CONFLICT IN CANENGUS: THE BATTLE OF CONSEQUENTIALISM AND DEONOTOLOGY

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1 INTRODUCTION

This essay makes extensive use of a work of political philosophy that appears in the bibliography that draws 'The Canengusian Connection: the Kaleidoscope of Tort Theory' to a close. [1] In his *A Theory of Justice*, John Rawls advances an array of arguments for justice as fairness that prompt us to think hard about impartiality and the difficulties people have in acting as this ideal demands.[2] Moreover, he presents his readers with arguments that will, he believes, assist them in their efforts to fashion institutions that are socially just. However, he recognises that it is part of human nature that individuals are selfish rather than altruistic. This means that they are ready to sacrifice other people's welfare rather than their own. This leads to his construction of a device called the 'veil of ignorance' to secure an impartial perspective. He argues that, when people adopt this perspective, they can identify principles of justice that satisfy the demands of impartiality.

This essay explores the possibility of using Rawls's 'veil of ignorance' to assess three of the judgments in Hutchinson and Morgan's essay, namely, the judgments of Mill, Wright and Prudential JJ.[3] Among other things, their respective views on the law of negligence provide an example of the disorderly discourse that is a prominent feature of common law culture.[4] But out of this disorder, we may be able to find clues as to how we might do justice as fairness. Whilst Mill and Wright JJ give expression to moral philosophies that stand at the extreme ends of a deontological-consequentialist spectrum, Prudential J's advocacy of a no-fault compensation scheme exhibits assumptions associated with a mixed

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[1] A.C. Hutchinson and D. Morgan, 'The Canengusian Connection: the Kaleidescope of Tort Theory' (1984) 22 *Osgoode Hall Law Journal* 69, 111-113.

[2] J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971).

[3] A.C. Hutchinson and D. Morgan, n 1, above, 76-86 (Mill J), 87-94 (Wright J), and 94-104 (Prudential J).

[4] G. Keating, 'A Social Contract Conception of the Tort Law of Accidents' in G. Postema, ed, *Philosophy and the Law of Tort* (New York: Cambridge University Press, 2001), ch.2

conception of accident compensation law. Moreover, Prudential J's position deals (as we will see) with a weakness in Hutchinson and Morgan's essay. For they fail to indicate which of the views in 'The Canengusian Connection' works best. But before explaining how we can use Rawls to address this deficiency, we must look at his account of the veil of ignorance.

2 The Original Position and the Veil of Ignorance

Rawls imagines 'a purely hypothetical situation' which he calls 'the original position'.[5] This is a situation in which 'no one knows his place in society, his class position or social status'.[6] Thus those in the situation described by Rawls find themselves behind a 'veil of ignorance'.[7] Rawls introduces the veil of ignorance and the original position with the aim of identifying 'principles of justice'.[8] He regards them as necessary because he recognises that our views of justice are often distorted by the characteristics of human nature, such as selfishness, resentment, alienation and false consciousness.[9] Moreover, he recognises that biased laws and policies are generated as a result of, *inter alia*, selfishness.[10] This prompts him to regard impartiality as a necessary condition of a moral point of view.[11] With the aim of securing a condition of impartiality (or 'mutual disinterest'), he creates the hypothetical device of the veil of ignorance.[12] It is aimed at countering selfishness and, more importantly, securing an impartial, bias-free viewpoint.

Rawls is not merely concerned about individual bias and selfishness. He is also critical of utilitarianism (a form of consequentialism). For this body of thought tells us to organize society in ways that maximize aggregate utility or expected well-being (*i.e.*, the greatest good of greatest number). This inevitably sacrifices individual interests to the aggregate welfare of the whole community. Rawls's criticism of this weakness of utilitarianism is telling. He complains that it merely adopts for society as a whole 'the principle of choice for one man' - thus fusing many people into one.[13] It fails to 'take seriously the distinction between persons'.[14] As someone much influenced

[5] J. Rawls, n 2, above, 12.
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] J. Rawls, 'Justice as Fairness', *Journal of Philosophy (*1958) Vol. LXVII, 163-4
[10] J. Rawls, n.2, above, 24.
[11] For a helpful account of 'impartiality' in adjudication, see W. Lucy, 'The Possibility of Impartiality' (2005) Vol. 25, Issue 1 *Oxford Journal of Legal Studies* 3.
[12] J. Rawls, n 2, above, 17-22 and 189 (on 'mutual disinterest').
[13] *Ibid*, 24 and 27.
[14] *Ibid,* 27.

by the moral philosophy of Immanuel Kant, this is something that Rawls is not prepared to accept.[15]

The influence of Kant is also apparent in the emphasis Rawls places on the respect due to individuals.[16] On Kant's account, 'humanity' has intrinsic value.[17] Unlike things, people (on account of their humanity) merit respect and ought not to be used as mere means.[18] This leads Rawls to embrace the Kantian account of social contract.[19] His aim in doing so is to ensure that lawmakers promulgate only those law's to which all members of society could give their consent.[20] Moreover, Rawls takes the view that emphasis ought to be placed on individuals so as to reduce the chances of sacrificing their welfare and neglecting the separateness of persons.[21] Given that Rawls embraces the Kantian approach to justice, it comes as no surprise to find his emphasis on impartiality in reaching universal agreement on principles of justice.[22]

In order to secure impartiality, Rawls, as we have seen, places people in the original position and behind the veil of ignorance. The limited knowledge they possess makes it impossible for them to think in the selfish way to which people are prone.[23] For the people in the original position do not know their class position or social status.[24] However, they are aware of 'general facts'.[25] While Rawls says little about these facts in his account of the original position, it seems reasonable to think that they include some awareness of risks in society. This is important because Rawls describes society as 'a cooperative venture for mutual advantage'.[26] He also says that it is concerned with 'the proper distribution of the benefits and burdens of social cooperation'.[27] So it seems natural to imagine the people behind the

[15] For an account of the influence exerted on Rawls by Kant, see S. Freeman, *Rawls* (New York: Routledge, 2007), 21-22 (noting that Kant is the philosopher who 'most profoundly influenced' Rawls).
[16] *Ibid*, 21. See also J. Rawls, n 2, above, 586.
[17] R.J. Sullivan, *Immanuel Kant's Moral Theory* (Cambridge: Cambridge University Press, 1989), 358, n 6.
[18] *Ibid*, 195.
[19] T. Pogge, *John Rawls*: *His Life and Theory of Justice* (Oxford: Oxford University Press, 2007), 60-61.
[20] See S. Freeman, n 15, above, 142-144.
[21] J. Rawls, n 2, above, 27.
[22] *Ibid,* 60-1
[23] *Ibid,* 136-142.
[24] *Ibid*, 12.
[25] *Ibid,* 142
[26] *Ibid,* 4.
[27] *Ibid.*

veil of ignorance thinking about the sort of risk-regulation with which accident compensation law is concerned.[28] Moreover, they would do so with the aim of 'adopt[ing] the alternative the worst outcome of which is superior to the worst outcome of … other[ ] [possible arrangements]'.[29]

As well as presenting us with the original position and the veil of ignorance, Rawls also draws a distinction between 'rationality' and 'reasonableness'.[30] On his account, those who act rationally intend to further their own interests, whilst those who act reasonably take into account of the interests of others.[31] Since the limitation on knowledge imposed by the veil of ignorance erases any conception of an individual's particular situation, this forces those in the original position to think of all members of society. By contrast, those who do not find themselves behind the veil of ignorance would be likely to have a very different view of practical questions. For they would be unwilling to sacrifice their own interests for the interests of others. Hence, the original position works to promote impartiality. Thus Rawls concludes that, when placed behind the veil of ignorance, people will take account of all members of society. For when the veil is lifted, they could be any one of the individuals within the relevant group - from the best placed to the least advantaged.

Rawls' veil of ignorance helps us to understand how people would behave impartially. However, he does more than this. This is because the veil of ignorance provides us with the means with which to analyse the views of the three judges mentioned earlier. As we have noted, Mill and Wright JJ are each positioned at the opposite ends of a deontological-consequentialist spectrum, while Prudential J occupies a position that lies between these two extremes. Moreover, Prudential J's views on accident compensation law have, as we will see, much to recommend them – not least because they place emphasis on the notion of community responsibility.

[28] Concern with risk-regulation seems highly likely since Rawls's political philosophy focuses on what he calls 'the basic structure': *i.e.*, 'the basic social and political institutions that structure daily life and individuals' decisions and actions, and which distribute fundamental rights and duties and determine the division of advantages of social cooperation'. See S. Freeman, n 15, above, 464.

[29] *Ibid*, 153. (In making choices between alternative sets of arrangements in the way described in the text, the people in the original position apply a 'maximin' rule, according to which they should seek to maximize their minimum payoff. See S. Freeman, n 15, above, 474-475.)

[30] *Ibid,* 550 for a helpful account of the Rawlsian distinction between 'the rational' and 'the reasonable'.

[31] *Ibid*, 296-297.

3 *Quot Homines, Tot Sententiae*[32]

In 'The Canengusian Connection', Mill J places emphasis exclusively on economic efficiency. On his account, promoting the efficient allocation of resources is the 'central purpose' of negligence law.[33] To this end, he endorses the Hand Formula (which states that judges can impose liability when doing so satisfies a test of cost-justified accident prevention).[34] But this approach gives rise to a problem. Mill J is prepared to sacrifice the interests of individuals in the course of maximising utility. For this reason, we can see that his approach to negligence claims is utilitarian and gives expression to the maximum happiness principle - according to which we should seek to pursue the greatest good of the greatest number.[35]

There are many difficulties with this approach. People in countries like Britain, Canada, and the USA expect the law to be attentive to them as individuals. Rawls's account of the veil of ignorance reflects this. No one wants to discover that he or she is to be sacrificed or used for the purposes of maximizing utility. The sense of horror that comes with such a discovery is something that Hutchinson and Morgan convey in 'The Canengusian Connection' in their discussion of *Grimshaw v Ford Motor Co* (the Ford Pinto case)[36]. This is the case in which the Ford Motor Company decided (on the basis of a cost-benefit analysis) that it would be more efficient (cheaper) to pay compensation rather than spend money making its Pinto cars safer.[37] This approach, like that of Mill J, abandons the idea that people are inviolable. The emphasis is not on individuals and their interests. And an understandable reaction on the part of individuals is for them to say: 'I wouldn't want to be sacrificed by Mill J, the Ford Motor Co, or anyone else'.

As with Mill J, we can use Rawls to find fault with Wright J. Like Lord Browne-Wilkinson in *X v Bedfordshire CC*, Wright J clearly thinks that the goal of 'remedying every wrong' lies at the heart of negligence law (and tort more generally).[38] Moreover, Wright J seems to assume that people are intrinsically valuable.[39] If this is the case, then he is a deontologist. And this

[32] There are as many opinions as there are men.
[33] A.C. Hutchinson and D. Morgan, n.1, above, 76-7.
[34] *United States v. Carroll Towing* (2d. Cir. 1947) 159 F.2d 169, *per* Learned Hand J.
[35] On the maximum happiness principle, see W. Kymlicka, *Contemporary Political Philosophy*: *An Introduction* (Oxford: Oxford University Press, 2002, 2nd edn), 10-12 and 50, n 1.
[36] *Grimshaw v Ford Motor Co* (1981) 174 Cal Report 348. See also A.C. Hutchinson and D. Morgan, n.1, above, p. 87-88.
[37] *Ibid*, 87-88.
[38] *X v Bedfordshire CC* [1993] 2 AC 633, 749
[39] A.C. Hutchinson and D. Morgan, n.1, above, 90-4.

opens the way to a line of criticism where we can make use of Rawls and his paraphernalia of the veil of ignorance and the original position. For Wright J's unwillingness to consider consequences fits awkwardly with the notion of distributive justice.[40]

In our pursuit of distributive justice, there are circumstances where sacrifices must be made in order to bring overall benefit to society as a whole.[41] This gives rise to a dilemma that we can illustrate by using a case drawn not from tort but from the field of administrative law, *R v Cambridge Health Authority, ex p B*.[42] In *ex p B*, Sir Thomas Bingham MR was forced to choose between two approaches to the provision of health care – one deontological and the other consequentialist. The first of these approches involved delivering treatment to a gravely ill child (B) whose life could not, in all probability, be preserved. Laws J applied this approach in the Queen's Bench – taking the view that not to treat B would be to violate her fundamental right to life.[43] The Master of the Rolls reluctantly applied the second approach, which had to do with providing health care for a large number of people whose chances of survival would (in most cases) be very much better than those of B. In light of the limited budget available to Cambridge Health Authority, Bingham MR decided that B's interests should be sacrificed in pursuit of overall benefit to many other health-care recipients. This decision and others like it give us grounds for thinking that Wright J's exclusive focus on deontology is unsatisfactory. While, in cases like *ex p B*, it concentrates the mind of a judge on someone whose interests may be overridden, we need to think about the pursuit of socially advantageous outcomes that benefit large numbers of people. Not to do so would hardly be reasonable in Rawls's sense.[44]

Whilst the original position provides us with the means to identify deficient or unattractive positions, it can also be used to rank possible responses to practical problems (where considerations of social justice arise). This becomes clear when we examine the judgments of Mill J. Wright J, and

[40] Distributive justice is a normative idea. It regards allocation of benefits and burdens of economic activity as a guide to socially just outcomes. For more on distributive justice, see, D. Miller, *Political Philosophy: A Very Short Introduction* (Oxford: Oxford University Press, 2003) 74.

[41] On the costs involved in pursuing socially beneficial outcomes, see G. Calabresi, 'The Decision For Accidents: An Approach To Non-Fault Allocation Of Costs' (1965) 78 *Harvard Law Review* 713, 716-721 (on 'the nature of the decision for accidents'). See also G. Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70 *Yale LJ.* 499, 517-9.

[42] *R v Cambridge Health Authority, ex p B* [1995] 1 WLR 898 (CA).

[43] *R v Cambridge Health Authority, ex p B* (1995) TLR 159.

[44] See n 31, above, and associated text.

Prudential J. We can (as we noted earlier) locate Prudential J in a position between his two colleagues on the deontology-consequentialism spectrum. From this position, he is able to level criticisms at both Mill and Wright JJ. He says that he is filled with 'despondency and horror' at the thought of Mill J's 'indifference to the fate of individuals'.[45] He then turns to Wright J, whose views he recognises have 'intuitive appeal'.[46] While this may be the case, Prudential J finds Wright J's approach to accident compensation to be impractical – being 'thoroughly unequal to the massive task he sets it'.[47] He finds support for this conclusion in, for example, the difficulties judges have in resolving causal questions.[48]

Having rejected his colleagues' views, Prudential J stakes out a position of his own. He tells us that Canengus can only respond adequately to the 'plight' of accident victims by pursing the ideal of 'social justice'.[49] He recognizes that this cannot be achieved unless people engage in risky 'community activities' that are 'done for the benefit of all'.[50] However, these activities lead to 'predictable and almost inevitable accidents'.[51] This leads Prudential J to say that '[i]t is the plight of the injured plaintiff … that deserves our attention'.[52] He also argues for the abandonment of tort law. His reason for doing so is that it is a 'litigation lottery'.[53] Certainly a scheme of no-fault compensation will have greater appeal than a litigation lottery to those behind the veil of ignorance. For they, as we noted earlier, aim to 'adopt the alternative the worst outcome of which is superior to the worst outcome of the other[ ] [possible arrangements]'.[54] In light of these points, it is unsurprising to find Prudential J concluding that tort should be replaced by 'a thoroughgoing and comprehensive scheme of [no-fault] accident compensation.[55]

[45] A.C. Hutchinson and D. Morgan, n.1, above, 94.
[46] *Ibid.*
[47] *Ibid*, 95.
[48] *Ibid*. (In taking account of the consequentialist and deontological dimensions of negligence law, Prudential J embarks an interpretative exercise of the sort described in E. Mickiewicz, 'An Exploratory Theory of Legal Coherence in Canengus and Beyond' (2010) 7 *The Journal Jurisprudence*, section 4.
[49] A.C. Hutchinson and D. Morgan, n.1, above, 95 and 100.
[50] *Ibid*, 101.
[51] *Ibid.*
[52] *Ibid*, 94.
[53] *Ibid*, 97.
[54] See n 29, above, and accompanying text.
[55] A.C. Hutchinson and D. Morgan, n 1,above, 98.

Like the architects of the comprehensive no-fault accident compensation system in New Zealand,[56] Prudential J argues that his approach demonstrates a commitment to 'community responsibility'.[57] For the community benefits from risk-taking and, for this reason, should respond justly to the plight of 'the statistically necessary victims' of accidents.[58] This makes sense – not least from the standpoint of distributive justice.[59] But Prudential J could have added that his approach to accident compensation is a mixture of consequentialism and deontology. He focuses on socially valuable outcomes (consequentialism): 'community activities' that are 'done for the benefit of all'.[60] But he is also determined to make sure that accident victims receive just treatment through a no-fault scheme (deontology). In thinking along these lines, Prudential J might be classified as a qualified consequentialist.[61] He gives priority to valuable outcomes because they are necessary to the pursuit of justice (activities that 'benefit … all').[62] But he wants to treat all accident victims justly (deontology).[63]

4 Back Behind the Veil of Ignorance

Let us now imagine those behind the veil of ignorance contemplating a choice between the views of Mill J, Wright J, and Prudential J. Mill J's approach to accident compensation means that some of them will be sacrificed. Wright J may be committed to corrective justice, but he ignores the benefits to all members of society that come from the 'community activities' that Prudential J describes. For this reason, his commitment to 'reasonableness' in Rawls's sense is worryingly narrow in focus.[64] Prudential J's approach (which draws on the other two positions) is free from these glaring deficiencies (see Diagram 1 below). For this reason, it seems likelier to win the support of those behind the veil of ignorance. If this is right, then

[56] Report of the Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (Government Printer, Wellington 1967) [Woodhouse Report].

[57] A.C. Hutchinson and D. Morgan, n.1, above, 101.

[58] *Ibid.*

[59] See G. Calabresi, "The decision for accidents: an approach to nonfault allocation of costs" (1965) 78(4) *Harvard LR.* 713. at 714 on the logic of 'loss spreading', and P.S. Atiyah, *Accidents, Compensation and the Law* (Cambridge: Cambridge University Press, 2006, 7th edn) (on community responsibility). 8-10 and 415-421 (on, *inter alia*, 'society's responsibility').

[60] A.C. Hutchinson and D. Morgan, n.1, above, 101.

[61] On qualified consequentialism, see R. Mullender, 'Thorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy' (2000) 27 *Journal of Law and Society* 493, 500-501.

[62] See n. 60, above.

[63] See n.s 60-61, above.

[64] See ns 32-33, above and accompanying text..

Hutchinson and Morgan should perhaps have identified it as preferable to the approaches of Mill and Wright JJ.

But while Prudential J's approach may be preferable to that of Mill and Wright JJ, this does not mean that conflict in Canengus will come to an end.[65] Qualified consequentialism is a very general idea.[66] Judgments will have to be made as to how consequentialist and deontological considerations should be combined so as to do justice. And this is problematic. It is not obvious how we might rank these considerations. They may, in fact, be incommensurable. But even if this is the case, Prudential J's approach has the attraction of being 'reasonable' in Rawls's sense. This is because it is aimed at accommodating the interests of all Canengusians justly. Moreover, the form of justice that leads Prudential J to adopt this approach is (like that of Rawls) distributive. For these reasons, we could imagine not just the people behind the veil of ignorance but, also Rawls himself identifying Prudential J's approach as preferable to that of Mill and Wright JJ. This is because Rawls staked out the position that '[a] social order is to be accepted as *just* if and only if it could be the object of a fair agreement – of an agreement that takes account of all the individuals who are to live under this social order'.[67]

5 Conclusions

While Hutchinson and Morgan do not rank the positions staked out by Mill, Wright, and Prudential JJ, Rawls's device of the veil of ignorance gives us a way of doing this in a way that satisfies a test of impartiality (see Diagram 1 below). As we saw earlier, the approaches of Mill and Wright JJ (the first consequentialist and the second deontological) have real weaknesses. Mill J's pursuit of the greatest good of the greatest number means that he is insensitive to the separateness of persons. Wright J's deontological approach blinds him to the importance of outcomes that have general benefit. By contrast with these judges, Prudential J offers a preferable alternative. He recognises that society benefits from activities that necessarily lead to accidents. However, he also wants to ensure that accident victims receive compensation. In advocating a New Zealand-style no-fault compensation scheme, he reveals himself to be a qualified consequentialist. He places emphasis on the pursuit of outcomes. However, he also thinks that society should do the intrinsically right thing – which, in this case, means paying compensation to accident victims.

[65] R. Mullender, see n. 61, above, 514-5
[66] *Ibid*
[67] T. Pogge, n 19, above, 66.

We should not assume, though, that Prudential J's approach to accident compensation provides a neat solution to the problem with which he deals. This is because it seems to be impossible to rank consequentialist and deontological arguments. The best we can do is to accommodate them in an approach that gives priority to one of the two (consequentialism). But those who place emphasis on deontological considerations will be unhappy about this. For this reason, we can expect the battle of consquentialism and deontology to go on.

Diagram 1