "closely and directly affected" and as to acts "which you can reasonably foresee would be likely to injure your neighbour." The emphasis on control and proximity revives the notion of the unconscious agent in *Langridge v. Levy*, as well as the inability to inspect, unsuccessfully urged in *Winterbottom v. Wright* and apparently implicit in the *Skivington* case.

As for other prior cases it was now said that the distinction between things dangerous and those dangerous in themselves was "an unnatural one" and anyway the fact that there might be a

special duty for one category no longer meant that a duty might not exist for others. *Winterbottom* and *Longmeid* were no longer controlling because negligence had not been alleged and proved in those cases. And as for the *Blacker* case, Lord Atkin had read and re-read it but had difficulty “in formulating the precise grounds upon which the judgment was given.” Thus prior cases were realigned out of the way despite the protest of dissenting judges who adhered to the view of the exception only for dangerous articles in the more traditional sense.

While the emphasis was on continuing control in the *Donoghue* case, and counsel urged that the *Donoghue* case applied only to articles intended for internal consumption, its rule was applied in *Grant v. Australian Knitting Mills*<sup>39</sup> in 1936 to underpants defective due to the presence of an irritating chemical. Here the emphasis could be more on the point that the defect was hidden. While the *Blacker* case was in a sense disregarded, the point made by one of its judges was in fact accepted. Reasoning in a manner not unlike *Skivington*, which substituted negligence for fraud, the court put secrecy in the place of control. *Donoghue*’s case was now seen not to “depend on the bottle being stopped and sealed; the essential point in this regard was that the article should reach the consumer or user subject to the same defect as it had when it left the manufacturer.” The court realized that in applying its test of directness, control, proximity and hidden defect, “many difficult problems will arise. . . . Many qualifying conditions and many complications of fact may in the future come before the Courts for decision.” But “in their Lordships’ opinion it is enough for them to decide this case on its actual facts.”

With the breakdown of the inherently dangerous rule, the cycle from *Dixon v. Bell* was complete. But it would be a mistake to believe that the breakdown makes possible a general rule, such as the rule of negligence, which now can be applied. A rule so stated would be equivalent to the flight of Brett. Negligence itself must be given meaning by the examples to be included under it. Unlimited liability is not intended. As the comparison of cases proceeds, new categories will be stressed. Perhaps, for example, there will be a category for trade-marked, patented, advertised, or monopolized articles. The basis

for such a category exists. The process of reasoning by example will decide. [. . .]

### Notes

- 1 The controlling book is Frank, *Law and the Modern Mind* (Anchor Books, Doubleday & Co., 1936).
- 2 217 N. Y. 382, 111 N. E. 1050 (1916); see Parker, *Attorneys at Law*, Ch. 8 (1942).
- 3 5 Maule & Selwyn 198 (1816).
- 4 *Ibid.*, at 199.
- 5 2 Meeson & Welsby 519 (1837).
- 6 *Ibid.*, at 531.
- 7 Alderson, B., *ibid* at 525.
- 8 *Ibid.*, at 528; note also the hypothetical case set forth by counsel for the plaintiff in *Langridge v. Levy* reported in 6 L.J. (N.S.) Ex. 137, 138 (1837). “A case might be put of a wrong medicine sent from a chemist, which is received by a person, and placed by him in a cupboard, and afterwards taken by a third person, who, in consequence receives an injury; can it be said that he has no remedy against the chemist?”
- 9 *Ibid.*, at 530.
- 10 Meeson & Welsby 109 (1842).
- 11 *Ibid.*, at 112.
- 12 155 Eng. Rep. 752 (1851).
- 13 *Ibid.*, at 755. The opinion was by Parke, B.
- 14 6 N.Y. 397 (1852).
- 15 5 L.R. Ex. 1 (1869).
- 16 *Loop v. Litchfield*, 42 N.Y. 351, 359 (1870).
- 17 *Losee v. Clute*, 51 N.Y. 494 (1873).
- 18 *Devlin v. Smith*, 89, N.Y. 470 (1882).
- 19 11 L.R. Q.B. 503 (1883).
- 20 *Ibid.*, at 510; see also rule as stated at 509.
- 21 *Torgesen v. Schultz*, 192 N.Y. 156, 84 N.E. 956 (1908).
- 22 *Statler v. Ray*, 195 N.Y. 478, 88 N.E. 1063 (1909).
- 23 106 L.T. 533 (1912).
- 24 *Cadillac v. Johnson*, 221 Fed. 801, 803 (C.C.A. 2d, 1915).
- 25 217 N.Y. 382, 111 N.E. 1050 (1916); see Bohlen, *Liability of Manufacturers to Persons Other than Their Immediate Vendors*, 45 L.Q. Rev. 343 (1929).
- 26 Brief for the Plaintiff 16, 17, 18.
- 27 217 N.Y. 382, 396, 111 N.E. 1050, 1055 (1916).
- 28 *Ibid.*, at 399, 1056.
- 29 Brief for the Plaintiff 23.
- 30 Cardozo, *The Growth of the Law*, 40–1, 76–8 (Yale University Press, 1924).
- 31 *Johnson v. Cadillac*, 261 Fed. 878, 886 (C.C.A. 2d, 1919).



- 32 See Torts: Liability of Manufacturer to Consumer for Article Dangerous Because of Defective Construction, 9 Corn. L.Q. 494 (1924).
- 33 Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576 (1932); cf. Bates v. Batey & Co., [1913] 3 K.B. 351.
- 34 Hoenig v. Central Stamping Co., 273 N.Y. 485, 6 N.E. 2d 415 (1936).
- 35 Cohen v. Brockway Motor Corp., 240 App. Div. 18, 268 N.Y. Supp. 545 (1934).
- 36 Carter v. Yardley & Co., 319 Mass. 92, 64 N.E. 2d 693 (1946).
- 37 See Harper, Law of Torts § 106 (133).
- 38 [1932] A.C. 562. Note the reference to trade names and patents at 583.
- 39 [1936] A.C. 85.

