**Wordfulness for Neophytes**

‘The limits of the language (**the** language which I understand) mean the limits of **my** world.’

(Ludwig Wittgenstein)[[1]](#footnote-2)

# Abstract

Jurisprudence can be put to work to open the minds of neophyte students, whose past educational experiences have been in many ways narrowing. Three useful distinctions are explored: conclusory verdicts from motivations, reasons and justifications; factive from normative; and incontestable from uncontested-contestable and contested-contestable concepts. A tentative taxonomy of concept-contestation is offered. Whilst the paper concentrates on ‘Why try?’, it concludes with some suggestions of ‘How to?’

# Introduction

This article explores ways that jurisprudence might be ‘put to work’ to assist law students and law teachers. Adapting Wittgenstein aphorism, legal educators might say, ‘The limits of a student’s language are the limits of that student’s world’. To explore and expand some of those limits, I offer five ‘armchair hypotheses’. ‘Armchair’ because they are not yet rigorously tested.

## Hypothesis 1: A Cognitive Cultural Clash

On returning to teaching in 2009 (after a break of some 20 years), it struck me that predominant student attitudes had changed a good deal since I started in 1966. A greater proportion seemed to thirst for simple certainties—or, perhaps, were making that more apparent by their behaviour and demands. Willingness to invest effort in exploring issues, reading cases, etc. seemed to have diminished correspondingly. There was less curiosity about ‘what is going on?’ in a case or a developing area of law. Minds seemed set and Bacon’s 1605 warning ignored,

‘[I]f a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties.’[[2]](#footnote-3)

\* This paper developed from ideas and materials I presented to the SLS Jurisprudence Group at Conferences in 2015 and 2017 and at LSBU in 2017. I gratefully acknowledge help from Dan Priel, Andy Unger, Kim Silver, Mike Rodney, Cherry James, and Tracey Aquino, but remain fully responsible for the surviving shortcomings.

To explore this phenomenon, my first hypothesis posits model neophyte law students who have been affected by three factors:

1. Neophytes are accustomed to a ‘one-click’ pattern of approach.
2. They have been ‘taught to the test’.[[3]](#footnote-4)
3. They see themselves as ‘customers’ purchasing ‘outcomes’ (‘good degrees’) rather than an ‘educational experiences’.

Students who more-or-less fit this model experience a cultural cognitive clash with common law method’s mix of change and predictability. That troubles them and inhibits their learning. The clash is summarised in Table 1.

Table 1: Cultural Cognitive Clash

| Neophytes’ ‘expectations’[[4]](#footnote-5) | Common Law ‘method’ |
| --- | --- |
| Our neophyte is conditioned emotionally and intellectually to ‘expect’ | Whereas, the methods of the common law have very different attributes: |
| * A clear but ahistorical separation of law-application from law-making | * Common law is judge-made * Judicial legislative self-restraint comes, not from the words used, but from judges’ appreciation of the constitutional context[[5]](#footnote-6):   + unelected   + unable to create systems or institutions |
| * certainty, predictability  (simplistic ‘rule of law’ thinking) | * Common law changes incrementally * with occasional, more radical, interventions |
| * ‘subjects’ with water-tight boundaries | * Developments in one area of law sometimes permeate to others * Some issue can be framed *(e.g.)* in contract, or tort, or both |
| OR, at least |  |
| * fixed and precise meanings of words, as with quasi-mathematical concepts  (*e.g.* two-ness, triangularity) | * The stability of non-quasi-mathematical words comes from social consensus * Because usage determines meaning |
| * Concepts with a definite core with a penumbra that is an area for ‘modest interpretation’ | * The scope for interpretation can extend to the whole concept * Often no ‘bright line’ between ‘core’ and ‘penumbra’ |

## Hypothesis 2

This thirst for certainty imports a naïve form of ‘metaphysical realism’, manifested in an expectation that legal concepts have a *mind-independent* existence—as I might think my desk has. But, I contend that we should not over-indulge our certainty-seeking neophytes—and that ‘jurisprudence’ should be engaged early in their legal education.

### A different ‘realism’

By contrast, ‘American legal realism’ emphasises *mind-dependency*. It aims to be realistic about what goes on in lawyering, judicial decision-making, and rule-following. Here are some headlines, based on Karl Llewellyn’s ‘Some Realism about Realism’.[[6]](#footnote-7)

* concepts such as ‘negligence’, intention’, ‘contract’ are mind-dependent
* hence, the workings of the various minds involved must be investigated
* the common law is judge-made—and it changes
* law should be assessed by means of its social effects
* legal changes tend to lag behind social changes
* traditional rules are not always the best predictors of what courts will do

## Hypothesis 3

Legal education sometimes indulges neophytes’ thirst for certainty, rather as parents teach the very young about Santa Claus. For example, ‘formation of contract’ is typically chosen as the first common law subject—and, implicitly, as the ‘model’ of common law method. But, without careful investigation of the function and policy aspects of consideration and intention to create legal relations, that strategy will lend common law method a mechanistic tone—a ‘Mrs Beeton approach’[[7]](#footnote-8)—and does not counter neophytes’ pre-conditioning. Neophytes will warm to the mechanistic aspects but will tend to side-line inconveniently subtle policy points and be blind to the common law’s dynamic.

Of course, although some might be too much inclined to leave the myth undisturbed, no law teacher actually believes in Santa Claus. But some might well be described as ‘doctrinalists’, who take their main business to be the identification, refinement and application of doctrinal concepts and present those concepts as having a *mind-independent* fixed core meaning.[[8]](#footnote-9) Ernest Weinrib’s exposition of ‘the *whole* law of obligations’ as an aspect of ‘*corrective* justice’—based on ‘personality’ and the ‘correlativity’ of the ‘rights’ that ‘persons’ necessarily have—provides a paradigm.[[9]](#footnote-10) Although Weinrib’s exposition is elegant and insightful, it is restrictively fixated on a conception of purely private law that deals only in corrective justice.

‘For purposes of justifying a determination, the correlative structure of liability *entails* the *irrelevance* of *any factor*that is normatively significant only because of its possible role in a *distributive* comparison*…[T]he notion of right and correlative duty would be undone by the non-correlative conception of the content of those rights as being based on welfare.’*[[10]](#footnote-11)

This armchair *fiat* makes strangers to the ‘law of obligations’ of: stricter liabilities in tort[[11]](#footnote-12) (including vicarious liability);[[12]](#footnote-13) and the implication of contractual terms that would fail the classical ‘officious bystander’ test that seeks to reconcile adding terms to a contract with the (libertarian) will-theory.[[13]](#footnote-14) Furthermore, his view of human agency is exclusively force-dynamic[[14]](#footnote-15) or action-based, making liability for omissions difficult to justify except in contract.[[15]](#footnote-16)

### Confronting Santa Syndrome

When and how shall we alert neophytes to the consequentialistic policy thinking, welfarism and distributive justice that often motivates judicial decisions, especially when the relevant common law is in flux? To ensure that their offspring do not enter the adult world believing in Santa, parents can:

1. refuse to teach them Santa and tell their offspring that other children are being taught fairy tales—call this ‘begin as you mean to go on’;
2. teach them Santa but, having entrenched Santa in their minds, later break the news of Santa’s unreality; or
3. assume that their offspring will learn the news sometime or somehow.

I shall explore and commend option 1.

## Hypothesis 4

Although untested empirically, Hypothesis 4 is a key assumption. It can be stated briefly.

Most neophyte law students have the *intellectual* equipment to cope with uncertainty—our problem is to overcome their *emotionally entrenched* pre-conditioning.

## Hypothesis 5: three useful distinctions

Hypothesis 5 is also untested empirically. It is factive and predictive.

Careful treatment of the following three distinctions will be reasonably effective in overcoming Santa Syndrome, provided they are addressed explicitly and taught, choosing opportunities wisely, from the beginning of a course.

1. Conclusions and verdicts are not motivations, reasons or justifications.
2. Facts and norms are different in kind. One cannot get a normative ‘ought’ from a factive ‘is’.
3. Three categories of concept

Legal rules can be composed of concepts from any of the following categories: (a) incontestable (quasi-mathematical, tautologically true); (b) contestable-but-not-contested; and (c) contestable-and-contested.

The distinction of (a) from (b) and (c) is stable and lies in the different nature of the concepts. But that between (b) and (c) can fluctuate, being consensus-contingent and context-contingent. Responding to shifts in the dominant social consensus inherently contestable concepts can shift—for ‘policy’ reasons—between (b) uncontested and (c) contested. There are also interestingly different modes of contestation, some of which are explored below.

These three distinctions are examined in turn, exploring their utility in illuminating caselaw and developing comprehension and analytical skills. I hope thereby to demonstrate something of the explanatory power of this style of analysis and its potential to encourage neophytes to look beyond memorising doctrine to ask, ‘What’s going on in this case?’

The third distinction (or cluster of distinctions), being richer and untidier than the others, uses the most space. In the shadows, we shall notice another pedagogic question lurking: do textbooks—by distilling doctrine—discourage the exploration of the three distinctions?

# I. Verdicts are not motivations, reasons or justifications.

Adopting JL Austin’s concept of verdictiveness,[[16]](#footnote-17) a ‘verdict’ (*simpliciter*) just *is*. For example, ‘I shall sell my diesel car’ speaks nothing of why that verdict was arrived at or of how it might be justified. Unlike the verdicts they prompt, ‘motives’ are *explanatory causal stories* of the effects of instinct (D *acted* in self-defence), social conditioning, the state of the judicial digestion, or more noble loyalty to the rule of law or to particular conceptions of justice. And *justificatory* *reasons* are *normative* claims (D is *entitled* to act in self-defence)*.*

In January 2018, I sold my BMW 3 series diesel car and bought a JCW Mini Cooper S. I reached two ‘verdicts’: Verdict 1, ‘sell diesel car’; Verdict 2 ‘buy the hot, petrol-engined Mini’. Neither is, *ex facie*, a causal explanation or a normative justification. What were my motives—the psychological causes of my verdicts?

1. Ecological considerations? Perhaps. But I realised that someone will buy the diesel and would, very probably, do more miles each year in it than I would have. Ecologically, I ought to have scrapped the car. Furthermore, if I was really concerned about the environment I would have bought an electric car or a hybrid.
2. Desire for something sportier? Definitely a factor. I’m from a family of petrolheads.

Whilst (a) is the more suitable to be claimed as a respectable normative justification, it is unavailable because I cannot establish my reliance on it. I have to fall back on (b) and claim that I’m *entitled* to some fun.

Judges decide disputes. ‘Issuing verdicts’ is what they do. For example, Verdict (i) ‘D is not liable to C in negligence.’ That is obviously formally verdictive, but it lacks any patent explanation or normative justification. Verdict (i) will probably be ‘justified’ by invoking another verdict, such as Verdict (ii) ‘there is no duty of care’. Although Verdict (ii) looks like and is—in formal terms—a justification of Verdict (i), it too lacks any patent normative explanation or justification. If asked to justify Verdict (ii), a judge might well invoke Verdict (iii) ‘there is insufficient proximity between C and D’. In the scheme of the negligence tort, Verdict (iii) is also formally justificatory but, if simply asserted, it too lacks normative substance.

Nevertheless, such formalistic reasoning might satisfy a doctrinalist and might appeal to our neophyte law student as neat and learnable for regurgitation in examinations. But until we know what factors about the circumstances of the case were weighed *ex ante* to arrive at Verdict (iii)—or were invoked *ex post* to rationalise the hunch, intuition or prejudice that prompted that verdict—we do not understand the rule in the case, cannot use it reliably to predict future case outcomes and should not accept it as justification. Nevertheless, such reasoning as Verdicts (i)-(iii) exemplify is very often used, as Robert Wright describes.

‘[T]he human brain is, in large part, a machine for winning arguments, a machine for convincing others that its owner is in the right—and thus a machine for convincing its owner of the same thing…The brain is like a good lawyer: given any set of interests to defend, it sets about convincing the world of their moral and logical worth, regardless of whether they in fact have any of either. Like a lawyer, the human brain wants victory, not truth; and, like a lawyer, it is sometimes more admirable for skill than for virtue.’[[17]](#footnote-18)

# II. Factive verdicts differ categorically *from* normative verdicts

Verdicts can be factive or normative. Neophytes know the difference between *reading* a case (factive) and feeling they *ought* to (normative).

Nevertheless, they often find formation of contract problems relatively congenial because they present as[[18]](#footnote-19) reducible to ‘*Is* there a contract?’ and ‘*Are* all the ingredients there?’ I fear they are tempted to think (mistakenly) of legal concepts (offer, acceptance, considerations, intention to create legal relations) as having a reality that is context-independent and function-independent in the way that flour, fat, eggs, and sugar exist independently of Mrs Beeton’s intention to transmogrify them—once-and-for-all[[19]](#footnote-20)—into a Victoria sponge. Of course, properly considered, the question ‘Are all the contractual ingredients there?’ engages several normative subtleties. If neophytes can stay calm and get by without paying them too much attention, a rather mechanistic conception of common law method gets entrenched.

Neophytes commonly find negligence problems[[20]](#footnote-21) less congenial—even threatening—because the question ‘Is there a duty of care?’ does not lead to a list of ‘ingredients’ but to a range of open-textured ‘tests’[[21]](#footnote-22)—most obviously that of ‘reasonable foreseeability’. Many neophytes do not appreciate the uncomfortably demanding degree of care in the use of language (reading, listening, speaking, writing) required—especially as even judges sometimes use ‘foreseeability’ as shorthand for ‘reasonable foreseeability’.

Neophytes miss subtleties like the following too often. Assume that D has caused C harm.

1. (Factive) Foresight: If D actually foresaw the harm, D’s actions were intentional or reckless, not merely negligently. Thus, neophytes who highlight and memorise this passage from the judgment in *Wagon Mound (No. 1)* as capturing the gist of the new approach to remoteness of damage that the Privy Council was openly introducing, are seriously misleading themselves.

‘As Denning LJ said in *King v. Phillips*[[22]](#footnote-23): "there can be no doubt since *Bourhill v. Young* that the test of *liability for shock* is foreseeability of *injury by shock* " [We] substitute the word "fire" for "shock" and endorse this statement of the law.’[[23]](#footnote-24)

Taken literally, these sentences assert that, if it is *factively* possible for some people to foresee the fire risk, there is liability for it.’ But that runs counter to the outcome of the case. The claimant ship repairers’ employees stopped using oxyacetylene repair equipment as soon as they saw oil in the water[[24]](#footnote-25) and the *Sydney Morning Herald* reported workmen saying, ‘We have been expecting a fire here. It had to come sooner or later, with so much oil about.'[[25]](#footnote-26) Despite this clear evidence that the fire was actually foreseen, the claim failed.

However, if neophytes are alert to the factive/normative distinction, they will note that, only a few words earlier in the judgement, there is a patently *normative* sentence, which concludes that a claim ‘will fail if it can be established that the damage could not *reasonably* be foreseen’.[[26]](#footnote-27) That shows the court’s concern was whether the defendant *ought* (reasonably) to have foreseen fire damage—which is code for whether the defendant *ought* to be held responsible for it.[[27]](#footnote-28)

1. (Factive) Foreseeability: some people somewhere might well have *actually* foreseen a risk, but *non sequitur* that D *ought* to have foreseen it. Nevertheless, factive foreseeability functions as a filter. It is surely unreasonable to hold D liable, at least in negligence, for harm that, on the balance of probabilities, next to no-one has, or could have, foreseen.
2. (Normative) Reasonable foresee*ability*: We could plausibly dispense with the second word but not the first. All depends on the normative value-judgement of the *reasonableness* of requiring D to take responsibility for the harm to C. Here neophytes find themselves navigating treacherous seas that their previous education has not led them to expect or prepared them for.
3. Reasonable fore*sight*: is an inapt concept, hopelessly conflating factive and normative.

Prophylactically or therapeutically, neophytes must master the categorical distinction between:

1. upholding a factive proposition as the Popperian hypothesis[[28]](#footnote-29) that that best ‘explains’[[29]](#footnote-30) the available empirical evidence and has not yet, been falsified by further incompatible empirical evidence (we could only reasonably believe that the moon *is* made entirely of cheese until samples of its surface have been analysed and found not to be cheese); and
2. appeals to reason by which normative propositions (surgeons *ought* to take care to ensure that patients are well-informed about treatment options) are justified.

As already mentioned, factive propositions and normative propositions differ in kind. A factive proposition (it *is the case* that our vicar never swears) is *falsifiable* by incompatible empirical evidence as it becomes available (our vicar is heard to say ’bl\*\*dy’). Whereas, normative propositions (clergymen *ought* not to swear):

1. can be argumentatively[[30]](#footnote-31) *contested* on the grounds of moral value (a utilitarian might claim that swearing does no harm); but
2. cannot be *falsified*, although a claim of a particular norm’s existence can be (no smartphones at the table). Moreover, the as-yet-unfalsified hypothesis that some moral norms are widely held will lead (un-American) ‘moral realists’ to describe them as ‘moral facts’.[[31]](#footnote-32)

Our judgements of what *is* the case (Do we *believe* X’s account? Did Y *cause* that harm to Z?) and of what someone *ought* to do (Ought Y to compensate Z?) are: sometimes instinctual; sometimes the result of deep social conditioning; and sometimes more objective—although we are adept at using our brains to convince ourselves and others of that objectivity.

We can summarise the practical reasons neophytes should master this distinction:

1. Different modes of ‘proof’ or evaluation are appropriate.
2. Strictly, except where a factive verdict is manifestly perverse, only normative verdicts can raise questions of law and be appealed.[[32]](#footnote-33) However, appeal judges will sometimes take cover by categorising a normative verdict as ‘a matter of fact’ best left to the trial judge.
3. Confusingly for neophytes, normative verdicts are often expressed in *ostensibly* factive language.
4. If only the same factors are weighed for Verdicts A and B, issues A and B are not conceptually different. They just are different labels for the same concept (consider: ‘reasonable foreseeability’, [sufficient] ‘proximity’, ‘fair, just and reasonable’)[[33]](#footnote-34) and convenient means for avoiding precedents.
5. ‘Fact-finding’ is not mind-independent. Here are three ostensibly matter-of-fact issues. None is mind-independent. Without realising that, our neophytes will not learn to understand and/or challenge propositions.
   1. **Which evidence to believe?** Here we should seek the inference to best or most probable explanation of the available evidence. However, we might be affected by preconceptions acquired from direct experience or vicariously, which provide a framework for our judgements. By contrast, the objectivity (I resist the word ‘truth’) of normative propositions is not a matter of probabilistic best fit with the available evidence.[[34]](#footnote-35)
   2. **Choosing an ‘operative’ or ‘proximate’ cause of an event from its numerous *causae sine qua non.***[[35]](#footnote-36) We might be simply trying to *explain what happened* but, for example, our values lead us to choose force-dynamic actions rather than omissions.
   3. **Determining states of mind.** To find that D intended to, or was reckless, in striking C is clearly factive and Popperian. So too are determinations of D’s motives.

### Inference and imputation

One can legitimately *infer* that D is liable to C from:

1. a normative rule—*intentional* shooting of another is battery; plus
2. empirical evidence that D shot at C: a witness testifies that D took aim at C and, shouting, ‘Take that you b\*\*\*\*\*\*d’, fired, hitting C.

Similarly, one can *infer* from evidence that D *intended* to shoot T (a third party) but missed and shot C. However, to hold D liable for intentionally shooting C—as in transferred intention cases—is to decide to treat D *as if* D intended to shoot C. That is not *inference* of *factive* intent that brings D within the scope of the battery rule but a *normative imputation—*a value judgement that D *ought* to bebrought within the rule’s scope.[[36]](#footnote-37)When judges impute (even if they say they are ‘inferring’) they are making normative (not factive) judgements.

### Two cautionary examples

First, *Ardron* v. *Sussex Partnership NHS Foundation Trust*, in which the judge, Pushpinder Saini QC, designated ‘gross misconduct’ (conduct sufficient to justify summary dismissal) ‘a question of fact.’[[37]](#footnote-38) However, when he insisted that an employer cannot set the threshold of required grossness any lower than the general law provides, he set a *standard*, rather than found a *fact*. He said,

[37] …’the relevant conduct undoubtedly has to meet a threshold of seriousness. The earlier case law underlines the seriousness of the conduct which needs to be established in cases of claimed gross misconduct and gross negligence.’

[38] ‘[D] was not in law entitled to apply these [contractual] definitions [of ‘gross misconduct’] without a gloss which requires serious wrongdoing such as to justify dismissal’

Secondly, here’s a single bullet point, wrenched (as neophytes might) from a summary panel in a short book on tort law. Unfortunately, ‘reasonable’ before ‘foreseeability’ and ‘sufficient’ before ‘proximity’ are omitted.

‘The factors which courts take into account in determining duty of care are foreseeability of harm, proximity, and whether imposing a duty would be fair, just, and reasonable.’[[38]](#footnote-39)

Being treated as factive, ‘foreseeability’ and ‘proximity’ are mis-named and reified as ‘factors’. Despite the preceding bullet point: ‘The duty of care… is a matter of law and is strongly policy-based’,

neophytes might well be distracted from asking what factors about the circumstances of cases that led to reasonable foreseeability and sufficient proximity verdicts—especially if they have already absorbed the Mrs Beeton approach. Furthermore, in isolation, the bullet does not point neophytes towards Lord Bridge’s description, in *Caparo Industries Plc. v. Dickman,* of ‘fair, just and reasonable’ as,

‘little more than convenient labels to attach to the features of *different specific situations* which, on a *detailed examination of all the circumstances*, the law recognises *pragmatically* as giving rise to a duty of care of a given scope.’[[39]](#footnote-40)

# III. Incontestable, contestable (and sometimes contested) concepts

Legal concepts are not ornaments to be collected and displayed. Whether incontestable or contestable, they *function* in the justification of submissions and verdicts of liability and of what the rule is or ought to be. Consider the pesky Brexit Referendum. Conceptually, just as there can be no four-sided triangles, ‘Remain’ admitted of no competing conceptions. It amounted to maintaining the *status quo*.[[40]](#footnote-41) Whereas, ‘Leave’ has proved eminently *contestable*—and fiercely *contested*. The distinction is rather like that between the functionalities of an on/off switch (binary) and a continuously variable volume control (analogue).

The character of a rule is in large part determined by the character of the concepts of which it is composed. Sometimes the concepts involved are incontestable. Often, they are contestable. Less often, but frequently, they are contested.

Whilst incontestable concepts are not mind-dependent and can be applied by un-intelligent machines, contestable concepts are necessarily mind-dependent in application, whether the mind in question,

1. takes the meaning for granted, giving rise to uncontested-contestables, which occur when most of the dominant minds think alike or simply share the same intuitions and can be easily mistaken for incontestables; or
2. engages in interpretation, which will often be contested.

## Incontestable Concepts

‘Parking meter rules’ provide a paradigm for rules that depend almost completely upon incontestable concepts.

IF my car is ‘present in the meter bay’ for ‘longer than the time for which I have paid’ THEN I am liable to pay a penalty.

Neither of that rule’s two key concepts—'physical presence’ and ‘time’—admits of competing conceptions. ‘Time’ can be measured mechanically and officially by the meter. ‘Presence’ can be determined by observation, whether human or CCTV. The rule can operate almost completely mind-independently.

However, there is a mind-dependent issue of possible liability if the car has already moved halfway out of the bay when the meter flag goes up. This is akin to deciding whether to round 1.5 up to 2 or down to 1. Whichever option is chosen, the conceptions of one-ness and two-ness—being incontestable quasi-mathematical (or necessarily irrefutable) concepts—are not (and cannot be) contested. We can call this kind of question marginal or penumbral.[[41]](#footnote-42)

That apart, we can say that parking meter rules are ‘all core and no penumbra’. They have a quasi-mathematical irrefutability. In application, they raise factive issues of perception and measurement but no competing conceptions of their key concepts. Artificial *un*-Intelligence can easily be used to enforce them. Comprising incontestable concepts, they are neither context-specific nor consensus-specific.

## Latent and patent contestability

Hence, as already mentioned and Figure 1 illustrates, there is a crucial sub-division of contestable concepts between: (i) ‘contestable but not presently contested’; and (ii) ‘contestable and currently contested’. (i) occurs when the relevant social consensus is strong. (ii) occurs as consensus breaks down.[[42]](#footnote-43)

There is no bright line between uncontested-contestables and contested-contestables. But, given human nature, our neophyte will tend to think otherwise, or at least, that is what Hans Rosling, John Dewey and Hermann Hesse contend.

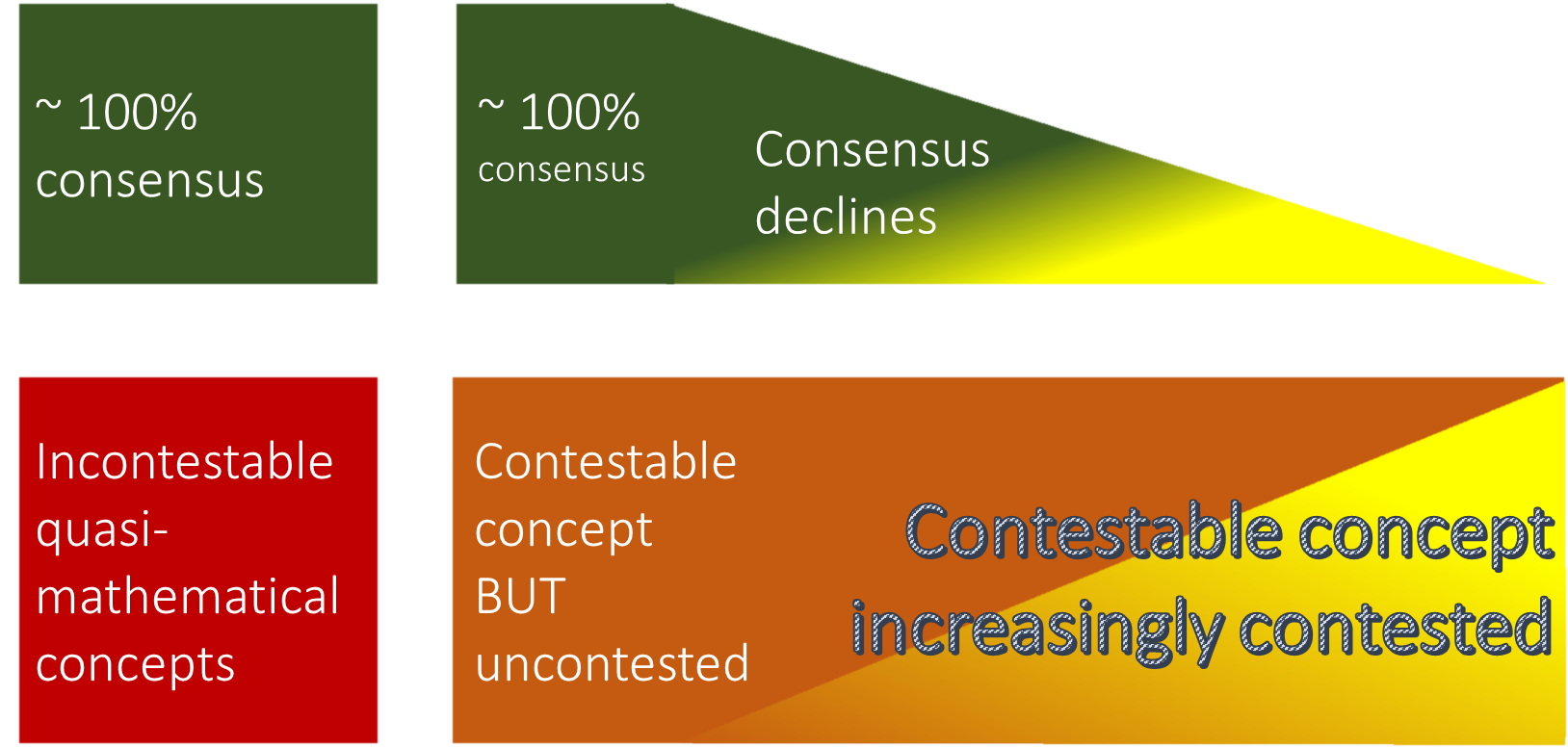
‘We love to dichotomize…Dividing the world into two distinct sides is simple and intuitive, and also dramatic because it implies conflict, and we do it without thinking, all the time…[We] imagine division where there is just a smooth range, difference where there is convergence, and conflict where there is agreement.’ (Hans Rosling)[[43]](#footnote-44)

‘Mankind likes to think in terms of extreme opposites. It is given to formulating its beliefs in terms of Either-Ors, between which it recognizes no intermediate possibilities. When forced to recognize that the extremes cannot be acted upon, it is still inclined to hold that they are all right in theory but that when it comes to practical matters circumstances compel us to compromise.’ (John Dewey)[[44]](#footnote-45)

‘Our mind is capable of passing beyond the dividing line we have drawn for it. Beyond the pairs of opposites of which the world consists, other, new insights begin.’ (Hermann Hesse)[[45]](#footnote-46)

The trap here is to think—dichotomously—of only two categories: (a) incontestable quasi-mathematical (or necessarily irrefutable) concepts, such as an isosceles triangle or two-ness; and (b) ‘essentially contest*able* concepts’.[[46]](#footnote-47) The on/off switch fits well with (a) and the continuously-variable volume control fits well with (b). But you might have a convention that having set the level when you first used the amplifier you simply do not move the control, until you discover solo guitar recordings and feel the need to increase the volume.

Figure 1 Incontestable, Contestable and Contested concepts

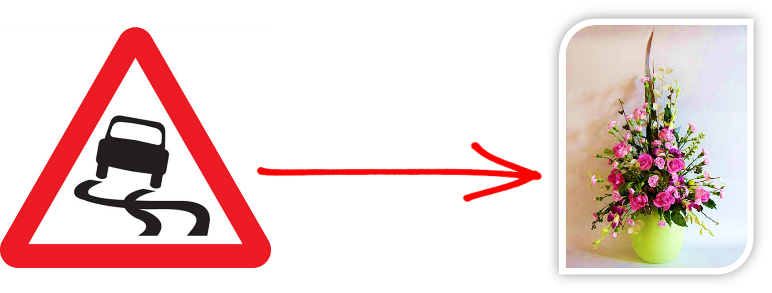


This necessary shift away from dichotomous thinking not only increases the effective number of categories from two to three, but introduces two continuously variable factors:

1. A well-established consensus will probably dissipate gradually. It might decline gradually. I’ve drawn a straight line in Figure 1, probably because we tend—often wrongly—to assume straight lines.[[47]](#footnote-48) But there could very well be sudden dips, plateaux, and even small upturns.
2. Similarly, despite my upward diagonal straight line in Figure 1, lawyers’ and judges’ practical recognition of contestability is likely to start slowly and then move more rapidly as test cases emerge.

Of course, there are differences in kind: a cow is not a dog; an animal is not a stone; a stone is not a vegetable. But we must also be alert for some subtle shifts. Whilst a triangle must have three sides that are joined—without rounding—at angles that must always sum to 180o, ‘triangularity’ is a matter of degree.

Figure 2: Are both the road sign and the floral display 'triangular'?



I have begun here to account for the paradox of change and stability in the common law that, I contend, is a particular barrier for our neophyte. But neophytes’ (and doctrinalists’) tendency to imagine that legal concepts have a mind-independent reality that offers only penumbral scope for interpretation.

## More contestability than meets the eye

Whilst there are many obvious cases of contestability, some contestable concepts seem to present uncontroversially—appearing much like the factive label for objects—and remain uncontested until particular circumstances cause lawyers, concerned to achieve a result that now seems demanded by circumstances of social need, put pressure on the concept.

Language fixed by Parliament can be seen to be contestable. Lord Bingham thought there to be

‘no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of ‘cruel and unusual punishments’ has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so.’[[48]](#footnote-49)

*A fortiori*, the many of the concepts of judge-made law are contestable.

## Fact-sensitivity

To say, as judges often do, that a concept is ‘fact-sensitive’ recognises that it cannot be mind-independent, because:

1. it is open-textured in the way that parking meter rules are not;
2. case-by-case variations in the parties’ circumstances will affect the concept’s application; and
3. the concept is contestable and sometimes contested.

Fact-sensitive concepts do not constitute a discrete class. They are simply contested-contestables that are applied mind-dependently. For example, in *Richard* v*.* *British Broadcasting Corporation*, Mann J thought the question of a reasonable expectation of privacy in a police investigation ‘fact sensitive’ and ‘not capable of a universal answer one way or the other’. He wondered ‘whether there is a *prima facie* answer, or a usual answer, to act as a starting point (and general guidance) in any given case’.[[49]](#footnote-50) Then he ruled that, ‘on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation’,[[50]](#footnote-51) adding that there is no ‘invariable right to privacy’—no litmus test.

‘There may be all sorts of reasons why, in a given case, there is no reasonable expectation of privacy, or why an original reasonable expectation is displaced.’[[51]](#footnote-52)

## Contestation: marginal and whole-concept models

Our tripartite distinction might well set our neophyte on the right track, but it might also help to find occasional curriculum opportunities to explain something of the further distinction between:

(a) cases of marginal or penumbral contestation, in which the core remains uncontroversial, as when the penalty flag comes up, the car having part-exited the parking bay; and

(b) cases in which there are contestable, and-contested, conceptions of the whole concept.

In both classes the broad-brush concept of ‘extension’ might be used, but (a) adding a conservatory to a house is very different from (b) turning the house into a school with a rear extension. Furthermore, in the following examples, several variants of (b) can be identified: re-interpretation; supplementation; sub-division; displacement; and expansion.

As an achievable pedagogic target for our neophyte’s learning, we should probably concentrate on the (a)/(b) distinction rather than distinguishing the variants. But I explore them here to illustrate the potential of this kind of analysis.

### Core/penumbra: the on/off switch

Despite the binary nature of the action envisaged, *An NHS Trust* v. *Y* evidences considerable uncertainties.[[52]](#footnote-53) After 90 paragraphs reviewing the fairly extensive case law and medical guidelines and a further 35 paragraphs of discussion, the verdict emerges that there is no common law (or Convention-derived rule) requiring prior judicial sanction for *all* life-ending decisions to withdraw treatment of patients who evidence a ‘prolonged disorder of consciousness’.[[53]](#footnote-54) Further, it was decided that treatment can be withdrawn without seeking a declaration provided that: professional guidelines are followed; and medical and family opinions on whether withdrawing treatment is in the patient’s best interests coincide.

That much being clear, our neophyte could simply record and learn it. However, the two provisos are open-textured, and the judgment offers no clear test of: who counts as a relevant medical professional; or what to do if the patient’s spouse is against withdrawal and the one adult child thinks withdrawal preferable. Core-penumbra (a) analysis fits well enough.

### Re-interpretation: ‘home’

The core-penumbra approach is less apt to describe the issue in *R (Walford)* v. *Worcestershire County Council,*[[54]](#footnote-55) *viz.* whether Ms Walford was entitled to regard as her ‘home’ her mother’s house, in which her mother had lived until going into care. If so, the value of the house would be disregarded in assessing the mother’s ability to pay the care costs. Ms Walford lived elsewhere but kept a room and office at her mother’s and intended to live there on retirement. On a narrow view, ‘home’ is simply the building in which one usually sleeps and from which one is entitled to exclude others. On a broader view, ‘home’ is—to use Margaret Radin’s expression—‘affirmatively part of oneself’? To find for Ms Walford, Supperstone J had to adopt the latter broader—psychological rather than geophysical—conception of the concept of ‘home’.

‘Home is a place to which a person has a degree of attachment both physical and emotional. The test as to whether a person occupies premises as their “home” is both qualitative and quantitative.’

Interestingly, this broader conception was common ground between the parties at first instance. Furthermore, in finding (effectively)[[55]](#footnote-56) for the local authority, the Court of Appeal did not reject the broader conception but focused on its quantitative aspect, holding that keeping rooms there was insufficient. This is not core-penumbral but whole-concept thinking. Any answer to the question ‘insufficient for what?’ must engage with the broader conception of ‘home’.[[56]](#footnote-57)

### Supplementation: ‘invisible handcuffs’

One might imagine that the false imprisonment tort enables victims of enslavement by ‘invisible handcuffs’, or those acting for them, to bring tort actions for compensation rather than rely on criminal prosecutions (which demand a higher standard of proof and, even if private, are subject to Crown Prosecution Service control).[[57]](#footnote-58) However, the dominant conception of tortious ‘imprisonment’ has been geo-physical, with *Bird* v. *Jones*[[58]](#footnote-59) taken as the paradigm and entrenched in the textbooks. That conception advantages claimants who suffer the indignity of imprisonment whilst unaware,[[59]](#footnote-60) whose claims would, on a purely psychological conception, fail absent some reputational damage. But it does nothing for those in ‘invisible handcuffs’.

However, the psychological and physical conceptions can co-exist. The Newfoundland Supreme Court has accommodated a psychological conception;[[60]](#footnote-61) Denman CJ took a similar line, unsuccessfully, in *Bird* v. *Jones* itself;[[61]](#footnote-62) and, recently, in *R (Jollah)* v. *Secretary of State for the Home Department*, the Court of Appeal endorsed a similar move. Under a defectively authorised night-time curfew, Mr Jollah was tagged and under threat of sanctions should he leave his abode. The ‘restraint’ was ‘sufficiently “complete” for the purpose of the tort’. The claimant, ‘was, and felt himself to be, obliged to be confined within the parameters of his home during the specified hours.’[[62]](#footnote-63)

This is not a mere penumbral extension but whole-concept thinking. In response to changing conditions and a changing consensus, ‘imprisonment’ now embraces both the geo-physical and psychological conceptions.

### Changing conceptions of consideration: replacement; entrenchment; circumvention

##### Replacement

Patrick Atiyah describes the conception of consideration before, at the dawn of the nineteenth century, ‘the economic liberalism of the common law…triumph[ed] over the protective paternalism of the Chancery’ and ‘jury and Chancery discretions were significantly curtailed.’[[63]](#footnote-64)

If (for instance) a seller brought an action for the price of something sold to the buyer, and if the buyer could persuade the jury that the price he had agreed to pay was grossly excessive, the jury might well award damages representing a fair price, rather than the agreed price. Moreover, it would be wrong to suggest even that in such a case the law “in theory was one thing”, and the law “in practice” was operating in disregard of its own rules. That…is to read later law back into the past. Throughout most of the eighteenth century Chancellors and judges knew that the common law jury had these discretionary powers “to mitigate damages”; they even encouraged their use where appropriate; and they made their own decisions on the basis that juries would continue to operate in the future as they had operated in the past.’[[64]](#footnote-65)

The story of consideration[[65]](#footnote-66) shows the *replacement* of:

1. a conception of consideration as ‘a compendious word simply indicating whether there are good reasons for enforcing a promise’[[66]](#footnote-67) (a conception which accommodated jury discretion and adjudication on the adequacy of the price paid); by
2. quite another—call it ‘bargained exchange’—that appealed to the economic liberalism of the nineteenth century textbook writers and insisted that, so long as some consideration moved from the promisee, its adequacy would be presumed.

##### Entrenchment

As formal education in English (rather than Roman) law began to develop in the nineteenth century, it required treatises and textbooks that would enable law—in keeping with the *Zeitgeist* of economic and possessive individualism—to hold its head up as ‘scientific’ along with the physical sciences. Sir Henry Maine called this, 'a reform of law-books than a reform of law.’[[67]](#footnote-68)

Textbook writers—‘legal scientists’[[68]](#footnote-69)—laboured to systematize Tennyson’s ‘codeless myriad of precedent’ and to bring the ‘wilderness of single instances’ under cultivation.[[69]](#footnote-70) They shoehorned carefully selected precedents into schemata that reflected the dominant individualistic ideology of that period time—lauding contract as jointly-willed by free individuals’ choices. In this systematization, conveniently supportive dicta were transformed into representations of eternal doctrine—and incompatible dicta and decisions consigned to oblivion. *Ex post* rationalisations were presented as *ex ante* purposes. ‘The “form” [thus imposed on the law that was taught and learned] expressed “substantive” values and policies’.[[70]](#footnote-71) In history, such selective reading undermines the validity of an account but, in law, ‘history’ is often re-made—despite the risk of undermining law’s legitimacy.

The essentially individualistic ‘sanctity’[[71]](#footnote-72) of (supposedly freely-made) contracts was entrenched as doctrine and has remained so. Recall that consideration is open-textured and inherently contest*able.* A particular conception of it will become settled only when the related (and dominant) socio-economic consensus is settled. In the nineteenth century that dominant consensus was settled and reflected in the doctrinal requirement that promisees must show that they have given ‘good consideration’—that they have done or refrained from doing something in exchange for the promise. In the era of self-help and social Darwinism,[[72]](#footnote-73) the law was not concerned that C had made a bad bargain. Consideration thus became what Atiyah calls ‘a technical requirement of the law which has little or nothing to do with the justice or desirability of enforcing a promise.’[[73]](#footnote-74)

##### Circumvention

The dominant consensus has shifted and welfarism now is a countervailing force. But welfarism has not assaulted consideration’s citadel directly. Instead it has swerved around it. Where felt fairness demands that a promise which is not supported by bargained exchange be enforced or a that a party be relieved from a bargained exchange, courts have developed ways of working around the rigidity of the essentially nineteenth century classical conception of consideration. The previous conception could well have accommodated much of what now appears in separate textbook chapters on duress, fraud or illegality, equitable quasi-estoppel. They have become separate doctrines.

Furthermore, the concept of ‘intention to create legal relations’ has emerged to deal with matters that earlier would have been dealt with in terms of consideration.[[74]](#footnote-75) There is probably now some overlap between the various conceptions of the two doctrines but, as an ‘un-American realist,’ our neophyte will be predisposed to think that the two concepts discrete. That would be to think of legal concepts (offer, acceptance, considerations, intention to create legal relations) as having a reality that is context and function independent in the way that flour, fat, eggs, and sugar exist independently of Mrs Beeton’s sponge-making intentions.

What accounts for what Atiyah calls the ‘hardening of the arteries’ of the consideration concept? Atiyah points to the ascendancy of the possessive individualism and of the belief in economic liberalism as the engine of progress—attitudes that became dominant in the nineteenth century and which required the ready enforceability of executory contracts. Roughly simultaneously, formal education in English law and the writing of treatises and textbooks that expounded theories developed and absorbed the new conception.

### Operational sub-division: conceptions of ‘reasonable care’

We might take ‘reasonable care’ as the paradigm contestable concept. To have taken what courts will recognise as ‘reasonable care’ is a good defence to a tort claim. At this high level of abstraction there is an ostensibly stable doctrinal unity—after all, we all intuitively favour a fault principle. But it is difficult to read across from the operational standards—do this but not that—required of a doctor to those required of a body-piercer[[75]](#footnote-76) or of a motorist.[[76]](#footnote-77) To get a handle on standards, we must sub-divide and look at the caselaw in quite narrow categories.[[77]](#footnote-78) We have to group: broadly similar kinds of risk; of broadly similar kinds of harm; arising in broadly similar ways; in broadly similar circumstances; caused by broadly similar particular kinds of defendant; to broadly similar kinds of claimants. This categorisation is mind-dependent, as are the standards required of defendants within the various categories. And, occasionally, new categories emerge, for examples: manufacturers’ liability to an ultimate consumer despite the absence of the privity so beloved of nineteenth century economic liberals;[[78]](#footnote-79) and liability for careless misstatements on which the claimant has reasonably relied.[[79]](#footnote-80)

Furthermore, within the particular categories of human affairs, standards shift. In 1938, to demonstrate reasonable care, a jeweller piercing ears had only to ‘place…his instrument in a flame and wash…his hands, and…dip…both the instrument and his fingers into a glass of lysol before he pierced the ear’.[[80]](#footnote-81) Nowadays, autoclaves can be purchased for under £100 (tax deductible for the professional) and the incidence of skin-puncturing for cosmetic reasons (and puncturists’ profits) has grown exponentially. A modern court would probably now raise the standard of care required within this non-therapeutic skin-puncturing category. Such a decision could not be merely penumbral. It would modify the standard within the category.

What counts as, say, the clearly contestable ‘reasonable care in doctor-patient relations’ might be *uncontested* for a period of time. For example, ‘Doctor knows best’ underlay the approach in *Bolam* v. *Friern Hospital Management Committee* that accordance with a significant body of medical opinion is exculpatory of negligence.[[81]](#footnote-82) For a while, this conception of the concept of ‘reasonable care in doctor-patient relations’ was broadly acceptable and accepted.

But, with the rise of consumerism and developing expanding conceptions of individual rights, that consensus began to break down—and its latent contestability became patent. By 1997, courts asserted their power to override medical opinion[[82]](#footnote-83) and, by 2015, the Supreme Court decided to insist on patients’ right to be informed of risks.[[83]](#footnote-84) We have probably moved to a new consensus.[[84]](#footnote-85) Both context and consensus matter—and necessitate a pragmatic approach to understanding language in use. Furthermore, in these cases we see a fundamental shift in the conception of the concept of reasonable care in the category—from ‘doctor knows best’ to ‘patient autonomy’.[[85]](#footnote-86)

### Enduring and expanding: changing conceptions of vicarious liability.

That some high-level legal concepts connect naturally with folk morality—as ‘reasonable care’ does and ‘consideration’ might yet do again—can encourage their review and development as the consensus about what we are entitled to expect shifts. Any such developments are not concept-driven but reflect changing responses to the equitable pull of the cases that come to court—experience, not logic.[[86]](#footnote-87) And earlier precedents elaborating the concept will tend to entrench particular conceptions limit development and encourage manipulative workarounds.

This direction of travel—'cases and consensus to conception’ rather than the ‘concept to conception’ direction that, I argue, neophytes are conditioned to expect—is well illustrated by developments in vicarious liability, which, at the highest level of abstraction, lacks obvious connection with any folk norms. The doctrine simply *asserts* that, irrespective of any personal fault, D must indemnify C for torts committed by T, with whom D has some relevant pre-existing connection. The concept itself is silent about the nature of that connection and about any principle that might justify rules that run counter to our intuitive bias towards fault-based liability[[87]](#footnote-88) for force-dynamic acts.[[88]](#footnote-89) Thus, Lord Bramwell confessed to a Parliamentary Committee in 1876 that he had ‘never been able to see…why a man should be liable for the negligence of his servant, there being no relation constituted between him and the party complaining.’[[89]](#footnote-90) Weinrib would share Bramwell’s puzzlement.[[90]](#footnote-91)

But, without vicarious liability, claimants injured by uninsured tortfeasors of little wealth would have themselves to bear the consequent losses. In *Hern* v *Nichols*, Holt CJ responded to this equitable pull in a commercial context. On D’s behalf, T was trading in silk and deceived C about the quality of the goods. Holt CJ held D liable in tort for T’s tort, saying that ‘somebody must be a loser by this deceit’ and preferring that D be the ‘loser’ because D had ‘employ[ed] and put…a trust and confidence in [T]’ rather than the ‘stranger’ C who had suffered loss through no fault of his own.[[91]](#footnote-92) Holt thus gave innocent C access to Ds’ ‘deep pocket’. Furthermore, access to deep pockets is essential if a fault-based system of accident compensation is to pass muster in a world that injures on an industrial scale and where ‘[i]n nine out of 10 cases the real defendants are insurance companies, with the remainder comprising large self-insured organisations or public bodies such as local authorities.’[[92]](#footnote-93)

In 1916, Harold Laski[[93]](#footnote-94) reviewed the various justifications offered in the cases and thought none satisfactory. He concluded, rightly, that ‘the basis of the rule, in fact, is public policy’[[94]](#footnote-95) although putting that in terms that economic liberals would reject.

‘Business has ceased to be mere matter of private concern… [Vicarious liability] is simply a legal attempt to see the individual in his social context. That, at which we industrially aim, is the maximum public good as we see it. In that respect, the employer is himself no more than a public servant, to whom, for special purposes, a certain additional freedom of action, and therefore a greater measure of responsibility, has been vouchsafed.’[[95]](#footnote-96)

Claimants cannot dip into just any deep enough pocket. Sir Frederick Pollock too was well aware of the weakness of justifications that were not consequentialist and thus policy-based. Pollock saw vicarious liability flowing from an obligation so to manage our affairs as not to injure others, even when conducted thorough others. [[96]](#footnote-97)  In his textbook, he noted that the caselaw evidenced ‘considerable difficulties of principle, and is often complicated with troublesome questions of fact.’ He found Willes J’s view that the master ‘has put the agent in his place to do that class of acts’[[97]](#footnote-98) helpful and noted that servants often act for their masters’ benefit. He concluded by articulating ‘the rule’—‘on whatever reason founded’—setting out the two limbs that, with the substitution of employer for master and employee for servant, shaped the debate for the twentieth century: ‘1. Who is a servant. 2. What acts are deemed to be in the course of service.’[[98]](#footnote-99)

For the first half of the twentieth century justifications focussing on an *employer*-D’s power of *control* over employee-T (and its corollary, ‘D not liability for independent contractors’) were probably the most congenial and durable. There were marginal issues about both limbs but the pace of expansion of the doctrine’s scope accelerated in response to two phenomena: (a) the advent of the expert employee who could not be controlled in the accustomed way; and (b) the scandal of child abuse. Broadly, (a) led to considerable expansion of limb 1 and (b) led to the expansion of limb 2.[[99]](#footnote-100)

The National Health Service was not permitted to avoid vicarious liability for the torts of the many experts that it employed. The emphasis moved from control to organisational allegiance—NHS doctors are not in working for themselves. As the shocking incidence of child abuse was realised, the necessary connection between T’s actions and D was expanded to provide victims with a source of compensation. Thus, a Christian brotherhood is now liable for tortious child abuse committed by its members with whom it has a relationship ‘akin to employment’[[100]](#footnote-101) and a local authority similarly liable for abuse in fostering arrangements that it has arranged.[[101]](#footnote-102) A care home is liable for abuse by its employees[[102]](#footnote-103) and, by extension, a supermarket owner is liable for the gratuitous violence of one of its staff to a customer.[[103]](#footnote-104) Although such employers will say that they did not employ T to do such things, their enterprises created the opportunities.

We see conceptions developing in response to claims. Hence earlier conceptions—for example, that exculpated D when T is clearly an ‘independent contractor’—must now be considered far more flexibly. In *Barclays Bank plc* v. *Various Claimants*, (in which a bank was held vicariously liable for the abuse of employees by an independent contractor—who provided medical examination services regularly and was known as the firm’s doctor—of employees whilst undergoing such examination) Irwin LJ was not prepared to be ruled by any rigid conception of ‘independent contractor’. He clearly preferred (despite any consequent doctrinal untidiness) to deal with circumstances on their merits rather than to liken limb 1 to a parking meter rule or invoke core-penumbra reasoning.

‘It is clearly understandable that a "bright line" test, such as is said to be the status of independent contractor, would make easier the conduct of business for parties and their insurers. However, ease of business cannot displace or circumvent the principles now established by the Supreme Court. Lord Faulks advanced the status of self-employed independent contractor as representing a "coherent principle of law", thereby seeking to justify the maintenance of such a principle. The submission may be attractive at first blush. However...establishing whether an individual is an employee or a self-employed independent contractor can be full of complexity and of evidential pitfalls.’ [[104]](#footnote-105)

# Pedagogic practicality

Readers might reasonably suggest that ideas of this sort would be indigestible by neophytes. I certainly do not advocate their presentation as part of some grand analytical toolkit and I recognise that I have here have gone deeper with some distinctions than would be possible in teaching neophytes. But I do contend that, as and when the law on the various syllabi presents opportunities, we should—with suitable caution—use such explanatory techniques. It would, I think, be wrong to teach *Bird* v. *Jones* without touching on modern slavery in some way like the brief discussion above. And, if I am right that our neophyte is preconditioned to think parking meter rules and core-penumbra thinking paradigmatic, we are under some pedagogic obligation to utilise opportunities to explain whole-concept contestability and its significant absence when we see them.

Even if I have convinced readers of a need, I have given little indication of how the formidable task might be tackled. I will go to Edinburgh for the Festival but need a mode of transport, tickets and somewhere to stay.

Here’s a few suggestions:

1. If Santa Claus is not to rule their minds, students need, early on, to engage in case studies where conceptions of familiar everyday concepts (‘It was her fault’, ‘He intended to hit me’, ‘Why should he get that for nothing’, ’But I relied on her statement’) have changed in their legal application.
2. Reading and writing skills require practice. Why not take 1,000 words from a judgment that, for example, uses ‘foreseeable’ normatively but omits ‘reasonably’ on some occasions and ask student to prepare a 250-word précis?
3. Jenny Kemp suggests that students’ difficulties are not simply with unfamiliar single words, or the unfamiliar usage of familiar words, but with phrases for which students lack lexical priming. They lack the legal equivalent of a learned familiarity with such usage conventions as ‘a lift may be *out of order* if it does not function, but if a person is *out of order* it does not mean they are unwell or incapacitated.’ She argues that examining collections of concordance lines (roughly phrases with some context) can help.[[105]](#footnote-106)
4. Mooting is argumentative. Mooters must: often argue for an outcome they intuitively reject; devise a strategy; anticipate their opponents’ arguments; spot ambiguities; find weaknesses in their own and opponents’ arguments; develop counter-arguments; and deal with questions as they arise in the hearing.
5. *A fortiori* with clinic, which adds finding facts.
6. Assessment and feedback are crucial. If students do not confront the issues early in the course, they will fall back on Mrs Beeton and nutshell summaries. If they can pass assessments by so doing their (human) confirmation bias goes unchallenged.[[106]](#footnote-107) There is also some evidence of the forward benefits of testing. These cannot be realised within a course unit if testing is simply terminal and summative.[[107]](#footnote-108)left to the end of the course unit.

But there are the SQE and wastage rate worries.

1. Ludwig Wittgenstein (trs. Ogden), *Tractatus Logico-Philosophicus* (Routledge 2014, original 1921), 5.62 [↑](#footnote-ref-2)
2. Francis Bacon, *The Advancement of Learning* V (8) (1605) https://www.gutenberg.org/files/5500/5500-h/5500-h.htm transcribed from the 1893 Cassell & Company edition. [↑](#footnote-ref-3)
3. *Cf*. a leaked report of a new OFSTED inspection framework: ‘Inspectors will identify and mark down “exam factory” schools that narrowly “teach to the test” and do not offer a rich education including art, music, sport and drama.’ *Sunday Times*, 12 August 2018. [↑](#footnote-ref-4)
4. The ambiguity of ‘expectation’ brings scope for double disappointment—things being not as our neophyte thought they would (factive), or ought (normative) to be. [↑](#footnote-ref-5)
5. See: *Regina (Conway)* v. *Secretary of State for Justice* [2018] EWCA Civ 1431 [189] ‘the evidence available…is necessarily limited to that which the parties wish to adduce…[T]he court cannot conduct consultations with the public or any sector of it and cannot engage experts and advisers on its own account’; *Owens* v. *Owens* [2018] UKSC 41 [46] *per* Lady Hale, ‘I have found this a very troubling case. It is not for us to change the law laid down by Parliament—our role is only to interpret and apply the law that Parliament has given us.’ [↑](#footnote-ref-6)
6. (1931) 44 *Harvard Law Review* 1222, 1234-1238 [↑](#footnote-ref-7)
7. ‘[O]ne of the first cookery writers to list all the ingredients at the beginning of the recipe, so that the housewife could make sure she had everything she needed before she started.’ (British Library: https://www.bl.uk/romantics-and-victorians/articles/mrs-beeton-and-the-art-of-household-management, visited 6 August 2017). [↑](#footnote-ref-8)
8. See Ernest Souza in Ted Honderich (ed.) *Oxford Companion to Philosophy* (Oxford: OUP, 2005) 780-790. [↑](#footnote-ref-9)
9. Ernest Weinrib, *Corrective Justice* (Oxford: OUP, 2012) 10, my emphases. Similarly, Arthur Ripstein, ‘Tort Law in a Liberal State’ (2007) 1(2) *Journal of Tort Law*, Article 3, 1-43, 7: ‘[I]t is a mistake to think of tort law as having a function at all, if by that we mean a set of effects that it produces, in the light of which it is justified’. *Cf.* John Witt, ‘Contingency, Immanence, and Inevitability in the Law of Accidents’ (2007) 1(2), *Journal of Tort Law* Article 1, 23: [I]t would be quite startling if corrective justice’s principles were immanent in the common law’s extension of royal authority in late medieval and early modern England.’ [↑](#footnote-ref-10)
10. Note 9 above, 19 and 22, my emphases. [↑](#footnote-ref-11)
11. *E.g*. *Nettleship* v. *Weston* [1971] 2 QB 691. Weinrib rejects this ‘subjective standard’: see *The Idea of Private Law* (Oxford: OUP, 2012) 178-184. However, in *Corrective Justice*, in an illuminating discussion of unjust enrichment, Weinrib happily accommodates some imputations or ascriptions. He considers, ‘whether [an] improvement is a gift from the improver to the owner; [and, if it is not] whether…acceptance of the improvement can reasonably be imputed to the owner…[and explains that] [t]he law’s treatment of these two issues is…a matter not of fact but of juristic construction. It involves not merely ascertaining what happened but working out the relevant legal categories and ascribing meaning in their light to the conduct of the parties.’ Note 9 above 260-261. [↑](#footnote-ref-12)
12. The word ‘vicarious’ appears only once in *Corrective Justice* and is not indexed. Yet, linked with insurance, the concept is vital to the survival of a fault-based system of accident compensation. However, in *The Idea of Private Law*, note 11 above (186-187), he seeks to explain vicarious liability as an ‘extension’ of fault-based liability. It ‘imput[es] the injurious wrong to the organisation as a whole.’ Most employers found vicariously liable might accept the imputation of responsibility but not of wrongfulness. *Cf*. Heidi Hurd’s claim ‘that however “average the man,”·and however much “ordinary intelligence and prudence” he has, he is without moral blame if the harm he causes another is a product of genuine inadvertence (however unreasonable) to the riskiness of his own behaviour. In other words, *all* cases of negligence are purportedly exceptional, textbook cases [like *Vaughan* v. *Menlove* (1837) 132 ER 490, 492] that do the equivalent of imposing liability on foolish farmers whose harmful behaviour is a result of “the misfortune of not possessing the highest order of intelligence.”’ Heidi Hurd, ‘Finding No Fault with Negligence’ in John Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford: OUP, 2015) 387-405, 388. [↑](#footnote-ref-13)
13. The officious bystander test was articulated by MacKinnon LJ in *Southern Foundries (1926) Ltd* v. *Shirlaw* [1939] 2 KB 206, 227. In the House of Lords in *Shirlaw*, Lord Atkin said, ‘Personally I should not so much base the law on an implied term, as on a positive rule of the law of contract that conduct of either promiser or promisee which can be said to amount to himself "of his own motion" bringing about the impossibility of performance is in itself a breach’ [1940] AC 701, 717. Such a rule does not depend on the parties’ intentions. On implying terms, see also Lord Hoffman in *AG of Belize* v. *Belize Telecom Ltd* [2009] UKPC 10 [27].

    In *Liverpool City Council* v. *Irwin* [1977] AC 239 a landlord’s obligations to a council tenant were constructed by the court despite virtually non-existent evidence of the landlord’s intention (see PS Atiyah, *Essays on Contract* (Oxford: OUP Clarendon, 1986) 339-341. Courts have regularly implied a condition of trust and confidence in employment contracts: see (*e.g.*) *Courtaulds Northern Textiles Limited* v. *Andrew* [1979] IRLR 84, EAT. [↑](#footnote-ref-14)
14. Stephen Pinker, *The Stuff of Thought: Language as a Window into Human Nature* (London: Penguin, 2007) 218-224. Arguably, the common law, having escaped codification, has stayed closer to Gaius’s tri-partite classification—persons, things, *actions*—than have Continental systems. In thinking structurally, the latter are more influenced by a nominalist tendency to reify the concepts used in normative reasoning and have substituted ‘*obligations’* (or ‘rights’ and ‘duties)’ for ‘*actions*’ and ‘property’ for ‘things’. See Geoffrey Samuel, ‘Is Legal Knowledge Cumulative?’ (2012) 32(3) *Legal Studies* 448–479, 454-455. [↑](#footnote-ref-15)
15. *E.g.* ‘[P]assivity [in receipt of an arguable unjust enrichment] means that the recipient cannot plausibly be regarded as a wrongdoer.’ Note 9 above, 188. Weinrib also classifies property law as ‘private law’—'proprietary rights worked out and protected by private law within a conception of corrective justice’, *op. cit.* 263. We might grant that most property is ‘private’ but protected by a ‘public’ law of property. [↑](#footnote-ref-16)
16. JL Austin (eds. JO Urmson & Marina Sbisà), *How to do Things with Words* (1975, 2nd edn: Cambridge MS, Harvard University Press) 153-155. [↑](#footnote-ref-17)
17. Robert Wright, *The Moral Animal* (London: Abacus, 1996) 280. [↑](#footnote-ref-18)
18. Not that contract law is inherently easier than tort law is to understand fully—just more congenial to many neophytes. [↑](#footnote-ref-19)
19. *Cf*. the malleability of business and employment contracts during the parties’ relationship (Stewart Macaulay, ‘Non-Contractual Relations in Business’ (1963) 28(1)*American Sociological Review* 55-67; and Ian Macneil’s model of ‘relational contracts’ (*The New Social Contract*: (New Haven: Yale University Press, 1980). At 47-48, Macneil suggests the obsession with consent can obscure understanding. [↑](#footnote-ref-20)
20. And probably constitutional and public law problems too. [↑](#footnote-ref-21)
21. An American realist would think these formulae for framing *ex post* justifications. [↑](#footnote-ref-22)
22. (1953) 1 QB 429, 441. [↑](#footnote-ref-23)
23. *Overseas Tankship (U.K.) Ltd*. v. *Morts Dock & Engineering Co. Ltd.* [1961] A.C. 388, 426. [↑](#footnote-ref-24)
24. *Ibid*. 391. [↑](#footnote-ref-25)
25. 2 November 1951, page 3. I am indebted to Dan Priel for a copy of this article. [↑](#footnote-ref-26)
26. My emphasis. [↑](#footnote-ref-27)
27. Similarly, Lord Lloyd in *Page* v. *Smith* [1996] AC 155, 189 *cf.* 197. [↑](#footnote-ref-28)
28. Karl Popper, *The Logic of Scientific Discovery*, published in German in 1935 and in English in various editions from 1959. [↑](#footnote-ref-29)
29. Elizabeth Fricker, ‘Inference to the Best Explanation and the Receipt of Testimony: Testimonial Reductionism Vindicated’ in Kevin McCain and Ted Poston (eds.), *Best Explanations: New Essays on Inference to the Best Explanation* (Oxford: Oxford University Press, 2017) 262-294. [↑](#footnote-ref-30)
30. Chaim Perelman & Lucie Olbrects-Tyteca, trs. John Wilkinson & Purcell Weaver, *The New Rhetoric* (Notre Dame, Indiana, University of Notre Dame Press, 1969, 2006) 190, ‘[A]rgumentation is characterised by constant interaction among all its elements.’ [↑](#footnote-ref-31)
31. See: Laura Schroeter, ‘The Limits of Conceptual Analysis’ (2004) *Paciﬁc Philosophical Quarterly* 85 (2004) 425–453; and Timothy Williamson, *op. cit*. note 8 above, 787-789, 788: for moral realists,‘[t]o discuss whether the judgement “Rape is wrong”·is correct independently of being judged [*i.e.* mind-independently correct] is to discuss the objectivity of moral truth, not the existence of moral objects…The existence of objects is relevant only when it is required for a judgement to be true’ (*e.g.* ‘Unicorns exist’). [↑](#footnote-ref-32)
32. For a useful review, see Adrian Diethelm, ‘Law and Fact in Common Law Procedure’ (May 17, 2009), available at SSRN: https://ssrn.com/abstract=1385622 or http://dx.doi.org/10.2139/ssrn.1385622. [↑](#footnote-ref-33)
33. *Cf*. *Robinson* v. *Chief Constable of West Yorkshire Police* [2018] UKSC 4 [↑](#footnote-ref-34)
34. Alex Biedermann *et al*., ‘The consequences of understanding expert probability reporting as a decision’ (2017) *Science and Justice* 57, 80–85. [↑](#footnote-ref-35)
35. Wex Malone, ‘Ruminations on ‘Cause-In-Fact’ (1956) 9 *Stanford Law Review* 60-99. [↑](#footnote-ref-36)
36. Vincent Johnson, Transferred intent in American Law (2004) 87(5) Marquette Law Review 902-938: http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1211&context=mulr.; Stephen Sugarman, ‘Restating the Tort of Battery’ (2017) *Journal of Tort Law*, https://doi.org/10.1515/jtl-2017-0020; *cf.* *Rhodes* v. *OPO* [2015] UKSC 32 [81] *per* Lady Hale, ‘Imputation of an intention by operation of a rule of law is a vestige of a previous age and has no proper role in the modern law of tort. It is unsound in principle.’ [↑](#footnote-ref-37)
37. [2018] EWHC 1535 (QB) [36]. [↑](#footnote-ref-38)
38. Vera Bermingham and Carol Brennan, *Tort Law Directions*, 5th edn. (Oxford: OUP, 2012) 59. However, the quoted words are prefaced with ‘It is a matter of law and is strongly policy-based’. [↑](#footnote-ref-39)
39. [1990] 2 AC 605, 618, my emphases. [↑](#footnote-ref-40)
40. But countenancing limited flexibility through the machinery of the European Union. [↑](#footnote-ref-41)
41. Andrew & Michael Mauboussin, ‘If you think something is ‘likely’...?’ (2018) *Harvard Business Review* https://hbr.org/2018/07/if-you-say-something-is-likely-how-likely-do-people-think-it-is. [↑](#footnote-ref-42)
42. Cristina Bicchieri & Alexander Funcke, ‘Norm Change: Trendsetters and Social Structure’ (2018) 85(1) *Social Research* 1-21. [↑](#footnote-ref-43)
43. Hans Rosling, with Ola Rosling & Anna Rosling Rönnlund, *Factfulness*, (London: Sceptre, 2018) 38-39. [↑](#footnote-ref-44)
44. John Dewey, *Experience and Education: Traditional vs. Progressive Education* (New York: Macmillan, 1939) [↑](#footnote-ref-45)
45. Hermann Hesse, ‘Inside and Outside’ (1920) in *Stories of Five Decades* (London: Grafton: 1979). [↑](#footnote-ref-46)
46. This phrase is chosen to invoke WB Gallie, ’Essentially Contested Concepts’ (1965) 56 *Proceedings of the Aristotelian Society* 167-198. But note my substitution of ‘contest*able*’ for ‘contest*ed*’. *Cf.* Eugen Fischer & John Collins, ‘Rationalism and naturalism in the age of experimental philosophy’ in their *Experimental Philosophy, Rationalism, and Naturalism* (London: Routledge, 2015) 3-33, 15: ‘The relevant notion of automaticity is gradual, rather than dichotomous’. [↑](#footnote-ref-47)
47. See note 43 above, 75-99. [↑](#footnote-ref-48)
48. *R (Quintavalle)* v. *Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 [9]. [↑](#footnote-ref-49)
49. [2017] EWHC 1666 (Ch) [237]. [↑](#footnote-ref-50)
50. *Ibid*. [248]. [↑](#footnote-ref-51)
51. *Ibid.* [251]. [↑](#footnote-ref-52)
52. [2018] UKSC 46 [125]-[126] *per* Lady Black, with whom the other Justices agreed. [↑](#footnote-ref-53)
53. *Ibid*. [2], ‘encompasses both a permanent vegetative state...and a minimally conscious state.’ [↑](#footnote-ref-54)
54. [2014] EWHC 234 (Admin) [51] Supperstone J, reversed on appeal [2015] EWCA Civ 22, McCombe LJ dissenting. [↑](#footnote-ref-55)
55. Supperstone J had quashed the local authority’s decision to take the value of the house into account and remitted the matter with guidance that, on re-determination, account should be taken of Ms Walford’s use of the house *after* her mother’s entry into care: [70] (iii). The Court of Appeal majority rejected that guidance: [27], *cf*. McCombe LJ at {36], ‘I do not see that the language of the Regulations with which we are concerned compels the identification of that purpose without the insertion of [further] words…’ [↑](#footnote-ref-56)
56. *Cf.* *Yemshaw* v. *Hounslow LBC* [2011] UKSC 3 a ‘physical’ concept of domestic ‘violence’ in Section 177(1) Housing Act 1996 was supplemented by the ‘psychological’ conception previously rejected in *Danesh* v. *Kensington & Chelsea RLBC* [2006] EWCA Civ 1404 [14] *per* Neuberger LJ. [↑](#footnote-ref-57)
57. Modern Slavery Act 2015 creates a criminal offence that does not entail the causing of psychiatric harm. *The Times*, 11 August 2017, reports that the Vulnerabilities Director, National Crime Agency (UK), believes estimates of 10,000-13,000 ‘enslaved’ victims of trafficking to be ‘the tip of the iceberg’. [↑](#footnote-ref-58)
58. (1845) 115 ER 668, 669, *per* Coleridge J, ‘A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing’. [↑](#footnote-ref-59)
59. *Meering* v. *Grahame-White Aviation Co Ltd* (1919) 122 LT 44, [↑](#footnote-ref-60)
60. *Chaytor* v. *London, New York and Paris Association of Fashion Ltd* (1961) 30 DLR (2d) 527, Newfoundland Supreme Court, Dunfield J, 536-537. [↑](#footnote-ref-61)
61. Denman CJ (dissenting) said, at 672-673, ‘A company unlawfully obstructed a public way for their own profit, extorting money from passengers, and hiring policemen to effect this purpose. The plaintiff, wishing to exercise his right of way, is stopped by force, and ordered to move in a direction which he wished not to take. He is told at the same time that a force is at hand ready to compel his submission.’ Denman CJ thought that tortious, adding that he ‘had no idea…any particular boundary [was] necessary to constitute imprisonment.’ [↑](#footnote-ref-62)
62. [2018] EWCA Civ 1260 [81]. The suggestion that the conceptions of tortious ‘imprisonment’ and of ‘deprivation of liberty’ under Article 5 ECHR should be ‘aligned’ was noted at [27]-[33] but left for another day. See also Edis J, *R (Gedi)* v. *Secretary of State for the Home Department* [2015] EWHC 2786 (Admin) [67]. [↑](#footnote-ref-63)
63. PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: OUP Clarendon, 1979) 117, 148. At 139, Atiyah acknowledges reliance on AWB Simpson, *History of the Common Law of Contract* (Oxford: OUP Clarendon, 1987). [↑](#footnote-ref-64)
64. *Op. cit.* 149. [↑](#footnote-ref-65)
65. Roughly from *Rann* v. *Hughes* (1778) 101 ER 1013, putting paid to Lord Mansfield’s notion that, along with writing, consideration should be conceived as evidence that an undertaking was sufficiently serious to justify its enforcement: *Pillens and Rose* v. *Van Mierop and Hopkins* (1765) 97 ER 1035: ‘In commercial cases amongst merchants, the want of consideration is not an objection.’ [↑](#footnote-ref-66)
66. PS Atiyah, *Essays*,note 13 above,185. See also SFC Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 2nd edn., 1981) 358, ‘[W]ith this subject as with many others we have tried to be too precise, to trace the later meaning back to some single source; and…supposing that even in the later law the word had a meaning in the sense of representing an idea.’ And, at 360, ‘[Consideration] has always been just the label on a package containing many of the separate rules about the liabilities that may arise in the context of a transaction’. [↑](#footnote-ref-67)
67. Sir Henry Maine, *Dissertations on Early Law and Customs* (London: Murray, 1883) 362-363, cited by Samuel, note 14, 456. [↑](#footnote-ref-68)
68. See: Samuel, note 14; Harold Berman, ’The Origins of Western Legal Science’ (1977) 90 *Harvard Law Review* 894-943; and Dan Robinson, *The Broader Philosophical context*, in which ‘science’ as it would be understood at the close of the eighteenth century is characterised as ‘a systematic body of principles on which one can ground truths that are at once universal and necessary’ (https://podcasts.ox.ac.uk/broader-philosophical-context, visited 30 July 2018). [↑](#footnote-ref-69)
69. Alfred, Lord Tennyson, in ‘Aylmer’s Fields’ in his *Enoch Arden* (London: Moxon, 1891). The full passage reads: ‘Mastering the lawless science of our law, / That codeless myriad of precedent, / That wilderness of single instances, / Thro' which a few, by wit or fortune led/ May beat a pathway out to wealth and fame.’ [↑](#footnote-ref-70)
70. Berman, note 68, 942. See also: Samuel note 14, 455-456. Witt, note 9, 7, comments ironically, ‘The law professor’s work is to identify the general patterns and the salient facts, to jettison the accidental and irrelevant’. [↑](#footnote-ref-71)
71. Sir David Hughes Parry, *The Sanctity of Contracts in English Law* (London: Stevens, 1959) 71. [↑](#footnote-ref-72)
72. See (e.g.) Samuel Smiles, *Self Help* (London: John Murray, 1897, first published 1859) http://www.gutenberg.org/files/935/935-h/935-h.htm. [↑](#footnote-ref-73)
73. Note 13 above,185. ‘Modern lawyers…see nothing incongruous in asserting that a promise made for good consideration should nevertheless not be enforced [but for quite other reasons such as duress].’ [↑](#footnote-ref-74)
74. *Op cit*. 184-185. Atiyah compares two cases of promises to family members *Shadwell* v. *Shadwell* (1860) 9 CBNS 159 (dealt with as a ‘consideration’ case) and *Jones* v. *Padavatton* [1969] 1 WLR 328 (dealt with as an ‘intention to create legal relations’ case). [↑](#footnote-ref-75)
75. *Philips* v. *William Whiteley Ltd* [1938] 1 All ER 566. [↑](#footnote-ref-76)
76. *Nettleship* v. *Weston* [1971] 2 QB 691, in order to give her passenger amateur driving instructor access to an insurance fund, a learner-driver was required to reach the standard of an experienced driver. But in *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263, [1997] EWCA Civ 1352 a truck-driver who was unaware of his ‘impaired degree of consciousness because of the malfunction in his brain caused by the deficiency in glucose’ was not liable for property damage caused to the claimants’ road-adjacent property adjacent. The Court of Appeal might have thought that property owners are normally elf-insured against impact damage, whereas self-insurance amongst car passengers is rare (and unnecessary since Road Traffic Act 1988, sections 143, 145(3)(a) and 149 introduced compulsory insurance against liability passengers and rendered the *volenti* defence inapplicable. [↑](#footnote-ref-77)
77. Indeed, the current doctrine that negligence develops incrementally and by analogy now requires category-based thinking that identifies duty-situations or sets of circumstances from which to draw analogies or make distinctions. See *Robinson* v. *Chief Constable of West Yorkshire Police* [2018] UKSC 4 [21]-[29] *per* Lord Reed. [↑](#footnote-ref-78)
78. *Donoghue* v. *Stevenson* [1932] AC 562. [↑](#footnote-ref-79)
79. *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465. [↑](#footnote-ref-80)
80. *Phillips*, note 75, 567. [↑](#footnote-ref-81)
81. [1957] 1 WLR 583. [↑](#footnote-ref-82)
82. *Bolitho* v*. City and Hackney Health Authority* [1998] AC 232. [↑](#footnote-ref-83)
83. *Montgomery* v*. Lanarkshire Health Board* [2015] UKSC 11. [↑](#footnote-ref-84)
84. *Ibid*. [68]-[69]; see also BMA guidelines https://www.bma.org.uk/advice/employment/ethics/consent/consent-tool-kit/3-information-provision. [↑](#footnote-ref-85)
85. There is something of ‘trust the medics’ in *An NHS Trust* v. *Y* [2018] UKSC 46: see text at note 52. [↑](#footnote-ref-86)
86. Oliver Wendell Holmes, *The Common Law* (London: Macmillan, 1968, original 1881) 1. [↑](#footnote-ref-87)
87. See Gavin Nobes *et al*, ‘The influence of negligence, intention, and outcome on children’s moral judgments’ (2009) 104 *Journal of Experimental Child Psychology* 382–397. [↑](#footnote-ref-88)
88. See note 14. [↑](#footnote-ref-89)
89. Harold Laski, ‘The Basis of Vicarious Liability’ (1916) 26 *Yale Law Journal* 105-135, 111. [↑](#footnote-ref-90)
90. See text at notes 9-15 above. [↑](#footnote-ref-91)
91. (1798) 91 ER 256. [↑](#footnote-ref-92)
92. Richard Lewis, ‘Compensation Culture Reviewed’ (2014) 4 *Jo. Personal Injury Law* 209-225, 213. [↑](#footnote-ref-93)
93. Note 89, 109-111. [↑](#footnote-ref-94)
94. *Ibid.* 111. [↑](#footnote-ref-95)
95. *Ibid*. 112 [↑](#footnote-ref-96)
96. Sir Frederick Pollock, ‘Employer's Liability’ in his *Essays on Jurisprudence and Ethics* (London: Macmillan, 1882): https://archive.org/details/essaysinjurispru00polluoft 114-143, 127. [↑](#footnote-ref-97)
97. Sir Frederick Pollock, *The Law of Torts*, (London: Stevens, 4th edn., 1895) 67-86: http://oll.libertyfund.org/titles/pollock-the-law-of-torts-4th-ed. At 71, he cites *Barwick* v. *English Joint Stock Bank* (1866-67) LR 2 Ex. 259, 266. [↑](#footnote-ref-98)
98. Pollock, note 97, 72. [↑](#footnote-ref-99)
99. The advent of outsourcing has led to a revival of *personal* non-delegable duties. Engaging an independent contractor does not discharge the responsibility when the duty is owed to the inherently vulnerable and highly dependent: see *Woodland* v. *Essex County Council* [2013] UKSC 66, [25](1)-(2). [↑](#footnote-ref-100)
100. *Various Claimants* v. *Catholic Child Welfare Society* [2012] UKSC 56. [↑](#footnote-ref-101)
101. *Armes v. Nottinghamshire County Council* [2017] UKSC 60. [↑](#footnote-ref-102)
102. *Lister* v. *Hesley Hall Ltd* [2001] UKHL 22. [↑](#footnote-ref-103)
103. *Mohamud* v. *WM Morrison Supermarkets* [2016] UKSC 11. [↑](#footnote-ref-104)
104. [2018] EWCA Civ 1670 [61]. [↑](#footnote-ref-105)
105. See Jenny Kemp, ‘Working towards a Discipline-based Vocabulary Core’; http://www.educ.cam.ac.uk/events/conferences/talc2018/programme/presentations/S89.pdf (visited 22 August 2018). [↑](#footnote-ref-106)
106. Daniel Kahneman, *Thinking, Fast and Slow* (London; Penguin, 2011) 81, points out that even supposedly Popperian scientists seek confirmation data for their current beliefs. [↑](#footnote-ref-107)
107. See (*e.g*.) Chunliang Yang, Rosalind Potts & David Shanks, ‘Enhancing learning and retrieval of new information: a review of the forward testing effect’ (2018) 3 *npj Science of Learning’* Article 8: https://www.nature.com/articles/s41539-018-0024-y [↑](#footnote-ref-108)