Book Review

LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT by Lloyd Weinreb, Cambridge University Press, New York, 2005, vii, 184 pp, recommended price $60.00.

Reasoning by analogy is fundamental to common law method, and yet until recently has been subject to relatively little theoretical analysis. Analogy involves treating like cases as like and is sometimes regarded as an imperfect form of induction. It is commonly used in case law reasoning but the extension of it to reasoning with statutes is problematic.

Theologians in the middle ages sometimes distinguished between three different types of analogy reasoning: *unius ad alterum, duorum ad tertium, plurium ad plura*.[1] *Unius ad alterum* is a simple relationship of similarity in a certain respect. *Duorum ad tertium* is based on proportion, that is a relationship in common to a third thing. *Plurium ad plura* is a relationship of proportionality – A is to B as C is to D.

In case law reasoning, reasoning by analogy is usually the first stage which involves comparison of cases and something like induction to a rule or principle which then can be used in a more deductive manner. However, the rule or principle is not fixed and categories in case law reasoning represent a shifting classification system subject to further analogical development. Here, the concept of *ratio decidendi* performs an interesting role in the sequence from analogical reasoning to inductive reasoning.

Although the term *ratio decidendi* was found in canon law it seems to have been first introduced into English Law by John Austin, the jurist, in the early nineteenth century and it is significant that a book written by James Ram *The Science of Legal Judgment* in 1834 – a practitioners' book – made no reference to the term.[2]

The main attempts by judges to describe the process of case law reasoning have been in the area of tort. In *Heaven v Pender*,[3] Brett MR attempted to formulate a methodology for establishing a duty of care which unfortunately was very confused and his induction was generally regarded as having produced too wide a rule. In *Donoghue v Stevenson*,[4] Lord Atkin rejected Brett MR's formulation and then set forth his famous neighbour principle as a new general principle or standard. The status of this has been constantly questioned in later cases. A further attempt to describe the methodology was made by Lord Diplock in *Home Office v Dorset Yacht Co*.[5] Lord Diplock regarded the identification of analogical relationships as a first step in an overall inductive process. However, he confessed that 'the analyst must know what he is looking for, and this involves his approaching the analysis with some general conception of conduct and relationships, which ought to give rise to a duty of care'. He recognised the role of policy in this process.

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1 See J H Farrar, '*Reasoning by Analogy in the Law*' (1997) 9 Bond LR 149, 150.

2 Ibid, 151.

3 (1883) 11 QBD 503 at 509.

4 [1932] AC 562 at 578.

5 [1970] AC 1004 at 1058F to 1060E.

While there is still some equivocation about rules, principles, and policy, the judicial method in case law is reasonably settled. In the case of statutes the position is different and there seems to be a difference between common law and civil law jurisdictions.

Sir Robert Cross in his book *Precedent in English Law* thought that a legislative innovation is received fully into the body of the law to be reasoned from by analogy in the same way as any other rule of law.[6] However, this is to state the position far too boldly and is more qualified in the later editions,[7] although a similar view had been expressed by the American writer Dean Roscoe Pound in 1907.[8]

In an interesting article 'Statutes and the Common Law'[9] in 1992, Professor (now Justice) Paul Finn summarised the position in Australian law as follows:

Where a statute or statutory provision is consonant with or else builds upon a fundamental theme in the common law, then

- it should be interpreted liberally and in disregard of common law doctrines which would narrow its effect;
- subject to the natural limitations of judge-made law, it may be used analogically in the common law itself in its own development;
- but where it is cast in broad and general terms, it may be interpreted in the light of limiting consideration to be found in the relevant common law doctrines, where such doctrines are conducive to the attainment of justice in individual cases.

Where a statutory provision is antithetical (or else possibly inconsistent with) a fundamental theme in the common law, then:

- it will be interpreted strictly;
- it will not be used analogically in the common law, and
- it will be subjected to common law doctrines which serve to protect individual rights or to prevent unfairness.

This is essentially conservative doctrine. Historically, where a statute has been construed as remedial of the common law, it has been given a liberal interpretation. Also, the courts have been hesitant to identify fundamental themes or principles of the common law.

Although reasoning by analogy is discussed by all writers on legal reasoning, the main theories in recent years have been put forward by United States writers. Edward Levi in his book *An Introduction to Legal Reasoning*[10] emphasized that the basic pattern of legal reasoning is reasoning by example, reasoning from case to case: 'Similarities are 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'.[11] He described the processes as involving a shifting classification system.

Melvin Eisenberg in *The Nature of the Common Law*[12] criticised Levi's approach. In his opinion, reasoning by example is, as such, virtually impossible. Reason cannot be used to justify a normative conclusion without first drawing a rule from the example. Eisenberg argues that reasoning by analogy in the common law is a special type of reasoning from standards.

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6 3rd edition (1977), 169.

7 Cross and Harris, *Precedent in English Law* 4th ed (1991), 176-7.

8 'Common Law and Legislation' (1907) 21 Harv L Rev 383.

9 (1992) 22 UWA L Rev 7, 23-4.

10 (1948) 1.

11 See above n 1.

12 (1988) 88.

Two recent contributions in the Harvard Law Review have put forward new analyses. Cass Sunstein of the University of Chicago argues that the characteristics of analogical reasoning are a requirement of principled consistency, a focus on concrete particulars, incompletely theorised judgments and the creation and testing of principles at a low or intermediate level of generality.[13] Although he recognised the limitations of this kind of reasoning, he emphasised that there are also certain advantages. It does not require the development of full theories but enables moral evolution over time.

Scott Brewer analyses analogical reasoning at greater length in terms of a three step rule guided process.[14] This consists of an inference which he calls 'abduction' from chosen examples of a rule; confirmation or disconfirmation by a process of reflexive adjustment of the rule; and an application of a confirmed rule to the case. The problem is what is the meaning of 'abduction?' Brewer says it is not the same as deduction but shares some characteristics in common such as entailment. His theory seems to move from reasoning by analogy to reasoning with rule and precedent. At the same time, both Sunstein and Brewer seem to pay inadequate attention to the element of justification involved in case law reasoning.

Judge Richard Posner[15] is critical of reasoning by analogy. He argues that it belongs not to legal logic, but to legal rhetoric. Reasoning by analogy tends to obscure the policy grounds that determine the outcome of a case because it directs attention to the cases being compared rather than to the policy considerations that connect or separate the cases.

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

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

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

The diagram below attempts to depict the main factors operating in this aspect of case law. The inputs – *facts, rules* (which we use in a wide sense to cover principles and standards), the particular *stare decisis principles*, and *legal policy* – are all variables which, together with what one

13 'Commentary on Analogical Reasoning' (1992-3) 106 Harv L Rev 741.

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

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

American writer described as 'within-puts' (ie *judicial attitudes*) influence the decision-making by the court.[16]

Legal policy is a species of public policy which is hard to define in clear terms.[17] In legal policy there seem to be three sets of variables operating and interacting: *interests, legal values*, and what we shall call *other relevant factors* – ORFs for short.[18] *Interests* are the claims or expectations of individuals or groups which are perceived by the judges or the legislature to exist in society in respect of matters such as property, reputation and freedom from personal injury.[19] By claims we do not mean the enforcement of an *established* legal right but an attempt to establish the existence of such a right. In addition, in the words of the philosopher, Henry Sidgwick, there is a 'borderland, tenanted by expectations which are not quite claims and with regard to which we do not feel sure whether Justice does or does not require us to satisfy them'.[20]

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

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

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

The common law evolved as a pluralistic system with no clear hierarchy of values and the very looseness of analogical reasoning served its purpose and may add something to philosophi-

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

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

18 *Cf*. Benjamin N Cardozo, 'The Paradoxes of Legal Science' in M. Hall (ed), *Selected Writings of Benjamin Nathan Cardozo*, (1947), 251, 298-9.

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

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

cal method. Indeed, the distinguished Belgian philosopher, Chaim Perelman in his book *Justice et Raison* put it this way:

> … in studying with attention and analysing with care the techniques of legal procedure and interpretation which permit men to live under the Rule of Law, the philosopher, instead of dreaming of the Utopia of an ideal society, can derive inspiration ... from what secular experience has taught men, charged with the test of organising a reasonable society on earth.[21]

Weinreb recognises in his conclusion that there is no escape from doubt and the possibility of error. Reasoning by analogy enables us continually to evaluate and improve the law in the light of experience. Perhaps this is the true meaning of Oliver Wendell Holmes Jr's mystical utterance, 'The life of the law has not been logic: it has been experience.'[22]

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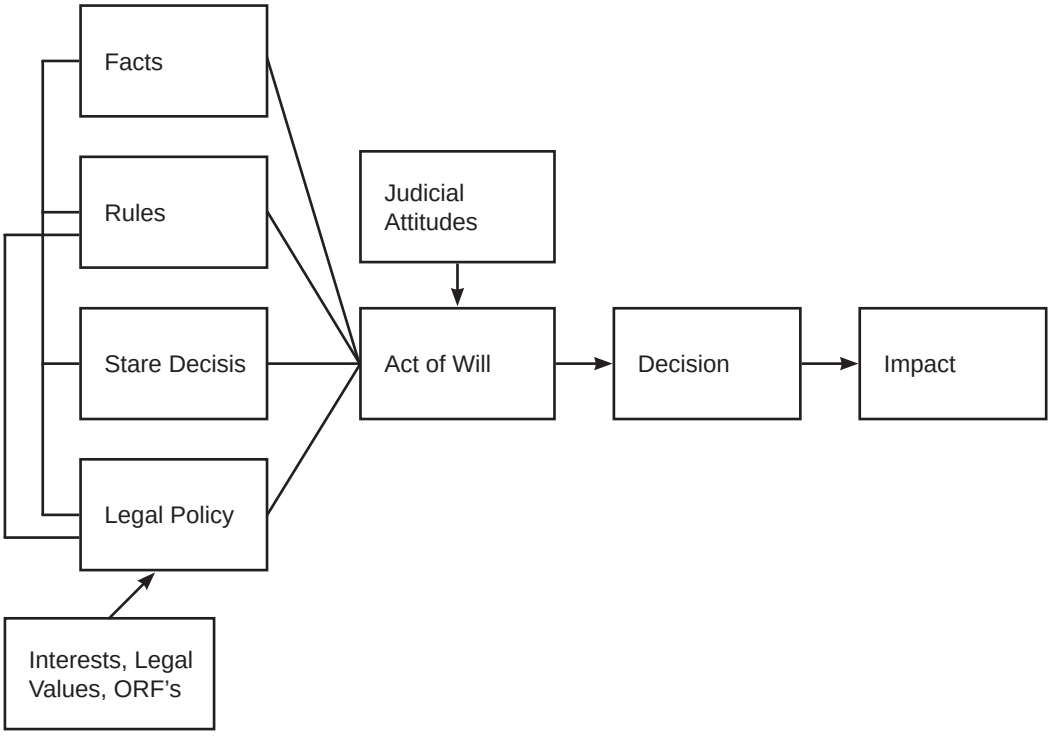
The Structure of Judicial Decision Making

(From J H Farrar, *Introduction to Legal Method*, first edition, 1977, 157, but omitted from later editions.)



21 (1963), 255 (my translation).

22 *The Common Law* (1881), 1.

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