
THE SCAMPERING DISCOURSE OF NEGLIGENCE LAW

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‘[W]e must ... discover the law operating behind all these diverse statements, and the place from which they come’.¹

1 Introduction

In ‘The Canengusian Connection: the Kaleidoscope of Tort Theory’, Allan Hutchinson and Derek Morgan describe a set of facts that provide the basis of a negligence claim on the ‘small, little known island’ of Canengus.² Canengus is a common law jurisdiction in which judges base their decisions on Canadian, English, US, and other (*e.g.*, Australian) authorities. The facts described by Hutchinson and Morgan provide the basis of claims that raise matters of ‘sensitive and heated’ legal debate.³ Among other things, they include the scope of liability rules allowing claimants to recover in negligence for psychiatric injury and the question as to whether the law’s addressees should be under a duty to rescue others. Hutchinson and Morgan do not respond to these matters directly. Rather, they present their readers with the judgments rendered by the five judges who decided the case in the Canengus Court of Appeal. Each of these responses gives expression to the doctrinal and/or theoretical assumptions that inform the thinking of its (judicial) author.

‘The Canengusian Connection’ helps us to understand why those seeking to make sense of negligence law run the risk of disorientation. Anyone unfamiliar with this branch of tort may conclude that they are stumbling across a battlefield.⁴ For the disputatious, disorderly discourse they find

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¹ M. Foucault *The Archaeology of Knowledge* (Abingdon: Routledge, 2002), 55.

² A.C. Hutchinson and D. Morgan, ‘The Canengusian Connection: The Kaleidoscope of Tort Theory’ (1984) 22 *Osgoode Hall Law Review* 69, 74.

³ *Ibid.*, 73. (The fictive presentational strategy used by Hutchinson and Morgan bears obvious similarities to that employed in L. Fuller, ‘The Case of the Speluncean Explorers’ (1949) 62 *Harvard LR* 616.)

⁴ See A.C. Hutchinson and D. Morgan, ‘Shock Therapy: Policy, Principle and Tort’ (1982) 45 *Modern LR* 693, 693 (describing tort law as ‘a battleground of social theory’). *Cf.* N.J. McBride and R. Bagshaw, *Tort Law* (Harlow: Pearson, 2008, 3rd edn), xiii-xvii (on ‘[t]he tort wars’). (Hutchinson has recently stated that ‘the common law has and continues to impose a duty on its personnel to respect the [doctrinal-cum- institutional] past ... by

themselves contemplating exhibits a murkiness that calls to mind the fog of war. Some judges declare that the ideal of corrective justice is central to negligence law's operations.⁵ But others identify broad notions like policy and the public interest as shaping doctrine on, *inter alia*, duty of care and remoteness.⁶ Those who confront such divergent opinions may turn to academic commentators for guidance. But when they do so, they find that their difficulties grow. This may be because some academics make particularly strong (or sweeping) claims concerning the law. For example, Ernest Weinrib and others who follow his lead argue that negligence law is exclusively concerned with righting wrongfully inflicted harms and that judges should, on all occasions, be 'agents' of corrective justice.⁷ Richard Posner flatly contradicts this account of negligence law by identifying it as a branch of tort informed by a commitment to the pursuit of efficiency.⁸

Talk of a 'battlefield' and 'the fog of war' captures something important about 'The Canengusian Connection' and the body of law on which it dwells. Hutchinson and Morgan identify negligence law as a site of conflict concerning, *inter alia*, the purposes that find expression in existing doctrine. However, they do much more than this. And, in order to press the analysis of their essay, negligence doctrine, and associated comment further, this essay explores the possibility that they have thrown light on a scampering discourse. We owe the idea of a 'scampering' discourse not to a judge or an academic lawyer but to an eighteenth century clergyman and novelist, Laurence Sterne, the author of *Tristram Shandy*. By a scampering discourse he means, among other things, an exchange of views that does not move doggedly in a single direction but that heads one way and then another and at a speed that is at times dizzying. The leap from *Tristram Shandy* to the law of negligence may seem large – not least because Sterne exhibits very limited interest in law. But against this we must set the fact that he has much to say

revolutionizing it in continuing acts of transformation'. See A.C. Hutchinson, *Is Eating People Wrong? Great Legal Cases and How They Changed the World* (New York: Cambridge University Press, 2010), 220. This emphasis on 'duty' points up a constraint on the way in which legal disputes may be conducted that talk of a 'battleground' tends to obscure. However, Hutchinson and Morgan continue to place emphasis on 'conflict' in tort law. See their critique of Cass Sunstein's notion of 'incompletely theorized agreements' in A.C. Hutchinson and D. Morgan, 'A Final Letter' [2007] 7 *The Journal Jurisprudence*.)

⁵ See, for example, *X v Bedfordshire County Council* 1995] 2 AC 633, 663, *per* Lord Browne-Wilkinson.

⁶ See *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1039, *per* Lord Diplock. See also J. Bell, *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983), 43-46.

⁷ E.J. Weinrib, *The Idea of Private Law* (Harvard University Press, Cambridge, Massachusetts, 1995), 65 (identifying judges as agents of corrective justice). See also A. Beever, *Rediscovering Negligence Law* (Oxford: Hart Publishing, 2009), 63-66.

⁸ R.A. Posner, *Economic Analysis of Law* (Austin Texas: Wolters Kluwer, 2007, 7th edn), 67-71.

on the deficiencies of discourse and those who participate in it. Moreover, Sterne's reflections have, as we will see, great relevance to negligence law and tort more generally.

While Sterne will bulk large in this essay, he is not the only thinker on whom we will draw in our efforts to make sense of negligence law and the discourse it has spawned. Sterne's account of a scampering discourse, while suggestive, lacks analytic rigour. The writings of two further thinkers will help us to make good this deficiency. They are the Russian literary theorist Mikhail Bakhtin and the French philosopher Michel Foucault. But before drawing on these sources of guidance, we must look closely at 'The Canungusian Connection'.

2 Hutchinson and Morgan on Negligence Law

The judgments in 'The Canengusian Connection' present us, in each case, with a standpoint or perspective that is ideal-typical.⁹ For they exaggerate certain features that we might find in the responses made by common law judges to negligence claims.¹⁰ Thus the first judge to whom Hutchinson and Morgan introduce us, Doctrin CJ, places emphasis on existing doctrine as a source of authoritative and determinate reasons for judicial action. As she unfolds this doctrine-bound account of the law, we catch an echo of formalism (or Legal Science) on the model propounded by Christopher Columbus Langdell at Harvard Law School in the nineteenth century. Langdell identified law as 'consist[ing] of certain principles and doctrines'.¹¹ He also argued that those with 'mastery' of these materials could 'apply them

⁹ On ideal types, see P. Worsley, ed, *Introducing Sociology* (Harmondsworth, Penguin Books, 1977, 2nd edn), 336.

¹⁰ To the extent that the judgments in 'The Canengusian Connection' throw light on their judicial authors, Hutchinson and Morgan adopt an approach to character that is reminiscent of Charles Dickens. This is because Dickens would often seek to convey a sense of character by reference to a limited number of salient features (with the result that his readers would find themselves confronted not by complex many-sided people but, rather, by grotesques). Hutchinson and Morgan go about their business in this way by identifying each of their judges as keen to pursue a limited number of themes. In a further respect, Hutchinson and Morgan adopt a Dickensian approach to their judicial characters. For they (like Dickens) employ the device of aptronymy (the use of names that capture the interests and/or personality (or, at least, disposition) of a character). On Dickens' approach to character, see T. Eagleton, *The English Novel: An Introduction* (Oxford: Blackwell, 2005), 149. On aptronymy, see J.A. Cuddon, *A Dictionary of Literary Terms* (Harmondsworth: Penguin Books, 1979, revd edn), 53.

¹¹ C.C. Langdell, *A Selection of Cases on the Law of Contracts* (Little Brown & Co, Boston, Massachusetts, 1871), viii.

with *constant facility* and *certainty* to the ever-tangled skein of human affairs'.¹² This is the view that Doctrin CJ appears to take. Certainly, she applies existing law to the case before her. And, by going about her business in this way, she expresses her commitment to the view that 'it is with matters of certainty that ... courts ... deal'.¹³

As well as assuming that judges are able to subsume the facts of meritorious claims under the existing law, Doctrin CJ finds support for her approach in a simplistic account of the separation of powers. She tells us that the legislature has the job of making law while 'the judiciary has the task of interpreting, applying and dispensing this received wisdom'.¹⁴ Doctrin CJ's thinking thus intersects with that Sir Owen Dixon CJ who declared that 'there is no other safe guide to judicial decisions ... than a strict and complete legalism'.¹⁵ Quite how we are supposed to reconcile this account of the judicial role with the judge-made common law is not something Doctrin CJ troubles to explain. But later in her judgment, we find the basis on which she seeks to defend the adoption of this incoherent position. She declares that 'it is incumbent on [judges] to resolve the issues presented [to them] in accordance with the law as it is'.¹⁶ Thus Hutchinson and Morgan present us with a judge who (against all the evidence to the contrary) disavows a law-making role.

These features of Doctrin CJ's judgment lead the judge who follows her, Mill J, to describe her as an 'unthinking formalist' who offers an account of 'the judicial role' that is 'confused, schizophrenic, and altogether too restricted'.¹⁷ He criticizes Doctrin CJ for, *inter alia*, downplaying the extent to which considerations of policy inform her response to negligence claims.¹⁸ Mill J finds support in a judgment of Lord Denning MR for the proposition that 'policy and not logic' has shaped the 'intricate doctrinal edifice' of

¹² *Ibid.* (emphasis added). (For further discussion of Langdell's views and their relevance to negligence and tort more generally, see G. Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 2003), 26, *et seq.*)

¹³ A.C. Hutchinson and D. Morgan, n 2, above, , 74.

¹⁴ *Ibid.*, 71.

¹⁵ *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 C.L.R. xi, at xiv. See also J. Gava, 'Dixonian Strict Legalism, *Wilson v Darling Island Stevedoring* and Contracting in the Real World' (2010) 30 *OJLS* 519, 543 (arguing that, while 'judges *can* act as strict legalists', this 'does not prove that they *should* decide [cases] in this manner'). Cf J.N. Shklar, *Legalism, Law, Morals, and Political Trials* (Cambridge, Massachusetts: Harvard University Press, 1986), (describing 'legalism' as an 'ethical attitude that holds moral conduct to be a matter of rule-following').

¹⁶ A.C. Hutchinson and D. Morgan, n 2, above, 71.

¹⁷ *Ibid.* 76 and 82.

¹⁸ *Ibid.*, 76-77.

negligence law.¹⁹ For, in *Home Office v Dorset Yacht Co Ltd*, Lord Denning stated that adjudication in negligence law is ‘at bottom’ not a matter of doctrine, but, rather, one of ‘public policy’.²⁰

Lord Denning treated ‘public policy’ as a commodious notion (embracing *inter alia*, loss insurance as a consideration relevant to the law’s operations).²¹ Mill J’s focus is, however, narrower. He states that the ‘central’ purpose of negligence law is to promote the efficient allocation of resources.²² This leads him to argue that judges should ‘design rules of liability which will provide a sufficient incentive to achieve an efficient level of safety’.²³ Moreover, he identifies ‘an algorithm for all negligence law’ as providing judges with a means by which to undertake this task.²⁴ This is the ‘formula’ set out by Learned Hand J in *US v Carroll Towing*.²⁵ The formula tells us that three variables provide judges with a basis on which to pursue efficiency when determining duty of care questions. These variables are the burden of adequate precautions, the gravity of the harm suffered by the claimant, and the probability of harm. Hand J argued that where the cost of taking care is less than the gravity of harm multiplied by the probability of harm, we have an efficiency-based ground for the imposition of liability.²⁶ By endorsing this approach, Mill J makes it plain that consequentialist moral philosophy informs his thinking. This is the view that the value of an action derives from the outcomes (good or ill) that it produces.²⁷

While Mill J finds in the language of costs and benefits a basis on which to capture negligence law’s ‘central’ purpose, the judge who follows him uses an altogether different vocabulary. Wright J tells us that ‘[i]ndividuals deserve and merit respect’.²⁸ He adds that we show them respect when we

¹⁹ *Ibid*, 77.

²⁰ *Home Office v Dorset Yacht Co Ltd* [1969] 2 QB 412, 426, *per* Lord Denning MR (where he also observed that ‘talk of “duty” or “no duty” is simply a way of limiting the range of liability for negligence’).

²¹ *Lamb v Camden LBC* [1981] 1 QB 625, 637-638, *per* Lord Denning MR.

²² A.C. Hutchinson and D. Morgan, n 2, above, 81.

²³ *Ibid*, 81.

²⁴ *Ibid*, 82.

²⁵ *US v Carroll Towing* 159 F 2d 169 (1947).

²⁶ *Ibid*, 173-174. (Hand J represented his algorithm (or formula) thus: where $B < P \times L$, an efficiency-based ground for imposing liability exists. ‘B’ stands for the cost of taking care, while ‘P’ (the probability of harm) x ‘L’ (the gravity of harm) yields the expected harm.) See also A.C. Hutchinson and D. Morgan, n 2, above, 82-83.

²⁷ On consequentialism, see S. Blackburn, *The Oxford Dictionary of Philosophy* (Oxford: Oxford University Press, 1994), 77.

²⁸ A.C. Hutchinson and D. Morgan, n 2, above, 90.

vindicate their rights.²⁹ Moreover, he states that '[a] deep sense of ... rights pervades the common law [including negligence]'.³⁰ On Wright J's account, this commitment to rights finds expression in the view that '[r]ights are trumps over social utility'.³¹ Wright J finds support for this claim in Lord Scarman's speech in *McLoughlin v O'Brian*.³² In this speech, Lord Scarman staked out a position on negligence law that has much in common with that of the Canadian tort scholar Ernest Weinrib. He stated that 'the objective of the judges is the formulation of principle'.³³ By this he meant that judges should fashion doctrines that focus on the relationship between the parties to a claim and that enable them (and the victims of wrongfully inflicted harm) to pursue corrective justice.³⁴ Lord Scarman's commitment to corrective justice appears to be (like that of Weinrib) unswerving. For he declares that, if the pursuit of principle yields socially unacceptable results, it is the task of the legislature to 'draw a line or map out a new path'.³⁵

The features of Wright J's judgment that we have noted provide a basis on which to pin down the moral philosophy that informs his thinking. When Wright J tells us that people deserve and merit respect, he appears to ascribe intrinsic value to them. And when he declares that judges should always base their decisions on principle regardless of the consequences, he seems to assume that principled decision-making is the intrinsically right thing to do. Those who make ascriptions of intrinsic value and assume that we should always do the intrinsically right thing are deontologists.³⁶ Deontological moral philosophy stands in an irreducibly conflictual relationship with

²⁹ *Ibid*, 90.

³⁰ *Ibid*.

³¹ *Ibid*. (The inspiration for this strand of Wright J's thinking is the account of rights as trumps over utility in R. Dworkin, 'Rights as Trumps', in J. Waldron, ed, *Theories of Rights* (Oxford: Oxford University Press, 1984), ch 7, and R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 199-200.)

³² *McLoughlin v O'Brian* [1983] 1 AC 410.

³³ *Ibid*, 430

³⁴ See E.J. Weinrib, 'Legal Formalism: On the Immanent Rationality of the Law' (1988) 97 *Yale LJ* 949, 969.

³⁵ A.C. Hutchinson and D. Morgan, n 2, above, 90. Cf *White v Chief Constable of the South Yorkshire Police* [1999] 2 AC 455, 500, *per* Lord Steyn (stating that he could see no 'coherent and morally defensible' basis on which to develop (pure) psychiatric injury-focused negligence doctrine and that the judiciary should bluntly declare 'thus far and no further' – thereby leaving Parliament 'to undertake the task of radical law reform' (if disposed to do so)).

³⁶ See S. Blackburn, n 27, above, 100, and T. Honderich, ed, *The Oxford Companion to Philosophy* (Oxford University Press, Oxford, 1995), 187-188.

consequentialism.³⁷ In presenting us with a judge who shows every sign of embracing deontology in this unqualified form and setting him alongside a judge who is committed to consequentialism, Hutchinson and Morgan focus our attention on an acute source of tension in negligence law (and tort more generally).³⁸

But while Wright J has firm views on the moral impulses that inform negligence law, it is not his only concern. As his judgment moves towards its conclusion, he mounts a hobby-horse that does not have direct relevance to the claim with which he is dealing. He identifies fault-based liability as inferior to a regime of strict liability and offers a rather breathless argument in support of this view. Strict liability, he tells us, is less costly than negligence law to administer and better protects our liberty and rights.³⁹ It also recognises that “*what* happened” [to the plaintiff] is more important than “*the how or why*”.⁴⁰

Like Wright J, the judge who follows him, Prudential J, pursues a clear (and very different) theme. For we find Prudential J declaring, in the first paragraph of his judgment, that ‘[i]t is the plight of the injured plaintiff and not the conduct of defendants that deserves our attention’.⁴¹ He develops this theme by arguing that Canengus can only respond adequately to the ‘plight’ of accident victims by pursuing the ideal of ‘social justice’ rather than corrective justice.⁴² To this end, he argues that it is necessary to abandon negligence law and replace it with a scheme of no-fault compensation.⁴³ He takes this view since Canengusians benefit from the use of modern technology.⁴⁴ While this technology serves the end of ‘collective progress’, a subset of individuals inevitably suffer harm due to the risks it generates.⁴⁵

³⁷ T. Nagel, *Mortal Questions* (New York: Cambridge University Press, 1979), 129. See also J.N. Adams and R. Brownsword, *Understanding Law* (London: Sweet & Maxwell, 2006, 4th edn), 36-37.

³⁸ The source of tension referred to in the text is present in, for example, general duty of care tests that are receptive to both deontological (corrective justice-related) and consequentialist (policy-based) arguments. See R. Mullender, ‘Negligence, The Public Interest and the Proportionality Principle’ (1997) 5 *Tort Law Review* 9, 10-11.

³⁹ A.C. Hutchinson and D. Morgan, n 2, above, 92-93. The emphasis placed on liberty by Wright J means that his argument for strict liability bears some similarity to that in R. Epstein, *A Theory of Strict Liability* (Cato Institute, San Francisco, 1980). However, Wright J’s emphasis on rights may mark a point of departure from Epstein’s argument. See N.E. Simmonds, ‘Epstein’s Theory of Strict Tort Liability’ (1992) 51 *Cambridge LJ* 113, 131.

⁴⁰ A.C. Hutchinson and D. Morgan, n 2, above, 91.

⁴¹ *Ibid*, 94.

⁴² *Ibid*, 94-95.

⁴³ *Ibid*, 98.

⁴⁴ *Ibid*, 96-97.

⁴⁵ *Ibid*, 96-97.

For this reason, Canegusians should, on Prudential J's analysis, be ready to spread the costs of these accidents across the whole of society.⁴⁶ They should most definitely not persist with fault-based accident-compensation. For such a system is a 'litigation lottery' in which deserving claimants sometimes receive nothing from defendants.⁴⁷ Instead, they should fashion a no-fault alternative on the comprehensive New Zealand model.⁴⁸

The judge who follows Prudential J, Lefft J, does not make a conventional doctrinal response to the claim before him. Instead, he proposes a departure from existing institutional arrangements. But before outlining his preferred approach, he sounds a dramatic note by declaring that he is rendering the last judgment of his career.⁴⁹ This, he adds is because the existing law, [f]ar from being a vehicle for social justice, ... represents a formidable barrier to significant social change'.⁵⁰ Thus it comes as no surprise to find Lefft J mounting an extended assault on negligence doctrine. He describes it as 'a major force in creating, sustaining and justifying our social situation'.⁵¹ This is because it forms part of an institutional superstructure that 'persuades us that contemporary life is almost rational and just'.⁵² Moreover, Canengus's economic substructure (which serves the interests of a minority rather than all the law's addressees) determines the shape of this superstructure.⁵³ Having subjected the law to these criticisms, Lefft J goes on to attack the judiciary. He describes them as 'hold[ing] in place the deep structure of society' by offering in their judgments

⁴⁶ *Ibid*, 98.

⁴⁷ *Ibid*, 96-97.

⁴⁸ *Ibid*, 102-103. (The ideal of 'community responsibility' informs the set of recommendations that prompted the New Zealand government to establish a comprehensive no-fault compensation scheme. See New Zealand Royal Commission of Inquiry into Compensation for Personal Injury, *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Wellington, New Zealand: Government Printer, 1967) ('The Woodhouse Report'), para 55. See also G. Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Wellington, New Zealand: Oxford University Press, 1979), 81 (noting that E.E. Isbey (a Labour MP and former trade union secretary) understood 'community responsibility' to mean 'democratic socialism'), and G. Palmer, 'The Future of Community Responsibility' (2004) 35 *Victoria University of Wellington LR* 41.)

⁴⁹ A.C. Hutchinson and D. Morgan, n 2 above, 104.

⁵⁰ *Ibid*, 105.

⁵¹ *Ibid*, 104.

⁵² *Ibid*, 105. (This strand of Lefft J's critique has featured in Hutchinson's later writings. See for example, A.C. Hutchinson, 'Les Misérables Redux: Law and the Poor' (1993) 2 *Southern California Interdisciplinary Law Journal* 199, 243.)

⁵³ A.C. Hutchinson and D. Morgan, n 2, above, 105.

‘rationalisations of our ideological prejudices’.⁵⁴ In making these points, Lefft J’s purpose is to debunk negligence law’s claims to be ‘neutral’ as between those who are affected by its operations.⁵⁵

Having identified negligence law as a site of intense political conflict, Lefft J offers us a ‘vision’ that he regards as ‘substantive and just’.⁵⁶ He argues that Canengusians should democratise and equalise the risks that are a necessary feature of life in an industrial society.⁵⁷ He finds a basis on which to do this in the existing but ‘artificially confined’ doctrine of informed consent.⁵⁸ On Lefft J’s analysis, this doctrine provides guidance on the question as to how Canengusians should respond to the risks that pervade their environment. For informed consent is ‘[f]ounded on the need to promote individual autonomy and to encourage rational decision-making’.⁵⁹ As a springboard for social transformation this is suggestive, but it is hardly a vision.⁶⁰

⁵⁴ *Ibid*, 104-105. (Lefft J’s critique appears to be Marxian in thrust since it focuses on the influence exerted by a ruling elite (or class) whose economic power shapes legal and political institutions in ways that serve their interests. See K. Marx, *The German Ideology* (New York: International Publishers, 1947, R. Pascal, ed), 39 (arguing that ‘[t]he ideas of the ruling class are in every epoch the ruling ideas’), and H. Collins, *Marxism and Law* (Oxford University Press, Oxford, 1982), chs 3 and 4. See also M. Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Reasonable Person* (Oxford University Press, Oxford, 2003), 136-137, 256, and 275 (on judicial rationalizations of negligence law’s power-laden ‘dark side’). Alternatively, we might interpret Lefft J’s judgment as Foucauldian in character. For Foucault identifies law as an ideology (or set of ‘false universals’) masquerading as a neutral institution. On Michel Foucault’s account of ‘false universals’, see L. Downing, *The Cambridge Introduction to Michel Foucault* (Cambridge: Cambridge University Press, 2008), 13. Informing the views of both Marx and Foucault is a theme pursued by Thrasymachus in Plato’s *Republic*: “‘right’ is always the same, the interest of the stronger party’. See Plato, *The Republic* (Harmondsworth: Penguin Books, 1974, 2nd edn), I, 339a.)

⁵⁵ A.C. Hutchinson and D. Morgan, n 2, above, 105.

⁵⁶ *Ibid*, 109.

⁵⁷ *Ibid*, 108-109.

⁵⁸ *Ibid*, 110.

⁵⁹ *Ibid*.

⁶⁰ We might describe ‘vision’ as ‘the ability to see the invisible’. See R.M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (New York: Cambridge University Press, 1987), 576. However, the suggestion that we apply an existing doctrine (informed consent) more broadly so as to advance the agenda of egalitarian risk-management does not constitute a detailed blueprint for social transformation. . Hence we have grounds for refusing to accept that it adds up to a ‘substantive and just’ vision. (Lefft J’s enthusiasm for the informed consent doctrine is perhaps surprising in one who prides himself on his understanding of the forces that shape negligence law’s development. For American judges integrated this doctrine into this branch of tort with the aim of restricting the liability exposure of physicians (who, previously, had faced a mounting number of battery claims on account of their failure to

While the fictive judges described by Hutchinson and Morgan stake out distinctive positions, there are occasions where some of them think along broadly similar lines. For example, Doctrin CJ and Mill J are, on one point, in agreement with one another. They each think that judges must (as Mill J puts the point) ‘be careful not to encourage or facilitate bogus claims’.⁶¹ But while they agree on this point, Hutchinson and Morgan indicate that this subject exercises Doctrin CJ more than her colleague. For she finds support in *Huston v Borough of Fremmanburg* for the proposition that claims of the sort that concern her are a ‘great danger, if not disaster to the cause of practical justice’.⁶² Thus, even where two of their judges agree in broad terms with one another, Hutchinson and Morgan continue to emphasise the diversity of judicial views on display in negligence law. While they clearly have grounds for doing so, there are reasons (explored in section 6, below) for thinking that they could have placed more emphasis on the extent to which judges agree with one another.

Aside from the doctrinal realities of negligence law, we might also explain the emphasis on disagreement in ‘The Canegusian Connection’ by reference to the body of theoretical (or philosophical) thought that informs the authors’ thinking. Hutchinson and Morgan were, at the time they wrote this essay, members of the Critical Legal Studies movement and offer an analysis that gives expression to some of its more prominent themes. Among these themes we may number the indeterminacy of legal language, the presence in the law of contradictions, and the political role played by legal doctrines in sustaining particular models of human association.⁶³ But alongside these strands of Critical Legal thought, we should set a further theme. This is negligence law’s human dimension. Hutchinson and Morgan present us with five judgments that tell us much about their authors. Doctrin CJ finds a role in the existing law (defender of the *status quo*). Mill and Wright JJ find eligible ideals within the case law they survey (the pursuit of efficiency (Mill J) and giving individuals their right-based due (Wright J)). In pursuing these ideals, each judge confers on him- or herself a particular role in the law’s operations. Mill J presents himself as a hard-bitten realist, ready to sweep

secure ‘informed consent’). Battery, rather than negligence, provided the context in which the doctrine of informed consent made its first appearance in American (Californian) tort law. See I. England, *The Philosophy of Tort Law* (Aldershot: Dartmouth Publishing, 1993), 162-163.)

⁶¹ A.C. Hutchinson and D. Morgan, n 2, above, 86, *per* Mill J. See also 74, *per* Doctrin CJ.

⁶² *Ibid* (citing *Huston v Borough of Fremmanburg* 61 A 1022, 1023 (1905), *per* Mitchell CJ).

⁶³ See, M. Kelman, *A Guide to the Critical Legal Studies Movement* (Cambridge, Massachusetts, Harvard University Press, 1987), and M. Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, Oxford, 1995), ch 6. See also A.C. Hutchinson and D. Morgan, n 4, above, on ‘the implied vision’, in ‘The Canengusian Connection’, ‘judges as moral and political activists’.

away the illusions that blind his colleagues to economic reality. Wright J, by contrast, assumes the role of a crusader for justice. Hutchinson and Morgan thus succeed in presenting negligence law as ‘a theatre of roles’: a context within which those concerned with the law’s operations are able to present themselves as having a particular character.⁶⁴ While both Prudential J and Lefft JJ argue for the abandonment of negligence law, each emerges as a distinct contributor to the debate in which they are participating (the first a sober reformer, the second a more radical thinker). This emphasis on the human dimension of adjudication certainly seems warranted when we examine the significantly different approaches adopted by the judges who have shaped negligence doctrine. Moreover, the association between individual make-up and the way in which a person thinks and approaches practical questions provides one of many points of intersection between ‘The Canegusian Connection’ and Laurence Sterne’s *Tristram Shandy*.

3 *Tristram Shandy*

At first blush, *Tristram Shandy* might appear to contain little that is relevant to negligence law. The novel is supposed to be Shandy’s account of his life-story. But he undercuts his efforts to unfold a narrative by recording in fine-grained detail the circumstances he describes. As a result, the novel takes on the appearance of a practical joke. For it becomes an account of Shandy’s efforts to get the novel started.⁶⁵ But while Shandy fails to chart his progress through life, he offers a detailed account of those closest to him. Most prominent among them are his father, Walter Shandy, and his uncle Toby. He also introduces us to a number of supporting characters (who engage in dialogue with Walter and Toby in Shandy Hall). They include his uncle’s servant, Trim, Doctor Slop (the physician who superintended Shandy’s birth), and a clergyman, Yorick. These characters are, for Shandy, a spur to reflection and, while he fails to tell us much about his ‘life’, he offers us a great many of his (and their) ‘opinions’.

In the course of presenting us with these opinions, Sterne pursues two themes that (as we will see later) have relevance to negligence law. He uses his characters to point up the limitations of dialogue. On Sterne’s account, dialogue is typically a haphazard process that usually tells us more about the idiosyncrasies of those who participate in it than it does about the topics on which they hold forth. In light of these points he pursues the more general theme that humans are ill-suited to engage in critical (or, more particularly,

⁶⁴ For an account of (human rights) law as ‘a theatre of roles’, see D. Kennedy, ‘The International Human Rights Movement: Part of the Problem?’ (2001) 15 *Harvard Human Rights Law Review* 101, 111 (spelling anglicized).

⁶⁵ T. Eagleton, n 10, above, 80.

philosophical) reflection. Sterne develops the first of his themes by presenting us with characters whose contributions to conversation are 'hobby-horsical'.⁶⁶ By this he means that they seize the opportunities opened up by dialogue to speak on topics and to pursue themes that have captured their imagination.⁶⁷ Thus we find Walter Shandy arguing, with numbing regularity, that a child's Christian name plays a significant part in determining whether its life goes well or badly.⁶⁸ This theme excites little interest in those whom Walter harangues. For example, rather than dwelling at length on Walter's claims, his brother, Toby, talks at length on a topic that enthralls him: military fortifications.⁶⁹ Moreover, the Shandy brothers and Sterne's other characters exhibit a tendency to take up residence in a world shaped by their own thoughts and the words in which they find expression. This is a feature of their behaviour on which Sterne repeatedly reflects. He tells us that the 'swell of imagination and fancy' may lead us astray.⁷⁰ As a result, we may find ourselves in 'a wilderness of conceits'.⁷¹ But those in such a wilderness are apt to remain in the grip of the thoughts that have led them there. Sterne illustrates this point by reference to Walter. Having described him as 'setting up another ... hypothesis' Sterne adds that it is the 'nature' of such a thought 'that it assimilates everything to itself'.⁷²

The picture of conversation that emerges from *Tristram Shandy* is far from positive. 'Conversation' predicates a process in which participants exhibit a high degree of attentiveness to one another's views. But this degree of

⁶⁶ L. Sterne, *The Life and Opinions of Tristram Shandy, Gentleman* (London: Everyman, 1912, G. Saintsbury, introduction), 10, 174 and 329.

⁶⁷ *Ibid.*, 81 (where Walter says to Toby: 'you would provoke a saint;- here you have got us, I know not how, ... souze [*i.e.*, suddenly, without warning] into the middle of the old subject [military fortifications] again'). (The hobby-horsical contributions to conversation that feature in *Tristram Shandy* go some way towards explaining why E.M. Forster described Sterne's novel as alive to 'the muddle of life'. See E.M. Forster, *Aspects of the Novel* (London: Penguin Books, 1976, O. Stallybras, ed), 35.)

⁶⁸ L. Sterne, n 66, above, , 38-39 and 80-82. (Christian names are only one of many hobby-horses ridden by Walter Shandy. Sterne tells us that his enthusiasms include door hinges (*ibid.*, 146).)

⁶⁹ *Ibid.*, 63-65.

⁷⁰ *Ibid.*, 31.

⁷¹ *Ibid.*, 254.

⁷² *Ibid.*, 109-110. (See also S.E. Fish, *Professional Correctness: Literary Studies and Political Change* (Oxford: Clarendon Press, 1995), 80 (describing a disciplinary perspective as a 'mould' that 'does not bring light to an antecedently existing reality' but, rather, 'form to a reality that fades when it is replaced by another [disciplinary 'angle']'). Cf L. Sterne, n 66, above, 281 (describing the way in which Walter Shandy's singular thought processes mould the reality external to himself: 'every object before him presented a face and section of itself to his eye, altogether different from the plan and elevation of it seen by the rest of mankind').)

attentiveness is rarely on display in the exchanges that Sterne records. Sterne's characters fasten infrequently on the thoughts of others and probe them for sources of insight and/or evidence of confusion. Rather, they seize opportunities to carry the 'conversation' in a new (and to them more agreeable) direction. It is for this reason that Sterne describes the exchanges that unfold in Shandy Hall as 'scampering' eternally from one topic to another.⁷³ But while interaction on this unpromising model is a prominent feature of life in Shandy Hall, there are occasions when Sterne's characters rise to the challenge of dialogue by raising doubts about others' hobby-horsical views. However, Sterne goes on to relate that those who face challenges of this sort rarely respond in an open-minded way. This, he explains, is because 'there is no disputing against HOBBY-HORSES'.⁷⁴ Thus even when conversation in Shandy Hall takes a genuinely critical turn, the enthusiasms of those who participate in it soon render it unedifying.

These features of conversation lead Sterne to draw a pessimistic conclusion concerning philosophers and philosophy. He describes philosophers as ready to reason on any topic and as committed to going about their business in a systematic fashion.⁷⁵ Sterne also identifies philosophy as a discipline concerned with the pursuit of truth.⁷⁶ He illustrates these points by reference to Walter Shandy. Walter's commitment to systematic reflection is apparent in, for example, his declaration that 'every thesis and hypothesis have an offspring of propositions: - and each proposition has its own consequences and conclusions; every one of which leads the mind on again, into fresh tracks of enquiries and doubtings'.⁷⁷ But while Walter sounds a modest note with his talk of 'enquiries and doubtings', he is apt to assume that he can offer unassailable answers to the questions that he addressees. This assumption finds expression in a text, the *Tristrapaedia*, that he has

⁷³ *Ibid*, 136. (Even Michael Oakeshott, who argues that '[a] conversation does not need a chairman', recognizes that one of its features is 'integration'. See M. Oakeshott, *The Voice of Liberal Learning* (New Haven: Yale University Press, 1989, T. Fuller, ed), 98. David Lodge's fictive academic, Morris Zapp, offers a view of conversation that occupies a position between those of Oakeshott ('integration') and Sterne ('scampering' discourse). For Zapp declares that '[c]onversation is like playing tennis with a ball made of Krazy Putty, that keeps coming back over the net in a different shape'. D. Lodge, *The Practice of Writing: Essays, Lectures, Reviews and a Diary* (London: Penguin Books, 1996), 191.)

⁷⁴ L. Sterne, n 66, above, , 10. See also 83 (noting that 'a man's HOBBY-HORSE is as tender a part as he has about him').

⁷⁵ *Ibid*, 41 and 137. See also 136 (where Sterne states that Walter Shandy 'had an itch, in common with all philosophers, of reasoning upon everything which happened, and accounting for it too').

⁷⁶ *Ibid*, 65 (identifying philosophy as a discipline concerned with 'independent facts'). See also 166 (where Sterne associates 'speculative subtilty [sic] or ambidexterity of argumentation' with the pursuit of truth).

⁷⁷ *Ibid*, 300.

prepared so as to plot for his son a path through life that will make it possible for him to flourish.⁷⁸

Sterne uses the *Tristrapaedia* to point up the misplaced confidence of Walter and other philosophers who believe that they can systematise the practical life of those around them. While Walter makes strenuous efforts to anticipate and counter the difficulties that his son will face as he journeys through life, his efforts are unavailing. The boy grows so fast that his father is unable to lay down a comprehensive plan for his welfare quickly enough. Life simply outpaces the would-be legislator.⁷⁹ And just as life outpaces Walter, so too it outsmarts him – by throwing up complexities and contingencies that he is simply unable to anticipate.

But none of this dampens Walter's philosophical ardour. In common with others who have fallen victim to the same enthusiasm, he regularly assumes himself to be in possession of the truth and concludes that a monologue (delivered by him) is preferable to dialogue. Sterne makes this point when he describes Walter's 'aim' as not being to 'discuss' matters with his brother but, rather, to make him 'comprehend' the content of his 'philosophick lectures'.⁸⁰ He adds that those who hold their views enthusiastically and use rhetoric in their defence may be unable to recognise the force of counterarguments.⁸¹ In light of these points, Sterne concludes that, while philosophy's ambitions are large, the capacities of those who seek to engage in it are typically very limited.⁸² Likewise, the prospects of progress in this discipline are, on Sterne's account, limited. Sterne does not, however, greet the philosophical failure on which he dwells with despair. He takes the view

⁷⁸ *Ibid*, 273 (describing the *Tristrapaedia* as 'an INSTITUTE for the government of [Tristram's] childhood and adolescence'). See also T. Eagleton, n 10, above, 83.

⁷⁹ L. Sterne, n 66, above, 276. See also T. Eagleton, n 10, above, 80.

⁸⁰ L. Sterne, n 66, above, 172. See also 52 (on 'the end of disputation' as being 'more to silence than convince') and 187 (where Sterne draws a distinction between a 'dispute' and a 'decree'). Cf D. Bohm, *On Dialogue* (New York: Routledge, 2004), 3 (arguing that a participant in a genuine dialogue does not simply 'attempt to *make common* certain ideas or items of information that are already known to him').

⁸¹ L. Sterne, n 66, above, 266 (arguing that those who use 'the *engines* of eloquence' to 'drive' (or influence) others are themselves 'driven like turkeys to market' by the force of their own rhetoric). See also 67 (noting that '[w]hen a man gives himself up to the government of a ruling passion, - or, in other words, when his HOBBY-HORSE grows headstrong, - farewell cool reason and fair discretion!'), and 171 (on 'the warmer paroxysms of [Walter's] zeal').

⁸² *Ibid*, 202 (where Walter Shandy acknowledges that people are 'totteringly put together'). See also Plato, n 54, above, VI, 301c (arguing that '[r]eadiness to learn and remember, quickness and keenness of mind', are capacities that usually make their possessors 'unpredictable' and, hence, unsuited for philosophy).

that we can seek to pursue truth.⁸³ But we should, at the same time, be alive to humankind's shortcomings. However, these shortcomings do not inspire in Sterne contempt for human beings. Rather, he is wryly amused at the pretensions of many of those who engage in learned disquisition. Moreover, he is ready to tolerate a wide range of views. Peter Ackroyd has identified these features of Sterne's thinking as giving expression to the English imagination.⁸⁴ On Ackroyd's account, this is a practical outlook informed by a strong commitment to moderation and compromise.⁸⁵ This is a subject on which Terry Eagleton has dwelt. He reads Sterne as encouraging his readers to cultivate the spirit of Shandeism.⁸⁶ If Shandy Hall is anything to go by, this would seem to involve acceptance of human imperfection and the idiosyncrasies in which it often finds expression.⁸⁷ Likewise, it appears to require the adoption of practices and institutions able to accommodate the ramshackle character of human interaction.

Sterne's emphasis on conversation (or discourse) and his sensitivity to the human failings that make it such a hit-and-miss process have (as we will see) relevance to the operations of negligence law. In the section below, we will seek to develop these strands of Sterne's thought by drawing on the writings of Bakhtin and Foucault. The aim in doing this is analytic: to fashion a set of tools that will enable us to make more adequate sense of the discourse on which Hutchinson and Morgan throw light in 'The Caneguisan Connection'.

4 Bakhtin and Foucault

Bakhtin and Heteroglossia

Readiness to entertain a wide range of views appears to be central to the spirit of Shandeism. Certainly, this aspect of Sterne's practical outlook finds expression in *Tristram Shandy*. For the novel's most prominent characters are highly distinctive and pursue themes that merit application of the adjective 'hobby-horsical'. Thus we encounter in *Tristram Shandy* a plurality of voices. This is a topic that Bakhtin subjects to extended analysis. Bakhtin argues

⁸³ *Ibid*, 65.

⁸⁴ P. Ackroyd, *Albion: The Origins of the English Imagination* (London: Vintage, 2004), 402 and 405-408.

⁸⁵ *Ibid*, 402. See also L. Sterne, *A Sentimental Journey Through France and Italy* (London: Penguin Books, 1967, G. Petrie, ed), 15 (where, A. Alvarez, notes in his Introduction, that 'casualness and unprejudiced receptivity become a procedure' in Sterne's writings).

⁸⁶ T. Eagleton, n 10, above, 90. (Eagleton's observation reveals Alvarez to be wrong when he declares that there is a 'lack of ... moral purpose' in Sterne's fictions. See L. Sterne, n 85, above, 9.)

⁸⁷ L. Sterne, n 66, above, 315 (noting that 'all men have their failings').

that we find in the novel, as a literary genre, a paradigmatic example of heteroglossia: a plurality of voices, each of which gives expression to a distinct standpoint.⁸⁸ Bakhtin developed his account of heteroglossia by reference to the novels of, *inter alios*, Dickens, Dostoevsky, and Thackeray (which he identified as internally dialogised). By this he meant that novels contain a variety of forms of life that find expression in modes of expression (or idiolects) that compete with one another.⁸⁹

Bakhtin pressed his analysis further by identifying it as having relevance to the world around him – arguing, *inter alia*, that practical life (like the novel) presents us with a ‘surplus of seeing’ (as those who occupy particular positions in society are able to offer insights available only from their perspective).⁹⁰ This led him to identify social contexts as ‘congeries of contesting meanings’.⁹¹ This is because they (like the novels of Dostoevsky) contain centrifugal and centripetal forces.⁹² The centrifugal forces arise because the values and presuppositions that find expression in a particular voice threaten, on account of their distinctiveness, to undermine the (shared) context in which they exert influence. But Bakhtin sets alongside these forces the readiness of fictive characters and people in practical contexts to respond attentively to the utterances of others and to place emphasis on shared concerns. To the extent that they act in this way, centripetal forces arise and counter those that threaten the common life in which fictive characters or members of actually existing societies participate.⁹³

In his account of the novel, Bakhtin finds a basis on which to argue that it provides clues as to how we might organize our practical affairs on a normatively appealing basis. He takes this view because the novel instantiates the idea of ‘dialogism’ (which bears similarities to the spirit of Shandeism).⁹⁴ For it affords a space (or framework) within which no single

⁸⁸ M.M. Bakhtin, *The Dialogic Imagination: Four Essays* (Austin: University of Texas Press, 1981, M. Holquist, ed). See M. Holquist, *Dialogism: Bakhtin and his World* (London: Routledge, 1990), 69-70.

⁸⁹ S. Dentith, *Bakhtinian Thought: An Introductory Reader* (London: Routledge, 1995), 196, and D. Lodge, *After Bakhtin: Essays on Fiction and Criticism* (London: Routledge, 1990), 92.

⁹⁰ M.M. Bakhtin, n 88, above, 301-331. See also M. Holquist, n 88, above, 35-37 (on Bakhtin’s account of a ‘surplus of seeing’).

⁹¹ *Ibid*, 24.

⁹² *Ibid*, 70.

⁹³ This aspect of Bakhtin’s account of a heteroglossia lends support to the claim that ‘[f]aithfulness to the shape of common concepts is itself an act of normative significance’. See J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 64.

⁹⁴ See ns 85-87, above, and associated text.

voice predominates.⁹⁵ Rather, a plurality of voices finds expression and elicits attentive responses since ‘there is neither a first word nor a last word’ on the matters that they address.⁹⁶ For these reasons, Bakhtin contrasts dialogism with another approach to practical life that he finds deeply unattractive. This is monologism and it takes the form of an effort on the part of those who take a particular view of practical affairs to inscribe it on all available social space (*e.g.*, a particular institution or the practical life of a nation-state).⁹⁷ Bakhtin is repelled by monologism on, *inter alia*, the ground that those who engage in it are utterly unwilling to accommodate the views of others.⁹⁸ Unwillingness to accommodate the views of others predicates, on the part of those who exhibit it, a capacity for open-mindedness that they choose not to exercise. For this reason, their outlook is different from those who feature in Michel Foucault’s account of heterotopia.

Foucault on Heterotopia

According to Foucault, a heterotopia exists in circumstances where worlds of ideas sit alongside one another but those who inhabit one such world cannot enter into dialogue with those who lie beyond its borders. Thus a heterotopia comprises a group of ‘unconnected islets’ and is, according to Foucault, ‘disturbing’.⁹⁹ He adds that this is because it ‘destroy[s] “syntax” in advance’.¹⁰⁰ This, it would appear, is because those who inhabit the unconnected islets have worldviews that (for reasons unexplained by Foucault) are quite discontinuous from one another. In circumstances of this sort, the impediment to dialogue (between the inhabitants of particular worlds) is not unwillingness to speak but, rather, inability to do so.¹⁰¹ The

⁹⁵ M. Holquist, n 88, above, 34 (noting that, on Bakhtin’s analysis, ‘Dostoevsky ... permits his characters to have the status of an ‘I’ standing against the claims of his own authorial voice’).

⁹⁶ *Ibid.*, 39.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, 33.

⁹⁹ M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Abingdon: Routledge, 2002), xx.

¹⁰⁰ *Ibid.*, xix.

¹⁰¹ *Ibid.*, xviii. See also B. McHale, *Postmodern Fiction* (London: Routledge, 1989), 44 (characterizing the sort of ‘heterotopian space’ described by Foucault as a ‘plural ‘zone’ in which ‘worlds coexist’). In his account of a heterotopian space or zone, McHale draws on a number of works of fiction, including: I. Calvino, *Invisible Cities* (London: Vintage, 1997, W. Weaver, trans), and T. Pynchon, *Gravity’s Rainbow* (London: Picador, 1973) (*ibid.*, 43-45). See also 51 (where McHale associates the idea of a heterotopia (or zone) with “‘a series of enormous solipsisms”” (quoting from A. Carter, *The Passion of the New Eve* (London: Victor Gollancz, 1977), 167). See also B. McHale, *Constructing Postmodernism* (London: Routledge, 1992), 137 and 250. *Cf* K.R. Popper, *The Myth of the Framework: In*

upshot, as Foucault, recognizes, is ‘disorder’ (or, rather, the inability to establish order).¹⁰² While Foucault’s account of a heterotopia is underdeveloped, we might see it as alerting us to practical problems much like those captured by the idea of solipsism (‘the belief that only oneself and one’s experience exists’).¹⁰³

If this is broadly correct, Foucault describes a state of affairs on which Laurence Sterne throws light. This is apparent when we look closely at Walter Shandy. Sterne tells us that, due to the ‘singularity’ of his ‘notions’, Walter’s ‘judgment ... became the dupe of his wit’.¹⁰⁴ As a result, he would, ‘like all systematick reasoners, ... move both heaven and earth, and twist and torture everything in nature, to support his hypothesis’.¹⁰⁵ These observations have led Terry Eagleton to describe Walter as ‘a crazed rationalist full of elaborately useless learning, for whom the real world must conform to the categories of the mind’.¹⁰⁶ Eagleton develops this point in a way that, as we will see later, has great relevance to the discourse of negligence law. He argues that ‘Walter ... is an idealist for whom concepts are more real than things, and who lives at a lofty distance from the actual world. By manipulating concepts, he believes in his Enlightenment fashion that he can persuade the world to do his imperious bidding’.¹⁰⁷ This, Eagleton recognises, is an extreme state of affairs in which dialogue (the process through which Walter might hope to persuade others) becomes impossible.¹⁰⁸ In circumstances of the sort contemplated by Eagleton, we see concepts operating in the same way as the Shandean hypotheses

Defence of Science and Rationality (London: Routledge, 1994, M.A. Notturmo, ed), ch 2. See esp 34 (describing the ‘the myth of the framework’ as the view that ‘[a] rational and fruitful discussion is impossible unless the participants share a basic framework of assumptions or, at least, unless they have agreed on such a framework for the purposes of discussion’). See also 46 (where Popper associates the myth of the framework with unwarranted appeals to incommensurability). Cf W.N.R. Lucy, ‘The Common Law According to Hegel’ (1997)17 *OJLS* 685, 686 (on ‘paradigm bumping’ (which occurs where those who embrace one ‘system’ of thought use it to ‘measure[] ... another system’ and find the latter ‘wanting’)).

¹⁰² M. Foucault, n 99, above, xix, *et seq.*

¹⁰³ S. Blackburn, n 27, above, 356.

¹⁰⁴ L. Sterne, n 66, above, 41.

¹⁰⁵ *Ibid.*

¹⁰⁶ T. Eagleton, n 10, above, 83.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, 90 (where Eagleton identifies the problem afflicting Walter as common to the characters in the novel: ‘Sterne portrays a world in which ... communication [is] collapsing, as men and women gradually retreat to their solipsistic enclaves’). See also M. Foucault, n 99, above, xix (noting that ‘heterotopias ... stop words in their tracks’).

mentioned earlier: in the minds of those who embrace them, they assimilate the world around them.¹⁰⁹

While Sterne finds in idealism a rich source of comedy, in the hands of another contributor to the English literary canon, it takes on a disturbing appearance (and one, as we will see, highly relevant to Mill J's account of negligence law). In *Hard Times*, Charles Dickens presents us with a character who has, through taking up residence in a narrow world of ideas, lost contact with the social context that surrounds him. The character in question is Thomas Gradgrind and he is an unswerving devotee of a particular form of consequentialist political philosophy: utilitarianism.¹¹⁰ Dickens describes Grandgrind sitting in a room that looks very much like a world of ideas as described by Foucault:

Gradgrind's ... room was quite a blue chamber in its abundance of blue books.¹¹¹ Whatever they could prove (which is usually anything you like), they proved there, in an army constantly strengthening by the arrival of new recruits. In this charmed apartment, the most complicated social questions were cast up, got into exact totals, and finally settled – if those concerned could only have been brought to know it. As if an astronomical observatory should be made without any windows, and the astronomer within should arrange the starry universe solely by pen, ink and paper, so Mr Gradgrind, in *his* Observatory (and there are many like it), had no need to cast an eye upon the teeming myriads of human beings around him, but could settle all their destinies on a slate'.¹¹²

Dickens shows us how those who inhabit a particular world of ideas may work up (in a manner that smacks of solipsism) a monologue that they see as a solution to life's practical problems.¹¹³ We will return to this point in the

¹⁰⁹ See ns 70-72, above, and associated text.

¹¹⁰ C. Dickens, *Hard Times* (Harmondsworth: Penguin Books, 1969), 48, 131-132, and 238.

¹¹¹ *Ibid*, 327 (noting that the term 'blue books' applies to governmental reports that recorded, *inter alia*, the numbers of those suffering from particular types of misfortune (e.g., living in the worst slums)).

¹¹² *Ibid*, 131-132.

¹¹³ By using the rather clumsy figure of an 'astronomical observatory ... without any windows', Dickens' aim seems to be to impress upon his readers the fact that Gradgrind is the victim of what David Lodge has called 'the real solipsism'. Those in this position do not know that they are in a state of solipsism. See D. Lodge, n 73, above, 189. (Gradgrind's monologic approach to practical matters might also be identified as an example of an enormous solipsism as examined by Brian McHale in his account of heterotopia. See n 101, above (and associated text). Likewise, we might use the notion of 'ideology' to gain analytic purchase on Gradgrind's thinking. See T. Eagleton, *Ideology*

section below (in which we will examine ‘The Canengusian Connection’ and the discourse of negligence law in light of the insights we have drawn from Sterne, Bakhtin, and Foucault).

5 ‘The Canengusian Connection’ and the Discourse of Negligence Law

Applying Sterne, Bakhtin, and Foucault

The five judgments that feature in ‘The Canengusian Connection’ present us with a plurality of voices (or heteroglossia). This is something that we can explain not just by reference to the realities of negligence law but also by considering the intentions of Hutchinson and Morgan. Their purpose is to present their readers with an impactful overview of the discourse that unfolds in the field they survey. Moreover, the format they employ – the fictive decision of a multi-member and conflict-wracked appeal court – provides an effective means by which to pursue this purpose. So too does Hutchinson’s and Morgan’s decision to place in the mouth of each of their judges an account of the law that tends in an ideal-typical direction.

The effectiveness of this expositional strategy becomes apparent when we consider the contrasts between the judges’ voices. While Wright J invokes the ideal of corrective justice, Prudential J places emphasis on social justice. The upshot is a jarring collision.¹¹⁴ The effect is the same when we turn to Doctrin CJ and Lefft J. Doctrin CJ seeks to cleave to the existing law by appealing to the separation of powers. By contrast, Lefft J finds in the doctrine of informed consent an ideal (personal autonomy) that provides a ground on which to conclude that Canengus should abandon tort as a compensation mechanism. From these sources of disagreement, a clear message emerges: negligence law is a site of conflict where each of the five judges argues (more or less self-consciously) for a particular model of human

(London: Verso, 1991), 60 (noting that ‘[i]deologies are discourses unable to curve back upon themselves, blinded by their own grounds and frontiers’).

¹¹⁴ While Hutchinson and Morgan present us with a jarring collision, there are reasons for thinking that corrective justice and distributive justice are not entirely distinct ideals. If we make the assumption that negligence law protects significant interests (interests in physical, mental, and financial security), the question arises as to where we acquire our understanding of ‘significant interests’. If, for example, we regard these interests as ‘social primary goods’ in the sense specified by John Rawls, our thinking on corrective justice is informed by assumptions associated with the ideal of distributive justice. See J. Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1971), 62-63 (defining ‘social primary goods’ as those ‘things that every rational [person] is presumed to want’ since they ‘normally have a use whatever a person’s rational plan of life’). See also R. Mullender and A Speirs, ‘Negligence, Psychiatric Injury, and the Altruism Principle’ (2000) 20 *OJLS* 645, 664, n 116.

association. But this is far from being the whole story. For Hutchinson and Morgan provide grounds for thinking that the discourse of negligence law is dialogic and highly resistant to contributions that are monologic in orientation.

Hutchinson and Morgan make plain negligence law's resistance to monologue in the judgments of Wright and Mill JJ. As we have noted, each of these judges identifies within negligence law a particular practical impulse that provides a basis on which to explain its operations. In Mill J's case, this impulse is the pursuit of efficiency, while in that of Wright J it is the vindication of individual rights. The result is a collision between consequentialist and deontological moral philosophies. Moreover, it is a collision between two monologues.¹¹⁵ This becomes clear when we pay close attention to the two judgments, in each of which we find the same hectoring, intolerant tone. Wright J declares that 'individuals w[ill] cease to exist morally' under a 'utilitarian regime'.¹¹⁶ This cuts no ice with Mill J who drives home the point that '[r]ules of tort *must* be designed and implemented' so as to facilitate the pursuit of efficiency.¹¹⁷ But while each of these voices is monologic, Hutchinson and Morgan identify them as part of a larger whole: the plural discourse of negligence law (which, while fraught with tension, retains an enduring shape).

This is a point we can pursue further by examining two components in Bakhtin's account of a heteroglossia: centrifugal and centripetal forces.¹¹⁸ Consider Lefft J's judgment. He argues that Canengus should abandon negligence law and embrace a new and strongly democratic social blueprint, according to which Canengusians should (as a collectivity) decide on the nature of and how best to regulate the risk environment in which they live. Moreover, he finds support for this position in the existing (if

¹¹⁵ Mill J's judgment provides a paradigmatic example of a monologue since its author seeks to explain the law, without remainder, by reference to efficiency. While Wright J follows his colleague's lead by pursuing a single theme (the centrality of rights to the law's operations), in one respect his judgment is less emphatic. For he identifies both negligence law and strict liability as means to the end of rights-based protection. On this point, see ns 39-40, above and associated text.

¹¹⁶ A.C. Hutchinson and D. Morgan, n 2, above, 87 (emphasis added).

¹¹⁷ *Ibid*, 80 (emphasis added). See also A. Ripstein, 'Tort Law in a Liberal State' (2007) 1 *Journal of Tort Law* 13 (arguing that those who, like Richard Posner, explain tort's operations by reference to the pursuit of efficiency exhibit an 'inability to conceive of what else [it] could be doing').

¹¹⁸ For general discussion of '[t]he centripetal-centrifugal force metaphor' as relevant to law's operations, see T. Morawetz, 'Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging' (1992) 141 *University of Pennsylvania LR* 371, 386.

underdeveloped) doctrine of informed consent.¹¹⁹ In the first of these features of his judgment we find a strong centrifugal force, while in the second we encounter a weak centripetal counterforce. Matters are broadly similar when we examine Prudential J's judgment. He finds in the existing law a concern with 'the plight of the injured'.¹²⁰ But he argues that this commitment provides grounds on which to strike down a new institutional path by establishing a no-fault compensation scheme.¹²¹

While Bakhtin's account of heteroglossia provides a basis on which to point up the pluralism of, and the centripetal and centrifugal forces within, negligence law, Foucault's notion of heterotopia provides grounds for a more troubling analysis. The judgments of Mill and Wright JJ will serve to bring this out clearly. Insofar as their respective analyses are monologic, the spectre of heterotopia looms. We do not appear to be surveying the outcome of a genuine exchange of ideas in which the current position of each of the two judges was, while the debate unfolded, open to revision. Rather, we receive reports from those who inhabit particular normative universes.¹²² In one of these universes, the pursuit of efficiency crowds out all other considerations; in the other, rights-based entitlements (underwritten by the ideal of corrective justice) fill the horizon.¹²³ To the extent that those who make these reports are incapable of engaging with the views of others, then talk of a heterotopia seems warranted.

Just as we can apply Bakhtin's thinking and that of Foucault to 'The Canengusian Connection', so too we can use it to make sense of judgments and commentary on negligence law. Consider the House of Lords' decision in *McLoughlin v O'Brian*. This is a case in which we encounter sharply contrasting judicial voices. Lord Scarman declares that he and his fellow judges should 'adjudicate according to principle'.¹²⁴ He adds that, '[i]f principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or to map out a new path'.¹²⁵ His Lordship's unqualified commitment to the pursuit of principle wins the

¹¹⁹ A.C. Hutchinson and D. Morgan, n 2, above, 110.

¹²⁰ *Ibid*, 94.

¹²¹ 102-104.

¹²² Cf M.J. Sandel, *Justice: What's the Right Thing to Do?* (London: Allen Lane, 2009), 27 (describing processes of argument from which open-mindedness is absent as 'a volley of dogmatic assertions, an ideological food fight').

¹²³ In light of the points made in the text, we can describe Wright and Mill JJ as engaging in very different totalizing discourses. Discourses of this sort 'seek[] to occupy *all* the available ground'. See J. Hawthorn, *A Concise Glossary of Contemporary Literary Theory* (London: Edward Arnold, 1994, 2nd edn), 217 (emphasis added).

¹²⁴ *McLoughlin v O'Brian*, n 32, above, 430, *per* Lord Scarman.

¹²⁵ *Ibid*, 430.

endorsement of Wright J.¹²⁶ This is unsurprising. For unqualified deontological impulses find expression in the positions that Wright J and Lord Scarman stake out. Whether we use ‘principle’, or ‘rights’, or ‘corrective justice’ to capture these impulses, the central theme in both judgments is the same: judges have the job of righting wrongfully inflicted harms.¹²⁷ But Lord Scarman (like Wright J) has to endure the criticisms of one of his colleagues. Lord Edmund-Davies describes Lord Scarman’s account of negligence law as ‘startling’.¹²⁸ He explains that judicial commitment to principle is not absolute but qualified. For judges have long identified policy considerations as grounds on which to reject otherwise good claims.¹²⁹

While the sharp exchange of views between Lords Scarman and Edmund-Davies occasioned much comment at the time it occurred, it is not as stark as that between Wright J and Mill J.¹³⁰ In *McLoughlin*, we do not witness a collision between unqualified deontology and unqualified consequentialism. Rather, Lord Edmund-Davies argues that negligence law’s deontological impulses are and should continue to be qualified by consequentialist ones. But the qualified approach defended by Lord Edmund-Davies does not afford a means by which to avoid a collision between deontological and consequentialist moral impulses in negligence law. For judges still have to identify the point at which deontological impulses should yield to consequentialist ones. This is a question that gives rise to tensions not just between the proponents of particular positions but in the minds of individual judges. This is, for example, true of Lord Browne-Wilkinson in *X v Bedfordshire County Council*. He declares that the ideal of corrective justice has first claim on the loyalty of judges in the law of negligence.¹³¹ But having done so, he grounds his decision on doctrines that serve to shield public bodies from negligence claims.¹³² Thus consequentialism triumphs over deontology. For his Lordships’ aim is to ensure that public bodies are

¹²⁶ See ns 33-36 above, and associated text.

¹²⁷ See E.J. Weinrib, n 7, above, 65.

¹²⁸ *McLoughlin v O’Brian*, n 32, above, 427 (where Lord Edmund-Davies explains that he finds his colleague’s approach ‘startling’ since it ‘runs counter to well-established and wholly acceptable law’).

¹²⁹ *Ibid*, 427-429 (where Lord Edmund-Davies finds support for his account of policy’s role in negligence law in, *inter alia*, P.H. Winfield, ‘Public Policy in the English Common Law’ (1928) 42 *Harvard LR* 76, 95-97).

¹³⁰ A.C. Hutchinson and D. Morgan, n 4, above, 695-696.

¹³¹ *X (Minors) v Bedfordshire County Council*, n 5, above, 633.

¹³² *Ibid*, 663.

able to focus on their central concern: delivering goods and services that benefit the public.¹³³

We might regard Lord Browne-Wilkinson's speech in *X*'s case as revealing a stable deontological core within the law of negligence (righting wrongfully inflicted harms) from which judges, on occasion, depart. However, this core (assuming it exists) may be less stable than cases such as *X* suggest. Consider *Chester v Afshar*.¹³⁴ The House of Lords imposed liability on a surgeon who failed to alert a patient to a 1-2% risk that crystallized in harm. A majority of their Lordships imposed liability on the ground that the defendant had violated the claimant's right to receive a warning of the risks inherent in the surgery she underwent.¹³⁵ Moreover, Lord Steyn identified the majority's decision as ensuring that the law gives 'due respect' to 'the autonomy and dignity of each patient'.¹³⁶ This (and other such statements from the majority) prompted sharp dissenting responses from Lords Bingham and Hoffmann. They argued that negligence law is not centrally concerned with vindicating rights but, rather, with wrongful harm-infliction.¹³⁷ Thus we find the House of Lords engaged in a disagreement as to how we should understand negligence law's normative core. On this topic, we might see the minority in *Chester* as making an appeal to the paradigm case. One commentator has summed up this argumentative move (which is strongly associated with ordinary language philosophy) thus: 'to do something incompatible with the Paradigm Case is *not to play* [the relevant] *game*'.¹³⁸ Certainly, the minority in *Chester* take the view that the majority is not playing the game of negligence law as they and others conventionally conceive it. Moreover, we can make sense of this dispute by reference to our earlier discussion of centripetal and centrifugal forces. Lord Bingham and Lord Hoffmann defend a long accepted position (liability should be imposed for the wrongful infliction of harm in circumstances where the

¹³³ See R. Mullender, 'Negligence, Public Bodies, and Ruthlessness' (2009) 72 *Modern LR* 961, 961-962.

¹³⁴ *Chester v Afshar* [2005] 1 AC 134.

¹³⁵ The majority of their Lordships found support for their decision in *Chappel v Hart* (1998) 195 CLR 232 (Australian High Court) and in A.T. Honoré, 'Medical Non-Disclosure, Causation and Risk' (1999) 7 *Torts Law Journal* 1. See also E. Jackson, *Medical Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2010), 202-203.

¹³⁶ *Chester v Afshar*, n 134, above, 144.

¹³⁷ *Ibid*, 141-142, *per* Lord Bingham.

¹³⁸ E. Gellner, *Words and Things* (Abingdon: Routledge, 2005), 60. *Cf* M. Foucault, n 1, above, 68 (on the 'General Grammar' that 'defines a domain of *validity* ... (according to what criteria one may [use to] discuss the truth or falsehood of a proposition)'), and M. Oakeshott, 'Man on His Past', ch 20 in L. O'Sullivan, ed, *The Vocabulary of a Modern European State* (Exeter: Imprint-Academic, 2008), 108 (arguing that participants in a practice sustain it by exhibiting a 'disposition' to observe its 'manners').

parties stand in a close relationship). By contrast, the majority appear (as the minority point out) to be bending the branch of tort with which they are dealing in a new direction (where the central focus is on the vindication of a right and the associated ideal of personal autonomy).¹³⁹ This has led Jenny Steele to describe the decision in *Chester* as ‘poised rather awkwardly between the torts of battery and negligence’.¹⁴⁰

While disagreement of the sort on display in *Chester* weakens negligence law’s already rather shaky claims to be a source of guidance to its addressees, it does at least present us with a dialogue. On occasion, we encounter contributions to the discourse of negligence law that suggest an absence of dialogue. In its third *Restatement* on the Law of Torts (1999), the American Law Institute (ALI) has set out an account of negligence law according to which an unswerving commitment to the pursuit of efficiency informs it.¹⁴¹ Richard Wright has subjected the ALI’s analysis to close historical scrutiny. He notes that, while the ALI’s first *Restatement* (1934) adopted a position on duty of care that indicated a commitment to the pursuit of efficiency, it recognised that other moral impulses inform the law.¹⁴² Moreover, he notes that the ALI adopted this qualified approach to the pursuit of efficiency in its second *Restatement* (1965). Wright adds that, when the ALI set out its third *Restatement*, the upshot was not only doctrinal (duty of care doctrine dropped out of the picture) but also moral. A single goal (the pursuit of efficiency) filled the horizon.¹⁴³ As a result, the ALI effectively blinded itself to the fact that not one but, rather, an array of moral impulses informs

¹³⁹ *Chester v Afshar*, n 134, above, 147, *per* Lord Hoffmann. (Since the decision of the majority in *Afshar* extends the bounds of negligence liability by weakening existing doctrinal requirements, we might see it as an example of sympathetic (pro-claimant) adjudication of the sort associated with the emergence of a so-called ‘blame culture’ (in which claimants and judges fail to take considerations of (corrective) justice sufficiently seriously). But to take such a view of the majority’s approach would be uncharitable. For their thinking is informed by a conception of justice (of the sort associated with human rights law) in which considerations of respect and dignity figure prominently. (On blame culture, judicial sympathy, and modification of existing doctrine, see R. Mullender, ‘Negligence Law and Blame Culture: A Critical Response to a Possible Problem’ (2006) 22 *Journal of Professional Negligence* 2, 7-9 (discussing the respective analyses of Patrick Atiyah and Tony Weir). See also R. Mullender, ‘Truth, Bullshit, and Blame Culture’ (2009) 11 *Legal Ethics* 272, 281 (on the field of interpretative possibility constituted by negligence doctrine).)

¹⁴⁰ J. Steele, *Tort Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2010, 2nd edn), 65.

¹⁴¹ J.C.P. Goldberg and B.C. Zipursky, ‘The *Restatement* (Third) and the Place of Duty in Negligence Law (2001) 54 *Vanderbilt LR* 657.

¹⁴² R.W. Wright, ‘Hand, Posner, and the Myth of the “Hand Formula”’ (2003) 4 *Theoretical Inquiries in Law* 145, 148.

¹⁴³ *Ibid*, 146-147.

negligence doctrine.¹⁴⁴ Among them, Wright numbers ‘dignity’, ‘respect’, and the ‘implementation of [corrective] justice’ (each of which gives expression to deontological assumptions).¹⁴⁵ On this analysis, the ALI now offers us an account of negligence law that amounts to a consequentialist monologue.¹⁴⁶ Thus we have grounds for identifying its members as having taken up residence in a closed world of ideas. To the extent that this is the case, it calls to mind Foucault’s account of a heterotopia.¹⁴⁷

While we can use Sterne, Bakhtin, and Foucault to press Hutchinson’s and Morgan’s analysis further, their essay exhibits a strength to which we must devote attention. There are, as we will see, reasons for thinking that ‘The Canengusian Connection’ throws light not on one but, rather, on three closely related but, nonetheless, distinct discourses. Moreover, it provides examples of the way in which movement from one of these discourses to another may take place.

Accidents, Compensation, and Discursive Diversity

‘Discourse’ embraces a range of exchanges from an open-ended conversation to the examination, at some length, of a particular subject.¹⁴⁸ As Sterne makes plain in *Tristram Shandy*, rising to the demands of discourse in the first sense is much easier than in the second. Insofar as it is open-

¹⁴⁴ *Ibid*, 147.

¹⁴⁵ *Ibid*. (See also E. Mickiewicz, ‘An Exploratory Theory of Coherence in Canengus and Beyond’ (2010) 7 *The Journal Jurisprudence*, section 4 (on Wittgenstein’s notion of ‘aspect-blindness’).)

¹⁴⁶ The shift in the ALI’s view of negligence law that occurs between 1934 and 1999 provides an example of ‘monologue creep’ in the sense specified in P. O’Callaghan, ‘Monologism and Dialogism in Private Law’ (2010) 7 *The Journal Jurisprudence*, section 5 (‘Monologue-Creep’).

¹⁴⁷ The journey into a closed world (of ideas) might begin when an actor decides to treat a particular body of thought as a source of exclusionary reasons for action. These are reasons that we regard as providing grounds on which to exclude other relevant matters from consideration. Over time, those acting on exclusionary reasons may decide to treat them (in light of what they take to be their explanatory power) as indefeasible. Where this happens, we appear to encounter an absence of negative capability. According to the poet John Keats, this is the ability to ‘be[] in uncertainties, mysteries, doubts, without an irritable reaching after fact and reason’. On exclusionary reasons, see J. Raz, *Practical Reason and Norms* (Oxford: Princeton University Press, 1990), 35-48 and 182-186, and on negative capability, see J.A. Cuddon, n 10, above, 419. See also S. Coote, *John Keats: A Life* (Hodder & Stoughton, London, 1996) 115 (describing the statement quoted by Cuddon as ‘a plea for ... receptivity and openness’).

¹⁴⁸ *Oxford English Dictionary*. See also M. Foucault, n 1, above, 90 (on ‘the rather fluctuating meaning of the word “discourse”, which relates to “the general domain of all statements”, “an individualizable group of statements” and “a regulated practice that accounts for a certain number of statements”’).

ended, those who participate in, say, a conversation can hardly complain if their fellow participants move it in a new direction.¹⁴⁹ But this is not the case when we turn to the sustained examination of a particular topic. To veer off in a new direction is to scamper away from the topic on which participants are focusing. In such circumstances, Sterne's adjective 'scampering' does critical work.¹⁵⁰ For those responsible for such a change of direction exhibit insensitivity to some of the obligations intrinsic to the examination in which they are supposed to be participating. To sustain such an examination, they have to be attentive to relevant contributions from others. And in order to determine what is relevant and what is not, they have to focus their attention on the considerations that give the topic under discussion its distinct shape (*e.g.*, the purposes it is supposed to serve).¹⁵¹

In the discourse of negligence law, these considerations include the concepts of wrongdoing and harm, and the principle of personal responsibility. They also include risk and the costs that may arise from the decision to regulate socially valuable activities. Likewise, they include the ideals of corrective and distributive justice – both of which are egalitarian since they identify the law's addressees as inhabiting a plateau of equality.¹⁵² These considerations

¹⁴⁹ See M. Oakeshott, n 73, above, 118 (arguing that '[a] conversation ... has no predetermined course, we do not ask what it is "for", and we do not judge its excellence by its conclusion').

¹⁵⁰ 'Scampering' also does psychological and anthropological work. For Sterne alerts us to the fact people are apt to mount their hobby-horses when an opportunity to do so presents itself and that dislocation (in the wider group) is the typical (and more or less practically significant) result. (Sterne's anthropological point is captured in D. DeLillo, *Underworld* (London: Macmillan, 1997), 371 (emphasis added) (describing a street as 'abound[ing] in idiosyncrasy, in *the human veer*'). See also S.E. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford: Clarendon Press, 1989, 508 (noting 'the variety that is a feature of interpretive performance').)

¹⁵¹ In his account of 'discursive formations', Foucault examines four factors that may work to stabilize them. They are (i) a shared object, (ii) 'a certain style, a certain constant manner of statement', (iii) the presence within them of 'permanent and coherent concepts', and (iv) 'the identity and persistence of themes'. See M. Foucault, n 1, above, ch 2. See also 84 (on the 'systematic ordering' of and 'the play of formal constraints' within discourses). (Foucault's phrase 'a shared object' reveals his thinking to intersect with that of the analytic philosopher John Searle on the subject of collective intentionality (on which see J.R. Searle, *Making the Social World: The Structure of Civilization* (Oxford: Oxford University Press, 2010), 43, *et seq.*). The collective intentionality of judges works to sustain, for example, the practice of imposing liability for the careless (and therefore wrongful) infliction of harm. Moreover, a judge makes the practical significance of collective intentionality apparent by, *inter alia*, engaging in an appeal to the paradigm case.)

¹⁵² Even those commentators who identify corrective justice and distributive justice as discontinuous nonetheless identify each of these ideals as oriented towards equality. See, for example, E.J. Weinrib, n 34, above, 980-981 (identifying corrective justice and distributive justice as representing two different functions of equality, the former

place limits on the range of contributions that we can make to the discourse of negligence law.¹⁵³ This is a point that we can develop by drawing on H.L.A. Hart's account of law's internal point of view. Those who adopt this point of view (for example, judges) grasp that it makes certain demands on them and so has normative significance.¹⁵⁴ But simply to apprehend law's normativity (or 'oughtness') is not to embrace it. This means that we find the internal point of view in its strongest form only among those who treat the law a source of authoritative reasons for action. This is a practical outlook that we find, for example, in a judge who is committed to the incremental development of existing negligence doctrine. Such a judge exhibits what Hart calls a 'critical, reflective attitude'.¹⁵⁵ For he or she ponders the question as to whether the normative impulses that find expression in existing doctrine provide grounds for extending it to a novel set of facts.¹⁵⁶ A judge who thinks in this way identifies these impulses as placing constraints on the contributions that he or she can make to the discourse of negligence law.

While the impulses captured in Hart's account of the internal point of view reveal adjudication to be a conventional process, we nonetheless find ourselves dealing, in the context of negligence law, with a range of

quantitative and the latter proportional). (While we cannot examine views such as Weinrib's in depth in this essay, there are reasons for doubting their plausibility. Corrective justice has to do with securing the (significant) interests of persons. Thus we have to consider how we come by our sense of what a person is and what his or her interests might be. According to some political philosophers (for example, Hegel), our sense of ourselves and our interests arises in a social context (most obviously, the state). This, according to Hegel, is the context in which ideas associated with justice as between the members of a group (e.g., the commonweal and distributive justice) grow up and shape practical thought (more or less self-consciously). If we assume that these ideas invest us with a sense of 'self' and 'interests-relating to-self', then we cannot unscramble corrective justice and distributive justice. On Hegel's political philosophy, see J. Rawls, *Lectures on the History of Moral Philosophy* (Cambridge, Massachusetts: Harvard University Press, 2000), 330 (where Rawls notes that Hegel viewed persons as 'rooted in and fashioned by the system of political institutions under which they live), 339-340 (on Hegel's view that a society's system of institutions 'constitute[s] [its] ethical life'), and 353-354 (on the Hegelian theme that 'society is held together ... by a sense of reasonable order, and that it is regulated by ... a common-good conception of justice'). See also R. Mullender and A. Speirs, n 114, above, and J. Coleman, n 212, below, and associated text.)

¹⁵³ See n 138, above, on the notion of an appeal to the paradigm case.

¹⁵⁴ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994, 2nd edn), 57.

¹⁵⁵ *Ibid.*

¹⁵⁶ R. Mullender, 'English Negligence Law as Human Practice' (2009) 21 *Law & Literature* 321, 333, *et seq.* See also R.E. Keeton, 'Creative Continuity in the Law of Torts' (1962) 75 *Harvard LR* 463.

defensible viewpoints.¹⁵⁷ Faced with the same set of facts, some judges want to elaborate existing doctrine while others urge caution. The House of Lords' decision in *Junior Books v Veitchi* serves to illustrate this point.¹⁵⁸ The majority of their Lordships thought it appropriate to extend existing doctrine relating to pure economic loss to a novel set of facts (the installation of defective but non-dangerous flooring). The majority justified their decision by reference to, among other things, a sufficient relationship of proximity.¹⁵⁹ But Lord Brandon saw matters quite differently. In his dissenting speech, he dwelt on the uncertainty that a finding for the claimant would generate and the adverse impact this would have on commercial activity.¹⁶⁰ While majority and minority thus scamper off in opposite directions, they appeal to considerations that, when viewed from the standpoint internal to negligence law, yield respectable reasons for action.¹⁶¹

Even where judges agree on which of the parties should prevail in a particular case, we often find them scampering off in different doctrinal or policy-related directions. Consider the Court of Appeal's decision in *Lamb v Camden LBC*.¹⁶² The claimant argued that, as a result of the defendant's negligence, third parties (squatters) had been able to gain access to and damage her home. The Court unanimously rejected this claim. But each of the Court's three members stakes out a distinctive position. Watkins LJ grounds his decision on the doctrine of remoteness. But while doing so, he renders a distinctly hobby-horsical judgment. He expresses the fear that he will never emerge from 'the maze of authorities on the subject of remoteness into the light of a clear understanding'.¹⁶³ Moreover, he likens his uncertainties to those of Winston Churchill on the subject of mathematics, and notes that Churchill made this declaration:

'I had a feeling once about mathematics - that I saw it all. Depth beyond depth was revealed to me - the byss and abyss. I saw - as

¹⁵⁷ C. Kutz 'Just Disagreement: Indeterminacy and Rationality in the Rule of Law' (1994) 103 *Yale LJ* 997, 1021.

¹⁵⁸ *Junior Books v Veitchi Co Ltd* [1983] 1 AC 520.

¹⁵⁹ *Ibid*, 546, *per* Lord Roskill (who enumerates no less than seven factors that establish proximity between the parties (including the fact that the defendants were 'specialists in flooring' and that the claimants 'relied' on their 'skill and judgment')).

¹⁶⁰ *Ibid*, 551-552.

¹⁶¹ *Ibid*, 551 (where Lord Brandon makes a contested appeal to the paradigm case of negligence law by arguing that: 'in *Donoghue v Stevenson* ... and in all the numerous cases in which the principle of that decision has been applied to different but analogous factual situations, it has always been stated either expressly, or taken for granted that an essential ingredient in the cause of action ... was the existence of danger, or the threat of danger, of physical damage to persons or their property').

¹⁶² *Lamb v Camden LBC*, n 21, above.

¹⁶³ *Ibid*, 644.

one might see the transit of Venus or the Lord Mayor's Show - a quantity passing through an infinity and changing its sign from plus to minus. I saw exactly how it happened and why the tergiversation was inevitable - but it was after dinner and I let it go'.¹⁶⁴

Having turned in this singular performance, Watkins LJ announces that he 'has the instinctive feeling that the squatters' damage is too remote'.¹⁶⁵ Oliver LJ is, by contrast, matter of fact. Having surveyed the doctrine relating to liability for the voluntary conduct of third parties, he concludes that it would be unjust to fix the defendant with liability.¹⁶⁶ Lord Denning MR takes a quite different tack. He looks hard at existing doctrine on liability for the conduct of third parties.¹⁶⁷ However, he cannot find within it a ground for his decision. This leads him to 'look[] at the question as one of policy'.¹⁶⁸ From this standpoint, he concludes that the defendant should not be held liable since homeowners such as the claimant usually insure against loss of the sort at stake in the case.¹⁶⁹ Alive to the fact that his response to the claim is not doctrinal, Lord Denning justifies it by noting that, '[i]t is commonplace nowadays for the courts, when considering policy, to take insurance into account'.¹⁷⁰

While the judgments in *Lamb* scamper off in a variety of directions, they are, in each case, rooted in the practice of negligence law. For the judges who set them out are not seeking to reshape the body of law they are applying. We now turn to some judgments that, while influenced by impulses that shape negligence law's internal point of view, promise to divert this branch of tort from its settled path. The judgments in a case we have already examined, *Chester v Afshar*, are relevant here. For the minority in the House of Lords adopt a conventional approach to negligence adjudication that contrasts vividly with the position staked out by their colleagues in the majority. As we have noted, Lord Steyn was centrally concerned with underwriting 'the autonomy and dignity of each patient'.¹⁷¹ For this reason, he and his colleagues in the majority were prepared to make what he called 'a narrow and modest departure from traditional causation principles'.¹⁷² This was a description of the change wrought in the law by the majority that the dissentients in *Chester*, Lords Bingham and Hoffmann, found wholly

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, 647.

¹⁶⁶ *Ibid.*, 639-644.

¹⁶⁷ *Ibid.*, 634-635.

¹⁶⁸ *Ibid.*, 637.

¹⁶⁹ *Ibid.*, 637-638.

¹⁷⁰ *Ibid.*, 638.

¹⁷¹ *Chester v Afshar*, n 134, above, 144.

¹⁷² *Ibid.*, 146.

unconvincing. On Lord Bingham's analysis, the majority were not making a 'modest' alteration to 'traditional causation principles'. Instead, they were abandoning them. This, Lord Bingham explained, was because the claimant 'ha[d] not established that but for the failure to warn she would not have undergone the surgery'.¹⁷³ While recognising that '[t]he patient's right to be appropriately warned is an important right', Lord Bingham pursued the theme that the central concerns of negligence law lie elsewhere.¹⁷⁴ They have to do with compensating those who can establish that a defendant has wrongfully inflicted harm upon another while in a proximate relationship with him or her.¹⁷⁵ When we turn to Lord Hoffmann's speech, we are presented with a clue as to the path down which the majority are striking. For he describes them as focused on 'vindicat[ing] the patient's right to choose'.¹⁷⁶ This is undeniably the case. Moreover, it lends the position that they stake out an appearance that bears obvious similarities not just to the tort of battery but to human rights law (where 'rights', 'autonomy', and 'vindication' figure prominently).¹⁷⁷

While the majority in *Afsbar* strike down this path, they nonetheless place emphasis on one of negligence law's central concerns (wrongdoing). The same point applies, *mutatis mutandis*, to judges whose emphasis is not upon wrongdoing but rather upon harm. Consider the use made of the doctrine *res ipsa loquitur* (the thing speaks for itself) by judges in *Gordon v Aztec Brewing Co* (a decision of the Californian Supreme Court). This doctrine specifies that a judge may infer that a defendant has harmed the claimant where the thing causing injury was under the defendant's control and would not ordinarily do so in the absence of carelessness.¹⁷⁸ Judges in the Californian Supreme Court have applied this doctrine in ways that led Traynor J – himself a prominent member of this court – to describe them as veering away from a fault-based liability regime. On his analysis, they were moving

¹⁷³ *Ibid*, 141.

¹⁷⁴ *Ibid*, 141-142.

¹⁷⁵ *Ibid*. See also E. Jackson, n 135, above, 203.

¹⁷⁶ *Chester v Afsbar*, n 134, above, , 147.

¹⁷⁷ C. Foster, 'It Should Be, Therefore It Is' (2004) 154 *New Law Journal* 7151. Cf K. Amirthalingham, 'Medical Non-Disclosure, Causation and Autonomy' (2002) 118 *LQR* 540, 542 (identifying the majority decision in *Chester* as concerned with 'accountability'). On human rights, see J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 3 and 33-37.

¹⁷⁸ *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596, 601, *per* Erle CJ. Cf *Bharma v Dubb (Trading As Lucky Caterers)* [2010] EWCA Civ 13, [31], *per* Moore-Bick LJ (on '[t]he concept of a shifting evidential burden of proof').

in the direction of strict liability.¹⁷⁹ To the extent that this is the case, it is a dramatic shift in direction (as would be movement from strict to fault-based liability).¹⁸⁰ But it is at the same time one that places emphasis on concerns (risk-regulation, causation, and harm) that occupy a prominent place in negligence law and shape the point of view internal to this branch of tort. However, Traynor J can identify his colleagues as departing from the paradigm case of negligence (which requires a claimant to prove causation on the balance of probabilities.¹⁸¹ In such circumstances, it is entirely predictable that a judge will respond to an unconventional doctrinal development in the critical way described by Hart in his account of the internal point of view.¹⁸²

Assuming that the distinction we have drawn between conventional and less conventional judgments is sound, we can use the later philosophy of Ludwig Wittgenstein to sharpen it. Wittgenstein uses the phrase ‘going on’ to capture the process by which the participants in a practice elaborate it.¹⁸³ To indicate what he means by ‘going on’, he describes someone who extends a series of numbers by ‘adding 2’ thus: ‘2, 4, 6, 8 ...’, etc.¹⁸⁴ We might see the incremental elaboration of negligence law as a broadly similar form of ‘going on’.¹⁸⁵ For judges extend the notion of ‘wrongful harm infliction’ (in the context of a proximate relationship) to new sets of facts.¹⁸⁶ But *Chester* and the Californian Supreme Court’s use of the *res ipsa loquitur* doctrine present us with rather different processes of development. The judges responsible for these decisions make appeal to values that shape negligence law’s internal point of view. However, they are ascribing increased significance to an

¹⁷⁹ *Gordon v Aztec Brewing Co*, 33 Cal 2d 514 (1949), 530. See also G.E. White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 2003, expanded edn), 200-201.

¹⁸⁰ For an example of movement from strict to fault-based liability, see *Burnie Port Authority v General Jones Pty* (1994) 68 ALJR 331.

¹⁸¹ On the (appeal to) the paradigm case, see E. Gellner, n 138, above, and associated text.

¹⁸² See n 155, above, and associated text.

¹⁸³ B. Bix, *Law, Language, and Legal Determinacy* (Oxford: Clarendon Press, 1993), 42 (discussing, *inter alia*, L. Wittgenstein, *Remarks on the Foundations of Mathematics* (Sussex: Harvester Press, 1976, C. Desmond, ed), 392-393).

¹⁸⁴ L. Wittgenstein, *Philosophical Investigations* (New York: Macmillan, 1968, 3rd edn, G.E.M. Anscombe, trans), sections 185-187.

¹⁸⁵ C. Kutz, n 157, above, 1013.

¹⁸⁶ See, for example, *McLoughlin v O'Brian*, n 32, above, 430, *per* Lord Scarman (describing judges as developing negligence doctrine by ‘start[ing] from a baseline of existing principle and seek[ing] a solution consistent with or analogous to a principle or principles already recognised’). See also R. Mullender, n 156, above, 326-328 and 342-343. More generally, see S.R. Letwin, *On The History of the Idea of Law* (Cambridge: Cambridge University Press, 2005, N.B. Reynolds, ed), 36 (on Aristotle’s account of legal rules as ‘signposts’ or ‘directions’).

existing practical concern ('due respect' for autonomy (*Chester*); harm infliction (*Gordon*)) and, as a result, veering away from a settled path of development. This means that we cannot employ the notion of 'going on' (in the sense specified earlier) as a basis on which to capture the doctrinal developments we are considering. We might, however, apply Wiitgenstein's account of 'going on' more broadly – to capture the activity of those who find in an existing practice materials with which to fashion a related but distinct alternative (*e.g.*, a strict (rather than fault-based) liability regime).¹⁸⁷ Alternatively, we could use language with a critical edge to describe the sort of activity we are scrutinizing. We could characterise those who engage in it as destabilizing the law's operations by riding hobby-horses that they find attractive.

While distinct from one another, the conventional and less conventional examples of case law we have examined share a (more or less conventional) commitment to the point of view that has shaped negligence law. For it is by reference to values or other considerations that shape this point of view that the judges whose decisions we have examined justify their respective positions. This provides a basis on which to distinguish their contributions to the discourses of negligence law and tort more generally from those who engage in radical critique of these branches of the law (see Appendix 2, below).¹⁸⁸ Consider Patrick Atiyah's writings on accident compensation law. He argues that negligence law is an expensive and often unjust compensation mechanism.¹⁸⁹ This has led him to point up the attractions of alternative institutions (including a no-fault accident compensation scheme

¹⁸⁷ Cf R.M. Unger, *What Should Legal Analysis Become?* (New York: Verso, 1996), 129 (on 'kenosis' as the practice of 'work[ing] from the bottom up and the inside out'). (While Unger's use of the locution 'from the bottom up' suggests a progressive trajectory, a process of doctrinal development of the sort contemplated in the text need not necessarily be regarded as progressive. Cf R. Dworkin, 'Law's Ambitions for Itself' (1985) 71 *Virginia LR* 173, 173 (on 'changes through adjudication' that judges regard not merely as the 'playing out [of] an internal program or design' but as 'improvements'). See also R. M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge: Cambridge University Press, 1987), 313 (arguing that 'a framework may influence its own sequel'), and I. Calvino, n 101, above, 28 (arguing that 'the traveller's past changes according to the route he has taken').

¹⁸⁸ As used in the text, 'radical' denotes a readiness, on the part of one offering a critique to make a decisive break with existing practices. See A. Giddens, *Beyond Left and Right: The Future of Radical Politics* (Cambridge: Polity Press, 1994), 45.

¹⁸⁹ See P.Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge: Cambridge University Press, 2006, 7th edn), 463 and 487 (contrasting negligence law unfavourably with no-fault alternatives on the ground that the administrative costs of the latter are significantly lower), and 175-177 and 183-185 (identifying fault-based compensation as 'bear[ing] no relation to the degree of fault [in particular cases]' and as 'pay[ing] little attention to the conduct or needs of the victim').

on the New Zealand model and self-protection by means of first-party insurance).¹⁹⁰ While Atiyah has in mind a dramatic departure (in one form or another) from the existing law, he nonetheless has much in common with those who defend negligence law and other forms of tort liability.¹⁹¹ He seeks to make constructive responses to the facts of harm and other forms of misfortune. To this end, he proposes regulatory mechanisms that, on his analysis, offer attractive alternatives. But, while he does this, his thinking continues to intersect with that of tort's defenders. For we find that he shares with them a commitment to egalitarianism.¹⁹² However, Atiyah's egalitarianism has a very strong (primary) orientation towards distributive justice that distinguishes his thinking from that of tort's defenders.¹⁹³ How then should we understand this contribution to debate? We might try to categorize Atiyah's as a critical voice within the discourse of negligence law or that of tort more generally. He is attentive to the views of those who defend or who assume the acceptability of the existing law and aims to respond to them with compelling counter-arguments. However, it makes more sense (in light of his arguments) to describe Atiyah as a participant in a discourse closely related to but broader than that on the topics of negligence law or tort more generally. We might call this the discourse of accident compensation law.¹⁹⁴ As Atiyah makes plain, this discourse intersects with negligence law and tort more generally, but is wider ranging:

The ultimate questions with which we are concerned are: for what injuries or damage ought the law to provide compensation; what

¹⁹⁰ *Ibid*, ch 18. See also P.S. Atiyah, *The Damages Lottery* (Oxford: Hart Publishing, 1997), ch 8 (on first-party insurance).

¹⁹¹ The idea of a dramatic (or radical) departure from existing practices is, on the analysis offered by Stanley Fish, unsustainable since they shape our consciousness (even as we contemplate their overhaul or abandonment). See S. Fish, n 150, above, 420 (arguing that 'without a mechanism for determining whether a proposed or imagined revision would constitute a step forward rather than a step backward on the journey to a truly transformed society, the journey can never begin'). Cf P. Cane, *Atiyah's Accidents, Compensation and the Law* (London: Butterworths, 1993, 5th edn), v (where William Twining describes Atiyah's first edition as 'a brilliantly designed and executed departure from tradition').

¹⁹² P. Cane, n 189, above, 5.

¹⁹³ P.S. Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld and Nicolson, 1987, 4th edn), 442-445 (where Atiyah wrestles with the question of 'egalitarianism and the problem of drawing the line': 'as medical science has advanced, and prolonged disease and premature death have ceased to be normal hazards in our society, it has become less easy to maintain the distinction between man-caused and natural disabilities').

¹⁹⁴ While we can identify Atiyah as a contributor to the discourse of accident compensation law, he shows signs of being actuated by a broader set of concerns. Among them, we may number his concern with 'misfortune' (in, for example, the form of diseases that do not arise from accidents). See P.S. Atiyah, n 193, above, 3-4, and P. Cane, *Atiyah's Accidents, Compensation and the Law* (London: Butterworths, 1999, 6th edn), ch 16).

form should compensation take; how should it be assessed; and who should pay it?’ Important related issues include how compensation should be administered and how the law seeks to reduce the amount of injury and damage inflicted.¹⁹⁵

Given that Atiyah participates in a discourse distinct from that of negligence law or tort more generally, we can use Wittgenstein’s account of ‘language games’ to throw light on the relationship between these forms of talk.¹⁹⁶ According to Wittgenstein, we can distinguish one language game from another by noting, among other things, the distinct ways in which those who participate in them use particular words.¹⁹⁷ The relevance of this claim to our concerns is immediately obvious. Consider negligence law. In this context ‘wrongdoing’ has to do with a lack of reasonable care (‘fault’). But when we turn to strict forms of tort liability, the meaning of wrongdoing alters.¹⁹⁸ We should not, however, leap from these points to the conclusion that we are dealing with radically different language games. This is because words like ‘harm’ and ‘risk’ seem to bear much the same significance in each of the discourses we are considering.¹⁹⁹ To the extent that this is the case, we should perhaps draw back from the conclusion that we are examining distinct discourses, concerned respectively with negligence law, tort in some other form (or in some more general sense), and accident compensation law. But if we assume that we can talk meaningfully about these three discourses, we have, in light of our earlier analysis, grounds for thinking that Hutchinson and Morgan throw light on each of them. Likewise, they demonstrate how rapidly a participant in one of these discourses may move into one of the others. We see this, when, for example, Leff J finds in the existing doctrine of informed consent a foundation on which to build an alternative model of human association.

While ‘The Canegusian Connection’ has these virtues, Hutchinson and Morgan fail to point up a particularly attractive feature of negligence law. This is the way in which we can combine some of the distinct normative impulses within it in morally eligible ways. This is, as we will see, a subject to which the concepts of complementarity, coherence, and consilience are relevant.

¹⁹⁵ P.S. Atiyah, n 193, above, 4. *Cf* P. Cane, n 189, above, 4 (where the locution ‘main questions’ replaces ‘ultimate questions’).

¹⁹⁶ A. Kenny, *Wittgenstein* (London: Penguin Books, 1975), ch 9.

¹⁹⁷ L. Wittgenstein, n 184, above, section 77.

¹⁹⁸ G.P. Fletcher, ‘Fairness and Utility in Tort Theory’ (1972) 85 *Harvard LR* 537, 543 (on ‘strict liability or “liability without fault”’).

¹⁹⁹ See M. Foucault, n 1, above, 67 (on the ‘dispersion’ of concepts ‘through *oeuvres*’).

6 Complementarity, Coherence, and Consilience

The concept of ‘complementarity’ has to do with, *inter alia*, opposing views that can augment – or complement – one another in practically significant ways. This is a topic to which the physicist Niels Bohr devoted attention. He argued that full understanding in a particular area of inquiry may require the use of mutually exclusive concepts, propositions, or explanatory models.²⁰⁰ While he emphasised the importance of complementarity in the natural sciences, he also identified it as a concept with wide relevance.²⁰¹ This has led a number of commentators on negligence law (and tort more generally) to argue that Bohr’s arguments concerning complementarity have relevance to their concerns. Thus we find England arguing that Bohr has given us a concept that helps us to gain a high degree of analytic purchase on tort law’s operations.²⁰² Likewise, England argues that complementarity yields a basis on which to present tort in an appealing light by presenting, *inter alia*, corrective justice and distributive justice as parts of a ‘harmonious totality’.²⁰³

When we examine ‘The Canengusian Connection’, we find support for the position staked out by England. The respective analyses of Wright and Mill JJ (as we have noted) stand in a highly antagonistic relationship. But each of these judges directs our attention to important practical concerns to which the law is alive: providing redress for wrongfully inflicted harm (Wright J) and relevant costs and benefits (Mill J).²⁰⁴ We can use Wright J’s analysis to point up the prominence given to wrongdoing (or, more particularly, fault) and corrective justice in negligence law. Mill J, by contrast, gives us consequentialist tools with which to pin down the limits of this commitment. The usefulness of the sort of analysis contemplated here becomes apparent when we examine general duty of care tests of the sort fashioned by the House of Lords in *Caparo Industries Plc v Dickman*.²⁰⁵ These tests give sequential priority to the question as to whether the defendant has

²⁰⁰ I. England, n 60, above, 85 (noting that ‘concepts and propositions ... are mutually exclusive in that the application of one such concept to a certain thing at a certain time precludes the application of the other to that thing at the same time’), and D. Murdoch, *Niels Bohr’s Philosophy of Physics* (Cambridge: Cambridge University Press, 1987), 54 and 60. (See also n 90, above, on Bakhtin’s account of a ‘surplus of seeing’, and P. O’Callaghan, ‘Monologism and Dialogism in Private Law’ [2010] 7 *The Journal Jurisprudence*, ns 70-72 (and associated text).)

²⁰¹ G. Holton, *Thematic Origins of Scientific Thought: Kepler to Einstein* (Cambridge, Massachusetts, London, revd edn, 1988), 133.

²⁰² I. England, n 60, above, ch 5.

²⁰³ *Ibid*, 88.

²⁰⁴ We might see each of these judges as directing our attention to distinct ‘aspects’ of the practice in which they participate. See E. Mickiewicz, n 145, above, section 4.

²⁰⁵ *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 617-618, *per* Lord Bridge.

wrongfully inflicted reasonably foreseeable harm on the claimant while standing in a proximate relationship with him or her.²⁰⁶ However, the *Caparo* test qualifies this commitment to corrective justice by building in a further consequentialist limb. One of the purposes of this limb is to draw judicial attention to the question as to whether the anticipated costs of imposing liability would be unacceptably high.²⁰⁷

To analyse negligence law in the way suggested here is to invite criticism from, *inter alios*, Weinrib on the ground of incoherence.²⁰⁸ Certainly, negligence law, on the account we are contemplating, embraces two types of moral impulse (deontological and consequentialist) that stand in a relationship of ineliminable tension. However, we can resist the charge of incoherence by identifying the two types of impulse we are considering as means to the same (egalitarian) end: defensibly accommodating the interests of all the law's addressees. General duty of care tests lend support to this analysis since they are supposed to mediate fairly between the claimant's interest in security and the defendant's interest in freedom of action. Moreover, they are supposed to accommodate the interests of those who are not directly involved in a particular dispute. For judges, when contemplating the (anticipated) costs and benefits of imposing liability, consider the impact that a new liability rule may have on members of society generally.²⁰⁹ To the extent that judges are motivated to accommodate the interests of all the law's addressees defensibly, we find within negligence law a moral impulse that invests it with coherence. This is a commitment to egalitarianism that provides a 'bridging notion' between the ideals of corrective and distributive justice.²¹⁰

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ See E.J. Weinrib, n 34, above, 958 (describing negligence law 'as a *this* [a coherent body of law informed by deontological impulses and a commitment to corrective justice] and not a *that* (an incoherent body of law in which both deontology (and corrective justice) and consequentialism (in the form of policy considerations that express commitments to the public interest and, on occasion, distributive justice)) each have a place).

²⁰⁹ R. Mullender, 'Prima Facie Rights, Rationality, and the Law of Negligence', ch 6, in M. Kramer, ed, *Rights, Wrongs, and Responsibilities* (Basingstoke: Palgrave, 2001), 179-181.

²¹⁰ On the idea of a 'bridging notion', see J. Griffin, n 177, above, 69. See also J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994, revd edn), 281 (on 'coherence' as 'mean[ing] something like "mutually reinforcing"). (The use of a bridging notion as a means by which to bring corrective and distributive justice into a harmonious relationship is not something that England (in his account of complementarity) considers. Rather, he asserts that complementarity yields a basis on which to 'create a harmonious totality optimally achieving both values'. He does not, however, explain on what basis we are to make judgments of optimality.)

We might see the egalitarianism at work within negligence law as having encouraged doctrinal developments (*e.g.*, general duty of care tests) that give expression to a distinct moral philosophy. This moral philosophy gives sequential priority to deontological impulses (by allowing claimants to seek redress for wrongfully inflicted harms). But consequentialist considerations (having to do with matters of public concern) qualify this commitment in a limited range of circumstances. Where the costs (or anticipated costs) of doing corrective justice are high, they may provide grounds for rejecting otherwise good claims. In light of these points, we might describe the moral philosophy we are considering as qualified deontology.²¹¹

If this analysis is broadly correct, we have grounds for thinking that the norm of ‘consilience’ is relevant to negligence law’s operations. On the account offered by Jules Coleman, ‘[t]he value expressed in the norm of consilience is that, other things being equal, it is good when a theory can bring a diversity of phenomena under a single explanatory scheme – and the greater the range of phenomena thus explained, the better.’²¹² Moreover, Coleman points up the relevance of consilience to tort law. For he identifies corrective justice as a means by which to bring a wide range of considerations (including ‘wrongdoing’, ‘repair’, and (personal) ‘responsibility’) under a single explanatory scheme.²¹³ However, he adds that his ‘corrective justice account [of tort as a whole] is embedded in a broader explanatory scheme that points to the *fundamental unity* of distributive and corrective justice’.²¹⁴ On the question as to how this ‘fundamental unity’ arises, Coleman argues that a commitment to ‘fairness as reciprocity among free and equal persons’ informs both ideals of justice.²¹⁵ Coleman thus presents us with an egalitarian bridging notion of the sort that we encountered earlier, in our examination of the general duty of care test in *Caparo*.²¹⁶

²¹¹ For more detailed discussion of qualified deontology, see R. Mullender, ‘Tort Law, Human Rights, and Common Law Culture’ (2003) 23 *OJLS* 301, 308-309. (Among the features of qualified deontology that give expression to its egalitarianism is a notion of reasonableness that extends beyond the parties to a negligence claim. On reasonableness in this (wide) Rawlsian sense, see M. Siu, ‘Conflict in Canengus: the Battle of Deontology and Consequentialism’ (2010) 7 *The Journal Jurisprudence* section 4. See also J. Rawls, n 152, above, on the Hegelian theme that ‘society is held together ... by a sense of reasonable order’.)

²¹² J. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press 2001), 41.

²¹³ *Ibid*, 43 and 53.

²¹⁴ *Ibid*, 53 (emphasis added).

²¹⁵ *Ibid*.

²¹⁶ See ns 208-210, above, and associated text.

While we can bring corrective justice and distributive justice into the coherent relationship contemplated here, there is, however, a difficulty with this analysis. Corrective justice resists reduction to a component in a scheme of distributive justice. Thus we encounter tension of the sort highlighted by Hutchinson and Morgan. However, it remains the case that we can show negligence law to have a high degree of coherence. For a commitment to egalitarianism yields a basis on which to explain and defend the law's operations. Moreover, the egalitarianism we have detected in the discourse of negligence law provides a basis on which to explain its close relationship with the other forms of talk we have surveyed. When we seek to discover 'the place' from which 'all these diverse statements ... come', we find that they have a common source.²¹⁷ They are the 'witness and external deposit' of our moral life.²¹⁸ And they tell us that we are the denizens of a social context in which a commitment to an egalitarian philosophy of government exerts a powerful hold over our imagination.²¹⁹ This is a body of practical thought concerned with fashioning institutions that secure the interests of all relevant people adequately.²²⁰

Conclusions

The analysis of negligence law in 'The Canengusian Connection' provides a basis on which to explain why those seeking to make sense of this branch of tort run the risk of disorientation. Hutchinson and Morgan drive home the point that the discourse of negligence law is highly pluralistic and, as a result, the facts at stake in the case they describe prompt widely divergent responses. In this respect, their fictive account of negligence law captures important realities. This becomes plain when we examine cases such as *Lamb v Camden LBC*, where three English Appeal Court judges base their (concurring) judgments respectively on doctrine relating to the acts of third parties, a congeries of remoteness and 'instinctive feelings', and the

²¹⁷ The source of the quotations in the text is M. Foucault, n 1, above. (See also J. Faubion, ed, *The Essential Works of Michel Foucault 1954-1988*, vol 2, *Aesthetics: Method and Epistemology* (New York: New York Press, 1998), 261 (where Foucault describes his critical-historical method of 'archaeology' as concerned with 'a certain implicit knowledge [*savoir*]' 'that 'makes possible, at a given moment, the appearance of a theory, an opinion, a practice'). See also L. Downing, n 54, above, 39, above, (noting that (in his archaeological investigations) 'Foucault begins from the observation that in order for something to be thought or institutionalized as knowledge (*connaissances*), certain conditions for that type of thought must already be in place at a more fundamental level (*savoir*)'.)

²¹⁸ On law as 'the witness and external deposit of our moral life', see O.W. Holmes, 'The Path of the Law' (1897) 10 *Harvard LR* 457, 459.

²¹⁹ On the egalitarian philosophy of government' as a feature of Western practical life, R. Mullender, 'Law, Morality, and the Egalitarian Philosophy of Government' (2009) 29 *OJLS* 389.

²²⁰ *Ibid*, 407-410.

availability of first-party (loss) insurance. We can, however, press our analysis of ‘The Canengusian Connection’ and the body of law it concerns further by drawing on Laurence Sterne’s *Tristram Shandy*. For Sterne, as we have noted, wrote on the topic of a scampering discourse. By this he meant a discourse that was apt to move rapidly in a wide variety of (sometimes unpredictable) directions. Moreover, Sterne offered an (anthropological-cum-psychological) explanation for the sort of discourse he described that has relevance to negligence law. He identified those who participate in debate as apt to ride ‘Hobby-Horses’. He also argued that people who advance their views in a ‘hobby-horsical’ fashion typically exhibit a reluctance to pay close attention to the views of others. These are points to which Hutchinson and Morgan lend support in ‘The Canengusian Connection’. They present us with judgments in which judges ride hobby horses. Likewise, they indicate that those astride these hobby-horses often fail to find in the views of their colleagues reasons to dismount.

While Sterne’s account of a scampering discourse is richly suggestive, the writings of Mikhail Bakhtin and Michel Foucault enable us to develop it in ways that throw light on the discourse of negligence law (see Appendix 1, below). Bakhtin’s account of a heteroglossia has relevance not only to the novel as a literary genre but also to tort and law more generally. As Hutchinson and Morgan make clear, the discourse we have been examining is one in which a wide range of voices clamour for our attention. Moreover, Bakhtin’s account of the centrifugal and centripetal forces at work in a heteroglossia has obvious relevance to negligence law. Some judges seek, as in *Chester v Afshar*, to pull the law in a new direction by talking the language of ‘rights’ and ‘respect’ rather than ‘wrongfully inflicted harm’.²²¹ Others, to take another example (*Gordon v Aztec Brewing Co*), place emphasis on harm while losing sight of wrongfulness as a salient concern. These arguments exert a centrifugal force. For they undermine settled assumptions about the core of negligence law. But we must set arguments such as these alongside others that exert a centripetal force. Among these arguments, we may number those where judges stick to what Sterne called ‘the common track’ by, for example, engaging in the incremental elaboration of existing heads of liability.²²²

While Bakhtin’s concept of heteroglossia affords a means by which to gain analytic purchase on the discourse we are examining, Foucault’s notion of heterotopia throws light on a threat to it. The assumptions made by some of those who take a particular view of negligence law may be so firm as to

²²¹ See also *Lachambre v Nair* [1989] 2 WWR 749 (Sask QB), 763 (on so-called infringement of autonomy).

²²² L. Sterne, n 66, above, 38.

render them incapable of seriously entertaining analyses that differ from their own. We might thus describe them as inhabiting a world of ideas that cuts (or that threatens to cut) them off from those around them. If this is the case, it is a state of affairs that bears some similarity to the (much more extreme) situation described by Foucault in his account of heterotopia. Certainly, the American Law Institute's growing enthusiasm for an economic analysis of negligence doctrine provides a basis on which to suggest that it has taken up (or is on the way towards taking up) residence in a narrow world of ideas.²²³

While using Sterne, Bakhtin, and Foucault to gain analytic purchase on the body of law surveyed by Hutchinson and Morgan, it became clear that we were dealing with not one but, rather, three discourses (see Appendix 2, below). The narrowest of these discourses has to do with negligence law. Those who adopt the point of view internal to this branch of tort identify themselves (more or less self-consciously) as having a highly specific central concern. This is providing redress for harm wrongfully (carelessly) inflicted by one person on another while the two stood in a proximate relationship. But while those who embrace negligence law's internal point of view share this central concern, they are nonetheless able to advance a wide range of arguments. Among them, we may number arguments for the incremental development of existing doctrine and counter-arguments that have to do with the value of certainty (which elaboration of existing doctrine by judges threatens to compromise).

But negligence law is not simply a space or field of interpretative possibility within which a range of arguments may unfold.²²⁴ On occasion, it provides a springboard for developments that carry those responsible for them into a new discourse. Hutchinson and Morgan alert us to this possibility when Lefft J sees in the doctrine of informed consent the outlines of a new and democratic system of risk-management and accident compensation. While Lefft J's 'vision' would, if implemented, mark a dramatic departure from the *status quo*, we have examined examples of judges bending negligence law in new directions. We saw this when Traynor J criticised his colleagues in *Gordon v Axtec Brewing*.²²⁵ On his analysis, they were, through their use of the *res ipsa loquitur* doctrine, bending negligence law in the direction of strict liability. To embark on a journey of this sort is to leave negligence law's

²²³ The position staked out by the American Law Institute in its third *Restatement* (1999) provides an example of the association between enthusiasm and 'monologism in action' examined in P. O'Callaghan, n 200, above, section 6.

²²⁴ The point made in the text might be developed by reference to Coleridge's idea of 'multeity in unity', on which see *ibid*, sections 2 and 7.

²²⁵ See ns 178-1-180, above, and associated text.

internal point of view behind and to take up residence in a different world of ideas (sustained by a distinct discourse). This point also applies to *Chester v Afshar* (where the development we scrutinized was inchoate in character). For the majority of their Lordships exhibited a concern with ideas ('autonomy', 'dignity', etc) that are the stuff of a tort strongly oriented towards the protection of human dignity and human rights law.²²⁶ Thus the decisions in *Gordon* and *Chester* are vulnerable to the appeal to the paradigm case (according to which negligence law is centrally concerned with the wrongful infliction of harm).²²⁷

Alongside the types of argument we have so far considered – those rooted in the discourse of negligence law and those that grow out of this discourse and head in a new direction – we must set a third group. Arguments in this group are critical of tort. But even here we find a point of intersection with the discourses of negligence law and tort more generally. For it is often the case that those who cleave to, say, negligence law's internal point of view nonetheless have critical things to say about, *inter alia*, existing doctrine. But criticism of this sort does not call for a departure from existing liability regimes. Rather, it calls for them to be more adequately operationalized. Matters are quite different when we turn to arguments in the third group. For they urge the adoption of new institutional means by which to address the problems tackled by judges in negligence law and tort more generally (e.g., the various proposals for reform made by Patrick Atiyah). Those who call for reform on the model contemplated here do not find in the points of view internal to tort law authoritative reasons for action. Instead, they find in this body of law clues as to how we might do distributive justice more adequately.

While distinct from one another, the discourses we have examined share a commitment to egalitarianism (see Appendix 3, below). At the most general level, this commitment finds expression in the proposition that all those affected by the law's operations occupy a plateau of equality.²²⁸ In light of this point, we have a basis on which to conclude that the discourses we have examined share a commitment to the same philosophy of government. This is the egalitarian philosophy of government. But this is (as Hutchinson and Morgan make clear) a philosophy that we can seek to operationalize in a variety of ways. While we cannot pursue the matter in detail here, this is a

²²⁶ See *Lachambre v Nair*, n 221, above, and associated text.

²²⁷ See n 138, above, and associated text.

²²⁸ On the commitment to equality mentioned in the text (and its relation to law and contemporary political philosophy), see R. Dworkin, *Law's Empire* (London: Fontana, 1996), 222 and 296, and W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2002, 2nd edn), 3-4.

point to which the political philosophy of Michael Oakeshott has relevance. According to Oakeshott, we can seek to underwrite our commitment to egalitarianism in two very different models of human association. The first of these models is ‘civil association’. This is a modest-rule governed framework within which people may ‘pursue the activities of their own choice with the minimum of frustration’.²²⁹ The second model is enterprise association. Enterprise associations focus on the pursuit of a desired goal (e.g., the pursuit of a distributively just end-state).²³⁰ The first of Oakeshott’s two models has affinities with negligence law while the second finds expression in the practical proposals made by Prudential and Lefft JJ (and, likewise, in Man Chun Siu’s contribution to this collection). Moreover, strict liability on the model argued for by Wright J has about it the look a *tertium quid*. For it is as much a species of social insurance as it is a means by which to do corrective justice.

Just as ‘The Canengusian Connection’ draws attention to the association between particular types of argument and distinct models of human association, so too it prompts reflection on three theoretical matters. They are the normativity (or oughtness) of law, the spaces (or fields of interpretative possibility) within which legal arguments resonate, and what we might call ‘movement’ (the ways in which participants in legal disputes may shift, in the course of argument, from one discourse to another). While none of the judges in ‘The Canengusian Connection’ declare the law to be the (more or less adequate) ‘witness and external deposit of our moral life’, they nonetheless assume this to be the case. In this way, Hutchinson and Morgan lend support to the view that tort seeks to reflect and refine moral impulses in the societies that it regulates. Likewise, they convey a sense of the limited ‘space’ (or field of interpretative possibility) within which arguments for fault-based liability have force. This becomes clear when Wright J identifies himself as a proponent of strict rather than fault-based liability. This, he explains, is because negligence law uses the criterion of fault to limit (in ways that he considers unjust) the rights-based protection enjoyed by individuals. If we agree with him, then the idea of movement from fault-based to strict liability has obvious attractions. While Hutchinson and Morgan do not present us with examples of judges engaging in such movement, they nonetheless provide us with tools with which to make sense of such a change of direction. For example, just as Wright J grasps the limitations of negligence doctrine (as a body of law concerned with the careless infliction of harm), so too do the majority in *Chester v Afshar*. Thus

²²⁹ M. Oakeshott, ‘On Being a Conservative’, in *Rationalism and Politics and Other Essays* (London: Methuen, 1977) 183.

²³⁰ M. Oakeshott, *On History and Other Essays* (Oxford: Basil Blackwell, 1983) 153, and M. Oakeshott, *On Human Conduct* (Oxford: Clarendon Press 1975), 289 and 315.

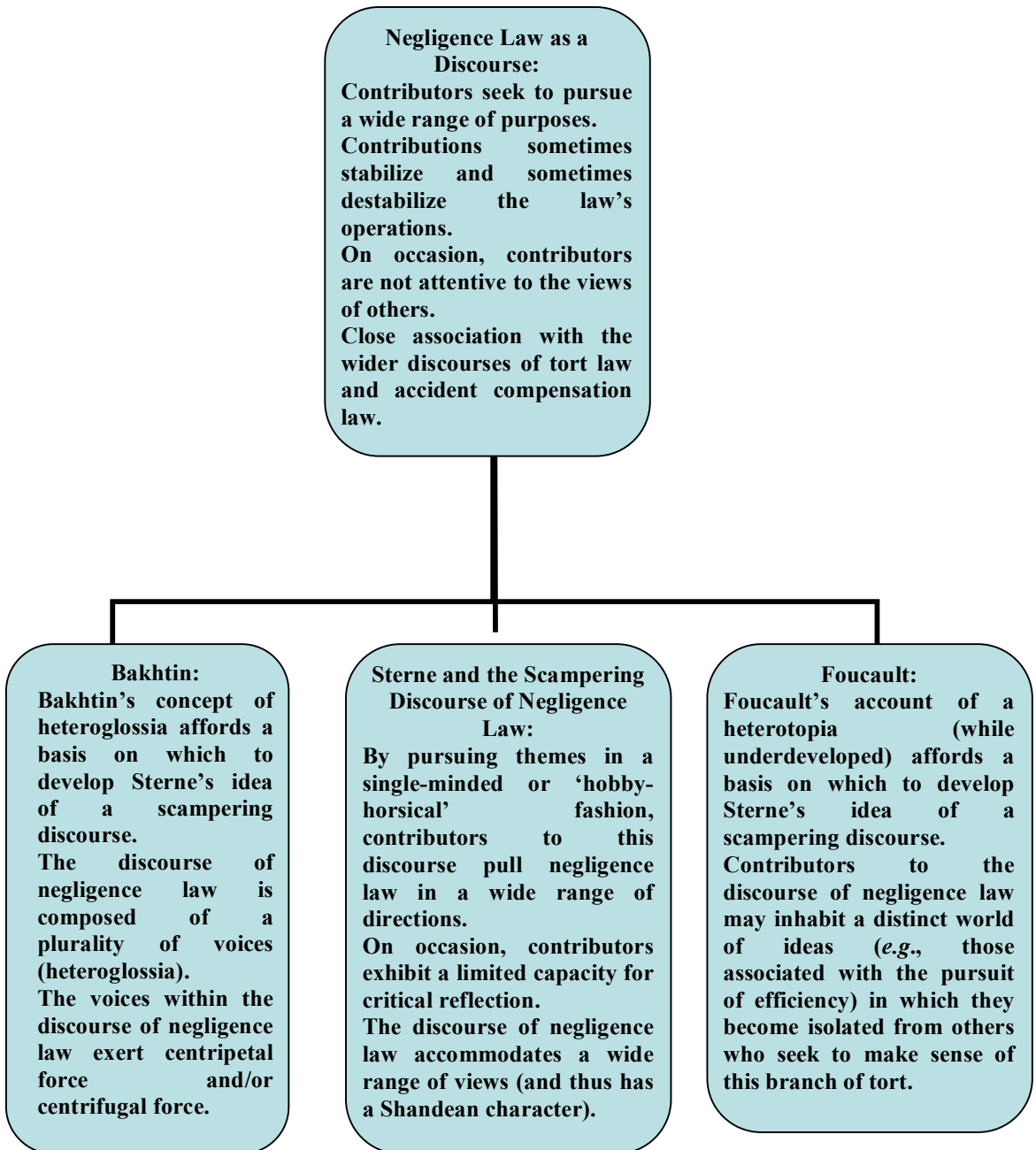
when Lord Steyn, for example, scampers off in a new direction, we are in a position to understand what is going on. And if Sterne's account of discourse and its deficiencies is accurate, we should consider ourselves fortunate to have read an essay that continues to throw light on the forms of legal argument we have surveyed.

While talk of normativity, space, and movement enables us to gain analytic purchase on the dramas that unfold in 'The Canengusian Connection' and in cases like *Chester*, there is much that remains to be said. Among other things, Hutchinson and Morgan present us with a form of life that accommodates diversity and the disputes that come in train with it. In this, their fiction intersects with that of Sterne. This is because there is something of the spirit of Shandeism in the way Doctrin CJ and her colleagues go about their business.²³¹ But, if we wanted to press the analysis further, we could do no better than to draw on an Australian philosopher, John Anderson. For he urges us 'not to ask of a social institution: "What end or purpose does it serve?" but rather, "Of what conflicts is it the scene?"'²³²

²³¹ On the spirit of Shandeism, see n 86, above, and associated text.

²³² A. MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 1985, 2nd edn), 163.

Appendix 1: Negligence Law as a Discourse



Appendix 2: Discursive Diversity

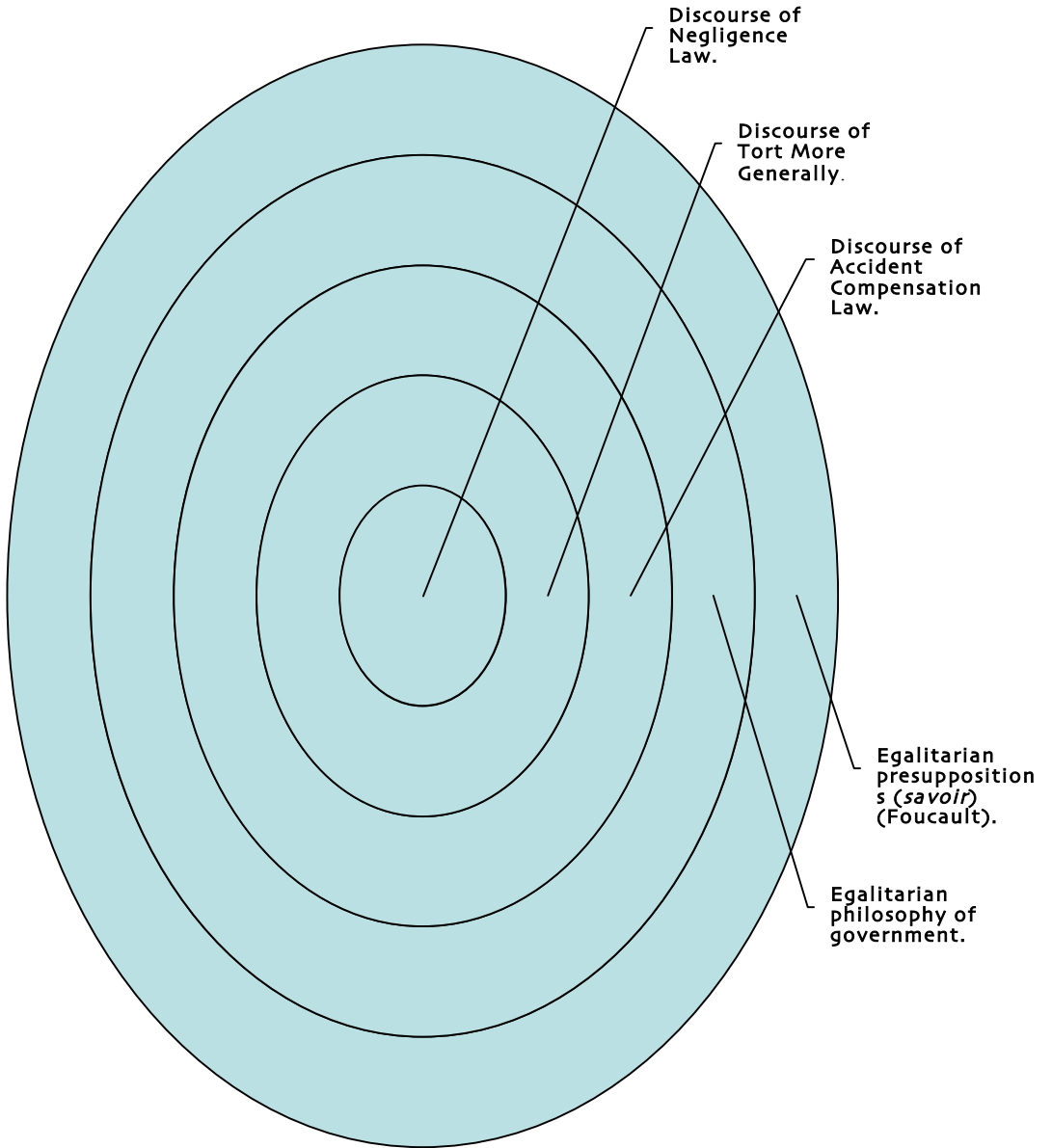
Three Discourses:
While the judges in ‘The Canegusian Connection’ respond to a claim in negligence, we can see them as participating in distinct but closely related discourses.
(We find in each of these discourses a shared commitment to egalitarianism and shared terminology (e.g., ‘risk’ and ‘harm’).

The Discourse of Negligence Law:
Doctrin CJ: applies existing doctrine in conformity with, *inter alia*, the doctrine of the separation of powers.
Wright J: emphasises the ideal of corrective justice.
Mill J: emphasises the consequentilist impulses in the law.

Discourses that Grow out of Negligence Law’s Internal Point of View:
Wright CJ: strict liability.
See also Traynor J’s critique of the Californian Supreme Court and *Chester v Afshar* (House of Lords majority): their concern with ‘autonomy’ and ‘dignity’ carries negligence law in the direction of battery and human rights law.

The Discourse of Accident Compensation Law:
Prudential J’s arguments for a (New Zealand-style) accident compensation scheme.
Lefft J’s arguments for society-wide risk-regulation on a democratic model.
Patrick Atiyah on, *inter alia*, no fault compensation and first-party insurance.

Appendix 3: Three Discourses in Egalitarian Context



The reader should not draw from Appendix 3 the conclusion that negligence law necessarily occupies a central place in the practical life of Canengus. The diagram's purpose is to relate the discourse of negligence law to more general bodies of legal and political thought and ultimately to the presuppositions that they share with one another.