Reflecting on Continuity and Discontinuity in “The Law” -

An Application of Foucault’s Archaeological Method in a Reading of Judicial Decisions in Negligence

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This thesis is presented for the degree of Doctor of Philosophy of Murdoch University, 2002
I declare that this thesis is my own account of my research.

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ABSTRACT

This thesis is a tentative application of Foucault’s archaeological method to the English common law. The project is an attempt at explaining and demonstrating the specific attributes of the method in terms of a contribution to an understanding of “the law” as both continuous and discontinuous.

From the understanding applied in this thesis, an application of the archaeological method requires a careful examination of the monuments of a discourse. The monuments that are examined in this project are a number of negligence law judgments. The “authors” of the monuments are seen as the sum of the practices that constitute them. That is, in this application of the method to the law, the judges are not considered as authors, instead, the judgments they write are seen as reflecting the practices of the legal discourse.

The most fundamental of these discursive practices, from the perspective applied in this thesis is the repetition of past legal statements in the production of judgments. In the understanding of law adopted in this project, cases are treated as sites within which judges choose from a number of possible legal statements made by preceding judges. The common law, then, is seen as representing a process in which statements by particular judges in specific cases are valorised, primarily through repetition, until the alternative utterances are largely, but never completely, excluded.

The application of the archaeological method to these negligence decisions demonstrates the operation of the discursive practice of repetition. The application provides a framework for appreciating the way in which “the law” can change without losing its continuity and legitimacy. The project examines cases between 1750 and 1972 and demonstrates that, despite apparently radical changes in the articulations of liability, from the writ system to the “duty of care”, “the law” has maintained its structure through the reproduction of the discursive practices that constitute members of the legal profession.
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INTRODUCTION

The main aim of this project is to use and explore Foucault’s archaeological method. This method involves a close examination of the “monuments” of a particular societal institution in order to gain a fresh perspective on what is known as the history of that institution. The product of an archaeology is a history, not the history, as the result may be a different story from the traditional history of the body. The institution that will be the focus of the archaeological method in this thesis will be “the law”. The story that is produced, another history of “the law”, highlights “the law” as being simultaneously continuous and discontinuous. This story stresses the contingent nature of the legal past and rejects any teleological telling of the story of “the law”.

The legal texts that will be excavated in this archaeology are a number of decisions from the general area of negligence law produced by English common law judges between the years of 1750 and 1972. The writings of the judges provide an ideal set of monuments for an archaeology. Judicial decisions reflect the specific legal training of judges and are used according to the specific training of the legal profession. The legal training of members of the profession will be examined in order to show the relationship between “the law”, in the form of written judgments, and the profession.

This application of the method is not a definitive application, it could even be described as a “tentative” one. It is an attempt at using the method in order to demonstrate the benefits (and constraints) of this particular style of historical examination. The understanding of the method reflects a particular reading of Foucault’s work and his discursive understanding of society and its members. This project is the first attempt at a detailed application of the archaeological
method to the law. It is not the first to use Foucault’s works in a study of the law. In order to appreciate the specific nature of the project, the next section will look at other uses of Foucault’s work in relation to the law.

FOUCAULT, LAW AND THIS THESIS

Foucault’s ideas and theories have informed many other writers in a wide variety of fields. I feel, however, that this project is using one of his ideas in a way that has not been done before. One of the purposes of this section is to indicate the manner in which this thesis is novel in terms of the use of Foucault’s work. Another purpose is to establish the relationship between his ideas, the work of others who have used his ideas and his ideas as they are used in this project.

The basic idea behind this thesis is to examine, using a Foucaultian “eye”, a sequence of judgments produced in English courts of appeal over the past three centuries. These judgments are from an area of law that is loosely termed negligence law - although many of the decisions predate the introduction of the label “negligence law”. The key elements of the thesis, then, are documents of “the law” and the Foucaultian method, the “archaeology” that allows for the use of the Foucaultian “eye”.

Foucault’s work has been used in a variety of contexts across a number of academic disciplines. His methods have been used before and his ideas have been discussed in relation to the law before. There has not been, however, an application of his methods to a series of legal decisions in which the goal of the application has been the application itself. It is in this space that this project seeks to sit.
Academic research projects in which Foucault’s ideas were used have included the construction of the medical discourse and an examination of the relationship between the individual and the wider community. Writers such as Alan Petersen\(^1\) have continued Foucault’s own work\(^2\) in the former category. In the latter category, Nikolas Rose, in *Governing the Soul*,\(^3\) uses Foucaultian ideas in his analysis of the way citizens are constituted in today’s society. In particular, Rose uses Foucault’s ideas relating to the processes of subjectification. That is, Rose uses Foucault in order to show how our senses of “self” are created in the day-to-day interactions with the structures of society. This notion of subjectification will be picked up on and explored further in Chapters One and Two of this thesis.

A number of writers have also looked specifically at Foucault’s historical methods, the “archaeological” and the “genealogical” methods. The particular Foucaultian “eye” that I will be using in this project is the one produced from the archaeological method. Theorists who have written on Foucault’s methods include Gary Wickham, Gavin Kendall and Mitchell Dean. Indeed, Kendall and Wickham’s *Using Foucault’s Methods*\(^4\) was significant in the development of the archaeological method used in this project and will be relied upon to explain my interpretation of the archaeological method. Their work, and that of Dean,\(^5\) is predominantly theoretical. That is, their focus is an explanation and discussion of the methods in the abstract. *Using Foucault’s Methods*, for example, has, central to its structure, a hypothetical class of students. The book is aimed at teaching the method to those who do not understand it. Their

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\(^2\) One of Foucault’s earlier works was *Birth of the Clinic – An Archaeology of Medical Perception*, Vintage, New York, 1975, a history of the medical “gaze”.
\(^3\) Routledge, London, 1992
\(^5\) For example, *Critical and Effective Histories – Foucault’s Methods and Historical Sociology*, Routledge, London, 1994
discussion is of the methods “in theory” rather than in practice. Their intention, unlike mine, is not to apply the method to a particular discursive structure but to explain how the method might be applied.

Many other writers have used Foucault’s ideas in practice but none have undertaken a “simple” application of Foucault’s methods. One context in which his ideas have been used is that of “the law”. “The law” has often been used an example in the examination of the structures and limits of society by many academics. The Foucaultian writers that have used the law in this way can be seen as falling into two camps. The first group sees “the law” as a meta-narrative, as an over-arching story that “explains” society as we now know it. The second camp uses the idea of “law as discourse”, applies it to the world and uses one of Foucault’s historical methods to provide evidence for this application of the “law as discourse” theory to the world. My project is an attempt to take this idea a step further. The thesis rests on a discursive understanding of the world, but the prime focus of the project is a “simple” application of the method.

To illustrate the relationship between my project and those of these other writers I will offer a few examples of their work. In terms of the first camp, theorists such as Ian Hunter, W. T. Murphy, Costas Douzinas and Peter Goodrich6 are significant. These people write of the law as “meta-narrative”, they write of the law as a way of explaining how society “works”. The work of these writers has gone a long way in terms of providing explanations of the way the law can be seen to work in society, yet their stories are different in style and application from the story in this project.

6 The work of Goodrich will be used in Chapter Two of this thesis.
For example, Hunter, Saunders and Williamson, in *On Pornography: Literature, Sexuality and Obscenity Law*, link Foucault’s writing with a history of the law. Hunter’s writings deal with trying to understand law as it is now, as a complete institution, as a complete discourse. He uses the “objects” of pornography and sexuality and their regulation via the law to examine the way law operates in our society and the that way in which society is, in turn, regulated by the law.

W. T. Murphy’s *The Oldest Social Science* discusses the importance of tradition to the law. Murphy engages with the traditional aspect of legal practice in terms of a discussion of Christian philosophies, Max Weber, hermeneutics, ethics and, of course, Foucault. This text is a discussion of law in terms of a grand narrative, it looks to explaining the law as it is today in wider society and is an exploration of some of the mechanisms that might have produced the law as it is today.

One significant writer in the second of my two broad classifications of Foucaultian theorists of the law is Les Moran. In *The Homosexual(ity) of Law*, Moran engages in a Foucaultian history of the law. That is, he applied Foucault’s genealogical method to the law and the documents of the law. The focus of his project, however, was a description of the law as a grand narrative. The law was seen as a grand narrative in which its in-built biases were evident through the documents that were produced by those who were part of the law. That is, the focus of Moran’s text is a narrative of law in the context of the broader regulation of sexuality by the law. This narrative is supported with

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7 Hunter, I., Saunders, D. and Williamson, D., Macmillan, Basingstoke, Hampshire, 1993  
8 Clarendon, Oxford, 1997. Some of Murphy’s work will be included as examples in Chapter Two below.  
9 Routledge, New York, 1996
reference to judicial decisions, but the central story was about sexuality rather than the law itself. Moran uses the genealogical method to discuss judicial decisions but his discussion provides evidence for the discussion of the law as grand narrative. The focus of Moran’s work is the law and not the application of the method itself.

Douzinas’ *Justice Miscarried: Ethics, Aesthetics and the Law*, with Ronnie Warrington, is, in some ways, a crossover between the two broad camps I have described. That is, it deals with the law in terms of a grand narrative, but also engages with some of the texts of the law. The central argument of their book relates these texts to the notion of justice, a meta-narrative that is used to describe the world. They use texts of the law to demonstrate this “justice”, but they do not use a Foucaultian method to examine these texts. Further, their focus is not on the individual texts as monuments in themselves but on what the individual texts have to add to the meta-narrative of justice.

My intention in this project was to draw on the work of theorists such as the above writers in order to try “something new”. The sheer weight of academic interest in Foucault’s ideas suggests that there is something valuable in his works. This thesis would not be possible without the extensive work of the authors who have taken Foucault’s writings and built on his themes.

The “something new” of this thesis is two-fold. First, it is an attempt to develop the archaeological method through an application of the method to a “discourse in action”. The second aspect of the thesis is that it offers a new perspective on the “discourse in action”, a new perspective on “the law”. Through the use of the application of the method, I hope to shed light on the manner in which the

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10 Harvester Wheatsheaf, New York, 1994
law operates. In particular, I hope to show how such an important discourse in the community is able to change drastically over time while maintaining its structure and practices.

The primary objective of this project is to illustrate and develop the method. The application is not done for the purpose of providing evidence to prove a different explanation of the cases discussed or of the law itself. However, this attempt is only possible because of the work of theorists like those I have mentioned above. I have taken their work and hope to add something to the body of Foucaultian literature by taking a tentative step toward a greater understanding of the possibilities opened up by Foucault’s historical methods.

The small step that this project is taking involves the application of Foucault’s archaeological method to a sequence of documents, a series of discursive monuments. The end product of the application may be a new story but it is one that is derived from the documents themselves. The legal decisions, the documents that I will be “excavating”, are to be examined not as evidence that reinforces a separate argument, but as monuments in themselves. These decisions are products of the common law and their examination, hopefully, will enable more to be said about the common law.

The set of documents that are to be examined have been chosen from a discourse that is readily seen as a cohesive body of statements. This was done both in order to make the application of the method as clear as possible and to provide a new approach to the study of law. The application of the method involves an examination of the law from within the law itself. This, necessarily, must produce a different story of the law from those of writers such as those mentioned above, as it could be said that they examined the law from without.
For the purposes of this thesis, the law can be seen as a set of texts produced by a relatively independent body of writers who, for centuries, have been responsible for the education of the next generation of writers. That is, the texts of the common law have been produced by a self-regulating, self-perpetuating body of lawyers and judges. These documents are the monuments of the discourse as they are produced through the practices of the discourse.

This brings in the other aspect of Foucault’s work that is to be used in this project, this is his notion of subjectification. Subjectification refers to a process in which the subjects of a discourse are created by the discourse. That is, those people who are subjects of a discourse are trained in the practices of the discourse and behave according to these practices. This process of repetition of practices perpetuates the practices themselves and the discourse as a whole. The texts of the law are written with an eye on “precedents” Judicial decisions are written, and read, in the context of previous writings of this body of writers. This self-regulating, self-referential body of work seems an ideal discourse upon which to base an application of the archaeological method.

This thesis is a tentative attempt at an application of the archaeological method. As it is a tentative attempt I have made the task as simple as possible by choosing a discourse that lends itself to an application of the method. The attempt is only possible because of the large body of work that has been built up around Foucault’s ideas. This thesis is “something new” but it is a small “extra step” that is investigating how a well-discussed, but under-utilised, method can be applied to a set of texts produced by those who belong to a specific discourse in society.
THE ARCHAEOLOGICAL METHOD

Broadly speaking, an archaeology is a process in which the monuments of a discourse are excavated. An archaeology is an exploration of texts that form a discourse, a discursive formation or set of discursive practices. The excavation is done in a particular manner and with a particular eye. The practices of the method are more specific than traditional histories and the results that can be gained from using it also may be different from those of a more traditional history. The method used in this thesis is based on Foucault’s *The Archaeology of Knowledge*,\(^\text{11}\) but has been modified in light of his later writings. As mentioned above, the understanding gained from Foucault’s work is expanded upon with, in particular, the aid of Kendall and Wickham’s work on Foucault’s ideas.

These authors considered the central elements of Foucault’s archaeological method to be that it ‘describes statements’ produced by a discourse. These ‘statements cover the sayable and the visible’. The method also ‘describes regularities of statements in [a] non-interpretive’ and a ‘non-anthropological manner’; and it ‘analyses the relation between one statement and other statements’.\(^\text{12}\) The focus of the method, therefore, is the statements that are produced by a discourse. The focus is not on the authors of statements. The method is non-interpretive, in the sense that there is no second order analysis that is part of the method. That is, the statements are taken at face value. This means the discourse can be known by an examination of the statements, as there is no need to “peer” behind the statement to guess at what is “really there”.

\(^{11}\) Routledge, London, 1994
\(^{12}\) Kendall and Wickham, *Using Foucault’s Methods* at 33
As described above the method is simple and straightforward. The results are also simple and straightforward. The more difficult aspect of the method is to accept what is not part of, or produced by, the method. For example, an archaeology does not deal with grand narratives. There is no argument about the importance or relevance of larger stories, such as those associated with justice or morality. An archaeology of the law, at least one in which judicial decisions are examined, looks at the words of the judges themselves. There is no re-interpretation of the words on the page to argue that the judge really meant something that was not written down. One particular grand narrative that is found in some of the traditional legal histories is that of the inexorable progress in the law from feudal forms to modern forms. Such a teleological assumption has no place in a post-structuralist reading of the law and the legal profession.

The continuities and changes described in this thesis are not meant to suggest progress. The forms of liability evident in the twentieth century are not held to be better than the forms of liability evident in the eighteenth century. There is simply change: change in the legal practices, change in the legal profession and change in the recognition and articulation of liability. These changes are evident through the changes in the legal decisions that deals with relationships and forms of liability between legal subjects.

Another “lack” associated with the method is that there is no recourse to stories of causation in an archaeology. The statements are as they are, when they are. The connections between the statements are described by the method and these connections are the practices of the discourse that created the statements. There

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13 For example, one text used in this thesis includes a chapter called “A General Sketch of Legal Development”, in which the author refers to ‘our legal evolution’ (Potter H., An Introduction to the History of English Law, 2nd edition, Sweet & Maxwell, London, 1926 at 8).

14 It is easy, however, to see it as better, but perhaps only because we are “modern”.

is no factor “external” to the discourse that “caused” one statement to follow any other statement. This also means that the method is equally at home in describing both continuities and discontinuities amongst a group of statements. The events that are described are taken at face value. All that an archaeology can record is that the statements were produced.

THE LAW ITSELF

The archaeological method must focus on a set of statements. These statements can be described as the “monuments” of a discourse. The monuments excavated in this project are a set of judicial decisions from the English common law. One of the purposes of this thesis is to apply the archaeological method. The focus, therefore, is on the method, and the set of statements chosen are simply “objects” to which the method is applied. The writings of the judges, however, were chosen for two very strong reasons. First, the words and the practices of the English judiciary have been important in the continuation of our society, so a new historical perspective may produce interesting results relevant to the functioning of our community. Second, the judgments discussed seem to be ideal monuments for an archaeological examination, as the rules for their production are so dependent upon the law and the judges’ legal training.

A term that will crop up repeatedly in this project, not surprisingly, is “the law”. The project is an application of the method and the statements chosen are judicial decisions that discuss negligence. It could be argued, therefore, that any broader notion of “the law” plays no part in the thesis. These statements, however, are produced by the legal practices which constitute the legal training of the judges. Therefore, the notion of “the law” that I am using in this thesis is
wider than the understanding of “the law” as just the totality of recorded judicial decisions.

If I am looking at legal practices, the legal profession and legal decisions it is hard, and indeed awkward, to avoid using the term “the law”. “The law”, therefore, needs definition, or at least an explanation of what it means in terms of this project. The term is used very broadly in the general community, in the academic community and even in the community of Foucaultian scholars. But “the law” has a wide, but precise, meaning for the purposes of this thesis.

The statements that are to be excavated in this project are produced as a result of the legal practices ingrained in the judges who wrote the decisions. The judges represent “the law”. The decisions they wrote function as “the law” and to produce their reasons the judges repeated previous statements of “the law”. In this thesis, then, “the law” is that which judges, and the legal profession as a whole, do. In other words, lawyers and judges, in their capacity as members of the profession act according to the ways in which they were and are trained. The end product of their actions is “the law”. The rules, opinions and judgments that construct proceedings in the courtroom are created by the forms of legal training undertaken by members of the legal profession. There is nothing outside these legal behaviours that can be considered to be law. There is no “law” that is separable from the actions, and therefore the training, of lawyers and judges.

This perspective is not without precedent. Llewellyn, for example, argued that what the agents of the law ‘do about disputes is… the law itself’. His category of “legal agents” included judges, sheriffs, clerks, jailers and lawyers, in other

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words, all people who function in a professional capacity on behalf of the law. This category is wider than the category of lawyers and judges that I use, but, again, this description is only for the purposes of this project. That is, the definition I use is intended to operate as shorthand for the body of legal statements, practices and actions.

With this understanding of “the law” it is useful to consider how, again for the purposes of this thesis, the law functions within the community. The law can be seen to operate differently with respect to two different bodies of people in society. First, the law “binds” all citizens. All members of society are limited by law and all are expected to behave according to the law. Second, the law can be seen to have a different “relationship” with that body of people who “speak” for the law, the legal profession. Lawyers and judges are bound by the law, yet they also speak of, and for, the law.

This can be re-stated in the language necessary to use the archaeological method, that is, it can be re-worded in the terms of the post-structuralist framework of the method. The law binds all citizens because the law is a discourse that creates those citizens as subjects of the legal discourse. That is, the law is a broad discourse that affects and constructs everybody within society. Members of the legal profession, too, are legal subjects but they also are a relatively cohesive body of people who use a special group of legal practices to speak of, and for, the law. In order to differentiate between the specifics of this smaller group and the generalities of wider legal discourse, the legal profession can be termed the “legal discursive formation”.

More fully, all members of society are legal subjects. All legal subjects have been trained to behave in certain ways in certain circumstances in order to
comply with the law. Sometimes this training is very specific; for example, a juror is given specific tasks to carry out in their capacity as a juror. Sometimes the training is more general; for example, legal subjects are trained to adopt and observe norms of behaviour that are not subject to criminal sanctions. People are trained from a young age about road rules and the legal consequences of interfering with the property of others. Legal subjects are trained in these behaviours and by carrying them out and repeating them, the behaviours are perpetuated and the legal discourse is maintained.

A subset of these legal subjects is the legal profession. These are legal subjects who have undergone specific forms of training that allow them to express and act on behalf of “the law”. These forms of training are a part of the discursive practices that constitute the legal profession. The English legal profession is a self-perpetuating, self-regulating institution of governance. That is, the profession is an independent body, at least for the period covered by this project. It is this independence that guided the choice of the endpoints for this archaeological excavation. 1750 is a time after which judges ceased to be dependent on the Crown and 1972 is the year in which the English legal system was provided with a higher Court of Appeal than the House of Lords, the European Court of Justice.

After applying the archaeological method to the legal judgments it will also be seen that the law is a discourse that operates through the repetition of legal statements. That is, when judges write their legal judgments their arguments are based on the repetition of previous legal statements. This process of repetition resembles, but differs from, the usual understanding of stare decisis, the doctrine of precedent. In terms of a discursive understanding of the operation of the law in our society, the use and repetition of past legal statements is
absolutely fundamental to the legal profession and the law.\textsuperscript{16} The use of these statements extends beyond the repetition of the \textit{ratio decidendi} (more commonly referred to as the \textit{ratio}) of previous decisions.

To repeat the \textit{ratio} of a decision is to repeat a specific statement contained in that decision. That is, before anything can be repeated, something has to be found. That something has to represent a ‘rule or principle of decision for which a given precedent is the authoritative source’.\textsuperscript{17} In other words, the repetition of a \textit{ratio} includes an act of selection and interpretation on the part of the judge.\textsuperscript{18} A judge has to read the previous decision and then extract the \textit{ratio} from the words of the judgment. Once this selection has been made the judge then has to consider whether that decision should be applied, followed or distinguished.

These actions can be seen to be legal practices that all judges exhibit as a result of their education and “training”. It is also possible to consider that this is reading too much into their behaviour. It can be as simple as a judge reading a previous decision and then repeating statements from that decision in their own judgment. Seen in this manner, it is irrelevant whether they are repeating a \textit{ratio}, a legal principle or a piece of \textit{obiter dicta}. The legal practices of the profession allow for, and encourage, the repetition of legal statements \textit{because} they are previous statements of law. The practice of repetition can either involve the repeating of specific phrases from specific cases, or it can be the repeating of a specific statement as a “legal principle”, a principle that needs no reference

\textsuperscript{16} I am neither the first to consider the law as an institution which operates through the repetition of past statements. Nor am I the first to discuss such an idea from a post-modern perspective. Margaret Davies, for example, engaged with that notion in \textit{Delimiting the Law}, Pluto Press, London, 1996. Her project is different from mine inasmuch that her work was based in a Derridean analysis, rather than a Foucaultian analysis.

\textsuperscript{17} MacCormick, N., ‘Why Cases have \textit{Rationes} and what these are’, in Goldstein, Laurence (ed), \textit{Precedent in Law}, Clarendon Press, Oxford, 1987 at 156

\textsuperscript{18} In the language of Kendall and Wickham, discussed below, this interpretation can be seen as a “second order judgment” on the “underlying meaning” of a particular decision.
to a specific decision because all legally trained people “know” what it means and where it comes from. All judgements are statements of law because they are written by judges according to their legal training and are comprised of earlier statements of law. In short, the practice of repetition of legal statements that is evident after the application of the archaeological method to common law decisions is wider than the doctrine of *stare decisis* as it is usually understood.

Another result of the archaeological excavation of judicial decisions in this thesis is that the law can be seen as both continuous and discontinuous. More specifically, there are legal practices that have remained relatively constant over the years while other aspects, in particular the statements themselves, of law have changed radically. The mechanism that produces change, the mechanism that has remained relatively constant, is the practice of repeating legal statements. Again, I emphasise that this process of repetition has similarities with, but is not identical to, the doctrine of *stare decisis*. The idea that the law changes through the use of precedent is not new. For example, Stone argued that change with continuity can be understood if we recognise that the structure of precedent law constantly produces and reproduces both new rules, and new areas for choice-making. The application of the archaeological method highlights the processes of repetition of legal statements through which the law can change.

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19 *Legal System and Lawyers’ Reasonings*, Maitland, Sydney, 1968 at 209. These references to Llewellyn and Stone may suggest a connection between this thesis and the legal realist school of philosophy. My intention is not to build upon the work of these authors, nor is it to use the same perspective as they do. I recognise that there are similarities but my approach is different. I am not seeking to describe the law and the legal profession in terms of their relationship to the broader policy processes of governance (Cotterrell, R. *The Politics of Jurisprudence*, Butterworths, London, 1989 at 203). My goal is to characterise the legal profession in a particular way and using that characterisation as a basis for the application of the archaeological method. The results of the application then demonstrate, to a limited extent, the nature and operation of law in our society.
Another significant result of the use of the archaeological method to the sequence of negligence decisions is a new perspective on the relationship between the defendants and the law.\textsuperscript{20} It is this perspective that has changed between 1750 and 1972. In the eighteenth century, liability in the area of law that came to be known as negligence was restricted to certain categories of defendants. That is, only certain people in restricted circumstances were “seen” by the law, the judges, as capable of being liable for damage suffered by another. In the latter part of the twentieth century, almost all people are capable of being “seen” by the judges as liable for negligent acts.

This concept of defendants being “seen” is linked to Kendall and Wickham’s characterisation of the method as a description of “statements [that] cover the sayable and the visible” and to Foucault’s notion of “the gaze”. For Foucault, “the gaze” is concerned with issues of power and knowledge.\textsuperscript{21} It is a technique of ordering and of control. In the context of the court room, “the gaze” relates to the categorisation of the citizens who enter it. In the field of negligence law, only certain categories of people could be considered to be liable (depending on the circumstances). If the previous statements of the law did not include a certain class of persons as being liable in a particular situation then that person, if they appeared in court as a defendant, would not be “seen” by the judge.

\textsuperscript{20} I acknowledge that to categorise all the decisions excavated in this thesis as negligence decisions could be misleading as negligence has not always been classed as a separate area of law. According to Baker, ‘even at the beginning of the twentieth century Sir John Salmond was denying the existence of a separate tort of negligence. In the practitioners’ book, \textit{Clerk and Lindsell on Torts}, negligence did not reach the status of a separate chapter until 1947’ (Baker, J. H., \textit{An Introduction to English Legal History}, 3\textsuperscript{rd} edition, Butterworths, London, 1990 at 455). All the decisions discussed in this project do relate to the potential apportionment of liability in circumstances where the defendant could be seen to be acting “without due care”. As a result, I refer, for simplicity, to the decisions as being from the general area of negligence law.

\textsuperscript{21} See, for example, \textit{The Birth of the Clinic} and \textit{Discipline and Punish – The Birth of the Prison}, Penguin, London, 1977
Only certain classes of defendant were considered to be liable under the writ system in use in the eighteenth century. For example, common carriers were liable for damage to goods in their care. If property was damaged in circumstances in which a carrier would have been liable but the defendant was not a common carrier, then the defendant would not have been “seen” by the court as liable. The defendant would not have been “seen” at all as they were not in an appropriate category. After the advent of the “duty of care” in the twentieth century, almost all people who came before the court were capable of being “seen” as liable. The manner in which this project understands this change is different, however, from the understanding of the change that is evident in other legal histories.

LEGAL HISTORIES

The focus of this project is a tentative application of Foucault’s archaeological method to a series of judicial decisions written by English common law judges. The initial purpose of the thesis was to “simply” apply the method, however, for a number of reasons, it occurred to me that an ancillary purpose of the application could be to investigate whether the story told by the application is significantly different from the stories evident in more “traditional” legal histories. It is recognised that there is no “template” for legal histories. There are some characteristics, however, that have been highlighted as being generally attributable to other legal histories. This section will suggest a number of the distinctions that may be between an application of the archaeological method and alternative legal histories.

Before understandings of legal history are discussed, an acknowledgement has to be made of a tension within understandings of law itself. Law as it is taught,
and as it is used in practice, centres on the application of past decisions. However, this use of past decisions does not necessarily reflect a historical understanding of, or perspective on, the law. For example, it has been argued that a ‘marked characteristic of most conventional accounts of the tort of negligence (and indeed of legal doctrine generally) is the complete absence of any historical perspective’. The use of past decisions is to explain the law as it is now, not how it was then. That is, if a nineteenth century decision is introduced in a lecture hall or legal argument, the decision is included as a statement of law applicable now, rather than a historical description of the law or society of the time the decision was written. This treatment of law as being “ever-present” ‘robs’ law of its ‘context. At the same time it deifies law by making it immortal’.

The use of past decisions in the practice of law is distinct from “traditional” histories of the law. This distinction is highlighted because the application of the archaeological method, as it is understood here, results in a description of cases that has similarities to the description of cases that can be developed in undergraduate course on negligence law. The argument here is that the understanding of law developed in a negligence unit is different to the understanding of law developed in a legal history course.

In order to establish this difference, an understanding of legal histories need to be developed. Broadly speaking, there can be seen to be two forms of “traditional” legal history. The first understands law from within and creates a story that explains the changes highlighted. The second understands law to be

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23 Id
the product of wider society and therefore describes legal change in terms of phenomena external to law.\(^{24}\)

An example of the first type of such histories in the context of negligence law is the works of Percy Winfield.\(^{25}\) This style of history focuses on the outcome of cases to describe the law as it was. Central to this history, therefore, are the words of the judges, and more particularly, the words that can be seen as the ratios of these cases. These ratios were used to ‘in support of an argument’ that underlay the historical narrative; ‘what emerged was a long and meandering narration mapping out what he perceived to be the “relevant” cases’.\(^{26}\)

The second form of “traditional” legal history uses outside forces to explain the changes that are evident in the law. One of the pre-eminent examples of an external history of negligence law is Morton Horwitz’s *Transformation of American Law, 1780-1860*.\(^{27}\) For Horwitz, there was a ‘close and intimate connection between the emergence of negligence and the industrial revolution’.\(^{28}\) According to Conaghan and Mansell, Horwitz adopts an ‘instrumentalist’ approach to law in which he suggests that the law is an ‘instrument in the hands of the judges, a tool for the promotion of certain interests and objectives’.\(^{29}\) In other words, for Horwitz, judges are external to the law and have sufficient agency to direct the outcome of cases to cater to broader societal concerns.

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\(^{24}\) This description of the two types of legal history, and the examples to follow, are taken from Conaghan and Mansell, ibid at 65-78


\(^{26}\) Conaghan and Mansell, *The Wrongs of Tort* at 66, emphasis in original.

\(^{27}\) Harvard University Press, Cambridge, Mass., 1977

\(^{28}\) Conaghan and Mansell, *The Wrongs of Tort* at 74. As Conaghan & Mansell, however, point out Horwitz was not the first author to make this connection (id).

\(^{29}\) Ibid at 72
I feel that an application of Foucault’s archaeological method adds a perspective to historical understandings of law not evident in the above two types of legal history. The application of the method, as understood in this project, examines the law from within the law in a manner distinct from the histories of Winfield. In addition, the use of the method in this thesis provides a description of change that does not require outside explanations or motivations for change, as is the case in histories such as those of Horwitz.

In the understanding of the archaeological method adopted in this project the processes of the law itself are “responsible” for change and there is a movement away from the law as being represented as a series of “marker cases”. Past cases are not seen as being represented by a single *ratio* and the statements in the decisions are given at least a legal context. This legal context is the statements of law put forward by counsel in legal argument. Therefore, the history of law developed in this thesis is a more inclusive history in that it recognises the importance of other members of the legal profession other than judges.

One particular feature of the use of the method developed here is that there *is* an explicit method being used. In most histories of law there is not an explicit engagement with a particular historical method. The legal past is read in a manner considered appropriate by the historian without a discussion of the processes and assumptions involved in the reading. As a result, there is no consideration of how the manner of construction of the subject matter of the history, and the unarticulated method, affect the narrative produced by the legal

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30 It would be impossible to undertake a complete literature review of legal histories to explore the use of articulated historical methods. Anecdotally, however, I attended the British Legal History Conference in Aberystwyth, Wales in 2001. My presentation was the only one that engaged with historical methods. In a later conversation, another attendee questioned the need, or purpose, of the explicit use of a historical method (conversation with Steve Hedley, Reader in Law at Cambridge University, 8 July 2001).
historian. The understanding of the discursive construction of lawyers, judges and the common law contained in this project is necessary to the use of the archaeological method as presented here. This discursive understanding also enables the application of other Foucaultian ideas to a discourse in action in a manner that may not have been attempted before.\(^{31}\)

Another feature of applications of Foucaultian histories is that they are problem-based. ‘Foucault’s approach to history is to select a problem rather than a historical period for investigation’\(^{32}\). This is true of application of Foucaultian methods to law. The purpose of the methods is not to describe how the past was but to produce an answer to a posed problem. In this manner they can be known as “histories of the present”. For example, the purpose of the application of the archaeological method in this thesis can be seen as attempting an answer to the problem of “how did a particular 1972 decision get to be decided in the manner it was”. The focus of the application, then, is not on the description of negligence law, or its antecedents, in the eighteenth and nineteenth centuries. However, the description of law from that period is more complete than the ratio-based understanding that is included in the practice of law and in many legal histories. In addition, the manner in which this project is set out is designed to highlight the way the archaeological method, as opposed to a “traditional” legal history, deals with this change.

\(^{31}\) For example, the use of “resistance” and the intersection of discursive practices in legal argument by counsel and the application of the techniques of discursive control outlined by Foucault in ‘The Order of Discourse’, in Young, R. (ed) Untying the Text: A Post-Structuralist Reader, Routledge & Kegan Paul, Boston, 1981. These Foucaultian ideas will be discussed in more detail in Chapter 2.

\(^{32}\) Kendall and Wickham, Using Foucault’s Methods at 22, emphasis in original.
THE STRUCTURE OF THIS THESIS

This project is an application of the archaeological method to a set of decisions of the English common law between 1750 and 1972. The key points of the method were highlighted above, but before the cases themselves can be excavated the method has to be more fully explained. Before the characteristics of the method can be discussed, the law, its operation and its operators must be examined. In order that the law and the legal profession are seen from the appropriate perspective, the framework upon which that perspective is supported has to be described. This is the sequence (in reverse) that this thesis follows.

There are two Parts to this thesis. The first, comprised of Chapters One and Two, provides the theoretical structure for the archaeology that forms the bulk of Part Two. Chapter One, “Post-structuralist Framework for Application of the Archaeological Method”, includes the theoretical grounding for this project. Broadly, the thesis is constructed upon a post-structuralist framework. Such a term needs explanation, as it can be, and is, interpreted very widely. This chapter, therefore, is largely stipulative. As this thesis operates within a discursive understanding of society, the use of terms such as “discourse”, “discursive formation” and “discursive practice” will be discussed, as will be the relationship between these concepts.

These ideas are central to the understanding of the legal profession that I describe in this thesis. These concepts denote the relationships between individuals, the words they use and the behaviours they exhibit. The words and practices limit the behaviours and actions of the individuals, and the individuals repeat the words and actions that construct their behaviour. These relationships
are known within this discursive understanding as the processes of “subjectification”. Discursive functions (discourses, discursive formations and discursive practices are examples of discursive functions) act upon, and constitute, the subjects of discourses. It is in Chapter One that the processes of subjectification will be explained in order to show how the eighteenth century judges “saw” the citizens that came before them differently from the manner in which late twentieth century citizens were “seen” by the judges they appeared before.

Also discussed in the first chapter are the processes and possibilities of discursive change. As the law is here understood to be both continuous and discontinuous, it is necessary to understand the mechanisms by which discourses and discursive formations can change while maintaining their validity. Briefly, discursive change is brought about by the interaction of discursive practices and discursive subjects. Therefore, the processes of subjectification are integral to discursive change. The details of how such change can, and does, occur will be examined here.

The second chapter, “A Foucaultian Understanding of Law as Object for the Archaeological Method”, considers the theoretical concepts discussed in Chapter One in terms of the law and the legal profession. This will produce the necessary understanding of judges and their actions for the following application of the archaeological method. There are many ways in which the law and those who produce the law can be seen, as the large body of jurisprudential writing over the centuries attests. The archaeological method, however, requires a specific understanding of the relationship between the law, the legal profession and the legal practices that construct both categories.
The second chapter includes a description of an understanding of the law that highlights the practices that, in the past, have allowed judges to produce the decisions in the manner that they do. Certain behaviours must be central to the training of lawyers and judges for the law to function through the repetition of past legal statements. It is these behaviours, these legal practices, that will be the focus of this chapter. There is also a brief discussion of the law as discourse and a history of the legal profession that emphasises its role as a self-educating, self-perpetuating, independent institution. I must stress that these “histories” are not exhaustive, but will be indicative of the various practices that constitute practitioners of the law and the law itself. Those practices that construct members of the legal profession perpetuate the legal profession, as the lawyers and judges repeat these practices in their legal activities. The repetition of the practices, in turn, forms the training of the next generation of the profession.

The practices that relate to the written nature of the law are of particular importance in this chapter and for the thesis as a whole. The focus of the project is the analysis of judicial decisions. The practices that relate to the production of such decisions are central, therefore, to the understanding of the law and judges used in the thesis. The practice of repeating of past legal statements and the way in which this practice contributes to change in the law will round out the discussion in Part One.

The second Part, Chapters Three to Six, is devoted to the application of the archaeological method to a set of negligence decisions. The first of these chapters is a more detailed discussion of the archaeological method. Chapter Three, therefore, includes a description of the method in abstract and a discussion of the characteristics of the analyses that might arise from the use of the method. The last section of the chapter will be an explanation of the
specifics of the application of the method to a set of legal practices or judicial decisions. This will include a discussion of the reception of judgments from other jurisdictions into the English system and the manner in which the cases to be examined in this thesis were selected.

Briefly, the technique for selecting judgments for inclusion in this project also reflects the archaeological method. This “reflection” is based on two factors. First, it is understood that all statements in a discourse are connected and that one of the purposes of an archaeology can be to expose and discuss the relationship between statements. Second, the documents, the decisions, are taken at face value and treated as monuments of the discourse. The connection between these two factors is that the choice of cases examined in this thesis privileges the cases that are highlighted in judgments of judges. The choice of cases is based on the cited decisions used by judges in presenting their judgments. The choice of cases, however, is not limited to the decisions that a judge “affirms”, the process of choosing equally privileges the decisions a judge “distinguishes”, or disagrees with.

One case was chosen to be the final decision to be examined in the project.\(^{33}\) This case is *British Railways Board v Herrington*.\(^{34}\) Once this decision was selected, the cases that were cited in the five written judgments were, in turn examined, that is, all the precedents cited in *British Railways Board v Herrington* were examined, and the cases cited in the precedents in the judgments cited in *British Railways Board v Herrington* were also read and the precedents cited therein were examined. These decisions were read and the precedents noted. There was no categorisation of the cases into those cited by

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\(^{33}\) The parameters of this choice were that decision had to be from a court of review, in the area of negligence law, and close in time to the end of the period covered by this thesis.

\(^{34}\) [1972] AC 877
majority judges or those cited by minority judges. Also, there was no classification into precedents that were distinguished or affirmed. The names of the cases were taken at “face value” and the cases examined. This process was continued until the chain extended beyond 1750, the starting point for the archaeology presented in this thesis. The result of this process was a “web of decisions” that can be seen as associated with *British Railways Board v Herrington*.

This method of selection was chosen in an attempt to “problematise the continuity” that is assumed in the training and practice of law today. As was noted above, there is a tendency to consider the change that is evident in the law over the past centuries to be a form of “development” or “evolution”. The intention behind the method of case selection in this thesis is to show that there is discontinuity behind this appearance of continuous “progress” in the law. That is, even in a “chain of precedents” that “leads” to a particular case there are multiple articulations of the law. There is no necessary development in the law. The judges perform the function of judges as they are trained to perform it. It is this consistency in practice and the use of previous statements of law that can be seen to allow for the change that becomes evident over time.

In addition, the choice to focus on the web of decisions of a single case is an attempt to display some of the benefits of the archaeological method as understood in this thesis. According to Kendall and Wickham, a ‘good Foucaultian use of history’ involves the ‘suspension of… second-order judgments’.

To describe a history of “negligence” or the “duty of care” involves a judgment regarding the category of law of which a particular decision is a part. Therefore, it would seem more appropriate to apply the

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35 *Using Foucault’s Methods* at 13
archaeological method to a series of documents that are not solely chosen on the basis of such a “second-order” judgment. The technique of selection for the decisions examined in this thesis was to limit the cases excavated to those in a series of decisions limited by a single case, rather than an arbitrary category.36

Chapters Four, Five and Six are the chapters in which the archaeology takes place. The format to be followed in these chapters reflects the priorities of the method. Each chapter will explore a number of judgments in detail. Primacy is given to the words of the constructed subjects of the profession, the judges, in these examinations. The opinions of each of the judges are examined individually. The specific words of all the judges are equally important. In addition, the words of counsel who appear before the judges and who put forward legal statements for repetition will also be examined because the statements counsel repeat in argument contribute to the statements repeated by judges in their judgments. Only after each judgment is fully explored are the similarities and differences with respect to the construction of the liability and the legal perception of the defendants highlighted.

The grouping of the excavated judgments into the chapters also reflects the requirements of the archaeological method as understood in this project. As highlighted above, the application of the archaeological method includes an attempt to move away from a history of law as a series of “marker cases”. That is, in the understanding of legal change developed here, each decision is a site

36 I acknowledge, however, that of all the decisions (there are over 1000) contained in the “web of decisions” associated with *British Railways Board v Herrington*, one method of selection for inclusion in this project was that the decision related to inter-personal relationships of liability. That is, the primary selection criterion for inclusion was that a decision was in the “web”, however, one of the secondary criteria was that any decision would be considered to be part of “negligence law”. Given the number of decisions in the “web” and the fact that many judgments are not limited to single legal issue, many of the decisions in the “web” can be considered to be part of contract, probate or even admiralty law.
of both continuity and discontinuity in law. Therefore, every case is equally valid in terms of a description of the “legal past”. In can be seen, in this perspective, that either every case is a “turning-point” in law or there are no turning points in this history of law. As a result, the application of the method is broken into three periods that are not delimited by marker cases. The periods in Chapters Four to Six are arbitrarily categorised according to the date. That is, Chapter Four includes the eighteenth century cases, Chapter Five the nineteenth century cases and Chapter Six the twentieth century cases.

This categorisation according to date, however, raises another concern. I recognise that to undertake the examination of the cases in chronological order increases the appearance of “continuity” or “evolution” in this “history” of the articulation of liability. I recognise that this is a risk given that one of the purposes of the archaeological method is to problematise standard histories. There are three reasons for the sequence that I have chosen. First, there has to be an order to the presentation of the cases. Any other ordering would have required a level of justification for the choice of order and there is no “right” order for an application of the archaeological method, as I understand it. Second, the order I have chosen seeks to give back the temporality of decisions that is missing in the use of cases in the law. The judgments were written at the time they are written. The judgments are not just a “resource” for twenty-first century legal argument or historical analysis.

The third reason for the order I have presented is that one of the goals of the application of the method in this thesis is the privileging of discontinuity within apparent continuity. There was not a smooth transition from one form of articulation to another, particularly in the nineteenth century. There were changes and there were repetitions of earlier statements of liability. This
becomes more apparent if the chronological order of the decisions is highlighted. The analysis at the end of each chapter does not continue with the strict chronological ordering, it is only the transcription of the statements from the cases that is presented in a sequence that reflects the years that the cases were decided.

Chapter Four covers the cases decided in the latter half of the eighteenth century. 1750 was chosen as the starting point as it is after the legal profession had gained its independence from the Crown. The legal practices of the time also meant that decisions were recorded regularly and in English. As the legal practices and procedures of the eighteenth century are less familiar to contemporary readers, I have provided a brief discussion of the writs and forms that are of interest for this project. The writs that were the forerunners to the modern tort of negligence were those of action on the case and trespass. The majority of the cases discussed in Chapter Four are founded on either a writ of trespass or case.

Both of these writs relate to the responsibilities owed by particular legal subjects to others in the community. The writs, therefore, describe and limit the liability to injured parties of particular categories of legal subjects. Judicial decisions based on either of those writs, therefore, provide examples of the legal perception of particular classes of legal subjects as defendants. The judgments based on these writs demonstrate the legal construction of the legal subjects of that period as, in Foucault’s sense of the word, feudal. The defendants who came before the court were categorised according to their station in life. If they were a member of a particular vocation or profession, then they were legally

obliged to live up to the responsibilities of that vocation or profession. They were held legally liable if they failed in those responsibilities. However, if the defendant did not belong to such a category of legal subjects, the judges could not “see” them as being liable for any damage suffered by the plaintiff.

Chapter Five covers the cases decided in the nineteenth century. The decisions examined in this chapter include discussions by the judges of the changing boundaries of the legal recognition of liability. That is, the judges do not limit themselves to the language of the perception of defendants that was evident in the eighteenth century, but they also do not extend the perception of defendants, and therefore the scope of legal liability, beyond the boundaries that was evident at the start of the moment of change.

After the beginning of the nineteenth century there is less evidence of the members of the legal profession “seeing” legal subjects along feudal lines. The members of the profession, however, did not construct legal subjects in a manner that we might call modern. In this chapter it will just be shown that the judges of that time used different statements to the eighteenth century judges to determine and limit liability. The findings in terms of liability were not necessarily different to the earlier findings, but the articulations of liability were different.

The process of change that is evident in the decisions in Chapter Five can be seen as the repetition of previous legal statements. In each judgment the judges refer to the words of earlier judgments and use them as the reasons for their decisions. The judges are not calling these previous statements the ratios of the earlier decisions. The judges are just quoting, or using, the phrases that they are
trained to repeat in the writing of their judgments. It is these repeated statements
that will be highlighted, particularly in Chapter Five.

Chapter Six is the application of the method to the cases decided in the
twentieth century up until 1972. 1972 is the time of nominal removal of the
independence of the English judiciary. It was in that year that a further avenue
of appeal beyond the House of Lords was provided for English legal subjects.
That is, under certain circumstances, if an English legal subject was dissatisfied
with the legal statements of the Law Lords they could take their case to the
European Court of Justice.

The twentieth century articulations of liability suggest a shift to the construction
of English legal subjects as “modern” subjects, in the sense that Foucault
considers subjects to be modern. Judges no longer constructed the community
as being made up of subjects who acted according to their station in life. Legal
subjects were held to the standard of the “reasonable man”,\(^{38}\) with this standard
modified to reflect the particular demands of the knowledge and expertise of the
particular defendant. That is, a wider group of subjects were “seen” by the
profession as being potentially liable for damage done by their acts or
omissions.

The above reference to “feudal” articulations of liability in the eighteenth
century and “modern” articulations in the twentieth is not meant to suggest that
the turns of these centuries represented, or produced, changes in articulations.
The descriptions of “feudal” and “modern” are general labels that can be
ascribed to a number of decisions in all three centuries to varying degrees. The

\(^{38}\) The construction of the “reasonable man”, and its gendered nature, will be discussed in
Chapter Two.
focus of this thesis, however, is on the application of the archaeological method and not on the production of arbitrary categories.

The Conclusion of the thesis, after the archaeological excavations of Chapters Four to Six, draws together the differences in the articulations of liability that are evident over the three periods. The Conclusion discussed the changes that have taken place and the processes by which those changes took place. The English common law has maintained its integrity whilst reflecting both continuity and discontinuity. The law has fundamentally stayed the same, as the predominant legal practice is still the repetition of previous legal statements. The law has changed through this process of repetition. The change that is evident in the area of negligence law between 1750 and 1972 is the different ways in which the judges “see” the defendants that come before them.

This is the result of the application of the archaeological method to legal judgments. The effectiveness of the application will also be discussed in the Conclusion of this project. That is, the differences, or similarities, between the application of the method, as understood in this thesis, and the narratives in other, more traditional, legal histories will be highlighted. Foucault’s own use of his methods produced challenging histories, the distinctiveness of the history produced in this thesis will be discussed as part of the process of assessing the value of Foucault’s work, or at least as I understand it, to the study of law.

The application of method is only possible where the members of the legal profession, and the legal subjects in the wider community, are seen as subjects constructed by the practices that constitute their training. That is, the changes in the law are explained by the internal workings of a group of specifically trained people who are engaged in the process of perpetuating and regulating the
practices of both the legal profession and, what might be called, the discourses of governance. It is the processes of subjectification and the discussion of the post-structuralist notions of discourse, discursive formation and discursive practice that will be found in the first chapter of Part One of this thesis.

It is the application of Foucault’s archaeological method that will follow in Part Two that represents the contribution of this project to the field of Foucaultian scholarship. There has not been an application of this method to a “discourse in action” before. Applying the method to the law as a “discourse in action” adds to the understanding of the law and the way that it operates in society. The use of the method illustrates how the law changes through the repetition of past legal statements. It is through the practices of repetition, an integral part of the training of judges and lawyers, that the law can change without losing its legitimacy.
PART ONE

This Part provides the theoretical groundwork for the application of Foucault’s archaeological method that follows in Part Two. There are two significant aims for this thesis, and, in a sense, each of the two chapters in this Part provide the intellectual basis for one of these aims. That is, Chapter One includes a description of the post-structuralist ideas that support the archaeological method itself. Chapter Two includes a description of the law and the legal profession that highlights the characteristics of the law and the legal profession that makes sense of the application of the archaeological method. It is the application of the method to the judicial decisions that illustrates the second purpose of the project, a description of the law as changing through the repetition of past legal statements.

The bulk of the material in this Part is a discussion of the legal profession and its relationship with the law. The law is seen as the sum of the legal judgments produced by judges trained to reproduce the law in particular ways. Therefore, this Part includes a description of the law as the legal documents that are produced by the members of the profession. This description focuses on the legal practices that produce both the judgments and the members of the profession (through the processes of subjectification). In order for the archaeological method to be understood and applied to legal documents, the judgments and the judges who wrote them have to be considered from a specific perspective.

The description of the law contained in this thesis entails a more complex understanding of the role and the training of lawyers and judges than is usual. It is the construction of the profession, the legal discursive formation, as a self-
regulating, self-perpetuating system of practices that makes it possible to apply the archaeological method to legal judgments. This Part provides the theoretical background for such a construction and illustrates this perspective with a description of some of the key practices of the profession.

This analysis of the legal profession is based on an understanding of lawyers and judges as products of their legal training. Their training constructs them to be subjects of the legal discursive formation. That is, legal practitioners, when they are acting as members of the profession, act in accordance with their training. From this perspective, lawyers and judges are not taken to be mindless automatons, but as professionals who are provided with a choice of allowed actions in each legal situation and are authorised by their training to choose from these allowed actions. This understanding is based in discourse theory, a category of post-structuralist theory. The first chapter in this Part provides an introduction to post-structuralist theory in general and discourse theory in particular.

Chapter One focuses on the terminology of discourse theory that will be used in the remainder of the thesis and explores the mechanisms of allowable discursive change. The theory has a particular lexicon which helps to limit unhelpful interpretations of more common words. Words such as “discourse” have a variety of meanings in common usage. For a project like this, however, there needs to be a specific discussion of key words, like “discourse”, in order to be clear about their specific use and meaning in the remainder of this thesis.

The specifics of the processes of discursive change are an area of the general theory not often considered. For a discourse to persist over time there have to be
mechanisms that allow for change while maintaining the integrity of the discourse. All discourses that exist in our society must include practices that allow for such change. In order to give an account of the workings of a discourse in society, the theory must engage with the conditions and possibilities of change. This will be done in the last section of the first chapter.

The archaeological method, as applied to the law in this thesis, excavates judgments written by judges. That is, my use of the method relies on the construction of legal decisions as monuments of the legal discourse. It is important, in this project, to establish the precise relationship between the judgments, the judges and the legal discourse as a whole. It is the discussion of these relationships that is the purpose of this Part. Chapter One is a discussion of the relationships in abstract, Chapter Two is a discussion in terms of the specific practices of the law and the legal profession.

The focus of Chapter Two will be on the way that legal practitioners have been constructed by various legal practices to act as members of the profession. The chapter includes a history of the discursive formation that traces some of the key aspects of legal training and legal conduct. This history is not exhaustive but highlights the important practices that have been passed down through the years from legal generation to legal generation. I am not the first to consider the law as a discourse and to “prove” the discursive nature of the law is beyond the scope of a project of this size. I am indebted to authors such as Peter Goodrich for their work in this area. The examples I provide in Chapter Two are only intended to draw attention to the legal discursive practices that illustrate the relationship between judges and the judgments they write.
One of the most fundamental of such practices is the repetition of past legal statements. This practice extends further than an application of the doctrine of precedent, which is generally held to be only a tool of the profession. For the purposes of this thesis a broader practice of repetition is considered to be fundamental to the construction and perpetuation of the law and legal profession. The authorised use of previous legal statements helps create the hierarchical character of the discursive formation. The authorised use of previous statements is also the pre-eminent technique for discursive change within the law. The law is reproduced on a case by case basis, the law changes on a case by case basis. The practice of repetition of past legal statements is the mechanism through which both legal reproduction and legal change occur. The practice of repetition, therefore, is central to the processes of continuity and discontinuity in the law.

An in depth discussion of the practice of repetition rounds out Chapter Two and Part One. The bulk of Part Two is the archaeological excavation itself. The discussion of the repetition of past legal statements provides the understanding of the law necessary for this application of the archaeological method to the law. The discussion of the repetition of past legal statements explains the relationship between the judgments and the judges who wrote them that will be central to the analysis conducted in this thesis. It is the practice of the repetition of past legal statements that is at the heart of the analysis of the judgments included in Chapters Four, Five and Six of this project.
CHAPTER ONE - POST-STRUCTURALIST FRAMEWORK FOR THE APPLICATION OF THE ARCHAEOLOGICAL METHOD

INTRODUCTION

The understanding of post-structuralism upon which this application of the archaeological method to the law is set out in this chapter. The discussion of discourse theory in general will explain the way that concepts will be used in the analysis of the legal profession that is to follow. The understanding of the profession applied in this thesis comes from the broad area of post-structuralism, and the first section of this chapter will identify themes and interpretations used in this thesis. The second section will develop this understanding and detail the understanding of basic concepts that arise from post-structuralism that will be used in the remainder of the thesis. These are “discourse”, “discursive formation” and “discursive practice”. The relationship between these concepts will be explored in order to develop a background against which to map the changes in the judicial decisions that make up this application of the archaeological method.

The third section will discuss the processes of subjectification, the manner in which discourses, discursive formations and discursive practices construct human subjects and their behaviours. The construction of subjects is important, as it relates to this understanding of the training of lawyers and judges. The final section of this chapter details one way in which discourses can change over time. As the archaeological method is a form of historical analysis there is a need for an understanding of the mechanisms that allow for discursive change. The changes in the judgments between 1750 and 1972 demonstrated in this project illustrate the mechanism of change discussed in this chapter.
POST-STRUCTURALIST THEORY

“Post-structuralism” is a broad, and unfortunately for me, ill-defined area of theory. This section provides a general description of the use of the term that is specific to this project. In this section, the work of two French theorists, Derrida and Foucault, will be considered. This will not be a complete account of the ideas of either of these theorists. It can only be a small sample of some of the key ideas that inform their work and are relevant to this thesis. The interpretation of the texts that are referred to in this project present one version of a Foucaultian analysis for which the ideas of Derrida have proved useful. That is, the thesis will use some of their concepts and understandings, but is not intended as a complete and definitive reading of either body of work. Three readings will be examined in this section, one by Derrida and two by Foucault.

Another French theorist, Lyotard, described the ‘post-modern as incredulity toward metanarratives’. While the relationship between post-modernism and post-structuralism has never been clear, this sentiment is shared by most writers in both traditions. Post-structuralists and post-modernists refuse to accept as legitimate totalising theories that cover all aspects of human behaviour and institutions. In its place, there is, in Derrida’s words, an acceptance of the ‘irreducible singularity of each situation’. All the “metanarratives” that have constructed society in the past, such as “democracy” or “capitalism”, are no longer considered to be either self-evident or based on anything solid. The ‘origin of authority, the foundation or

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1 The Postmodern Condition: A Report on Knowledge, University of Minnesota Press, Minneapolis, 1984 at xxiv
2 ‘Force of Law: The “Mystical Foundation of Authority”’ in Cornell, Drcilla et al (eds), Deconstruction and the Possibility of Justice, Routledge, New York, 1992 at 51
ground… can’t by definition rest on anything but themselves’. There is no Truth upon which to found such meta-narratives in a post-structuralist view of the world.

Post-structuralists focus on the internal nature of what it is to be human, they focus on the questioning of the ‘boundaries that institute the human subject’. However, for them, there is no absolute Truth. There are no metanarratives that relate to that which is central to “being human” that can be taken at face value. Human nature is not a given, it is an object of investigation. All behaviours are also “irreducibly singular”.

With this lack of certainty as to the nature of the world, any post-structuralist endeavour reflects the desires of the inquirer. As such, these projects are neither neutral nor objective. Foucault provided a brief summary of some of the aims of post-structuralist writers in his preface to Deleuze and Guattari’s *Anti-Oedipus*. The context of Foucault’s piece, in relation to Deleuze and Guattari’s text, highlights one of the central principles of post-structuralism. That is, Foucault provides a description of the authors’ work. Foucault’s preface is a commentary on their work with his own, subjective, analysis clearly labelled as such. As in the relationship between a preface and the text, post-structuralism can be understood to be a subjective commentary on the “objective” structures of human behaviour. Post-structuralism can be taken to be a privileging of subjective analyses over objective metanarratives.

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3 Ibid at 14
4 Ibid at 19
5 *Anti-Oedipus – Capitalism and Schizophrenia*, University of Minnesota Press, Minneapolis, 1983
6 Foucault refers to himself with the use of the pronoun “I” no less than five times in the three pages of text.
Foucault’s post-structuralism, as defined by the ‘principles’ he highlights in the preface, can be seen to function at a political level. His ‘principles’ include the development of ‘action, thought, and desires by proliferation, juxtaposition, and disjunction’ and the withdrawal of ‘allegiance from the old categories of the Negative, which Western thought has so long held sacred’. He also encouraged the preference for ‘what is positive and multiple, difference over uniformity, flows over unities’. For the purposes of the understanding of the post-structuralism adopted within this thesis, the two most important principles are ‘Do not use thought to ground a political practice in Truth’ and ‘Do not demand of politics that it restore the “rights” of the individual… The individual is the product of power. What is needed is to “de-individualise” by means of multiplication and displacement, diverse combinations’.

Post-structuralism can be seen to have two starting points. First, that there is no absolute groundings for the state and conduct of the society and, second, that there can be no assumption that there is such a thing as a person who exists prior to the action upon them of the practices and disciplines of society. There are multiple bodies, both physical and abstract, in many “diverse combinations” that produce the world. For Foucault, post-structuralists seek to describe the world favouring patterns of “proliferation, juxtaposition, and disjunction”, and prefer “what is positive and multiple, difference over uniformity, flows over unities”. Given this preference for multiplicity, there can be no single description of even post-structuralism itself. There can be only individual perspectives on what post-structuralism can mean, such as the one contained in this section, that are adopted for a specific purpose.

7 Ibid at xiii-xiv
A further discussion of post-structuralist thought can be found in Foucault’s piece, “Truth and Power”. Here, he discusses some of the ideas behind his projects. He refers to himself as an ‘anti-structuralist’ in that, in his conceptualisation of the distinction between “structure” and “event”, he recognises that it is ‘not a matter of locating everything on one level, that of the event, but of realising that there are actually a whole order of levels of different types of events differing in amplitude, chronological breadth, and capacity to produce effects’. There is no single structure that can account for the multiplicities and complexities of the events that constitute society. ‘History has no “meaning”, though this is not to say that it is absurd… it is intelligible and should be susceptible of analysis down to the smallest detail – but this is in accordance with the intelligibility of struggles, of strategies and tactics’. Events, and society as a whole, can be understood, therefore, in terms of such struggles, strategies and tactics.

One category used by Foucault in his discussion of society is that of relationships of “power”. His notion of power is not necessarily negative. For him, power ‘induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body’. No longer is power seen simply as a manifestation of the metanarrative of coercive governance or of domination. The power relation positively, or productively, effects all parties connected by that relationship. This conception of society informs the processes of the subjectification of humans that will be addressed in section III. Society is produced by these relations of power. ‘The important thing here, I believe, is that

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9 Ibid at 114
10 Ibid at 119
truth isn’t outside power, or lacking in power… Truth is a thing of this world… and
it induces regular effects of power’. 11 It is inter-relationships such as this that are
indicative of a post-structuralist approach.

For post-structuralism is a body of perspectives. An ill-defined body perhaps, but
one that encourages an author to disentangle herself or himself, at least as much as
is possible, from the assumptions that construct much of twentieth and twenty-first
century Western thought. Post-structuralism is useful as a tool in the interpretation
of society because it stresses the lack of a necessary, defining structure that
underpins the whole of society. There is no absolute Truth, either internal or
external to the human subject, in post-structuralist theory. There is a lack of belief
in metanarratives, on the part of post-structuralists, but there is an acceptance of the
multiplicity of events and power relations that form the networks of society. This
produces multiple perspectives, each with its own strengths and weaknesses, that,
when considered together, enhance any understanding of society.

DISCOURSES, DISCURSIVE FORMATIONS AND DISCURSIVE PRACTICES

This section deals with the specifics of discourse theory as they are understood in
this thesis. Discourse theory falls into the broad category of post-structuralist
theory that was described in the previous section. This section provides the
vocabulary necessary to consider both the processes of subjectification discussed in
the next section and the understanding of the legal profession that will be presented
in Chapter Two. In particular, there will be a discussion of the notion of
“discourses” and related “discursive functions” as they are to be used in this

11 Ibid at 129
project. This section will present an understanding of the relationship between a broad, all-encompassing “discourse”, a narrower, but more defined, “discursive formation”, and the specific forms of control that are termed “discursive practices”. In simple terms, discursive formations are treated as sub-categories of a discourse, and discursive practices are taken to be functions of both discourses and discursive formations. Yet these relationships can be understood to be symbiotic. Discursive practices construct discursive formations which, in turn, construct discourses; and discourses construct discursive formations which, in turn, construct discursive practices.

In a general sense, a discourse can be understood to refer to a body of statements. A textbook, therefore, is an example of a discourse. But the significance of such a work goes beyond that. For this thesis, “discourse” has a more specifically “powerful” meaning. As Foucault put it:

Discourse – the mere fact of speaking, of employing words, of using the words of others (even if it means returning them), words that the others understand and accept (and, possibly, return from their side) – this fact is in itself a force. Discourse is, with respect to the relation of forces, not merely a surface of inscription, but something that brings about effects.

More simply, Foucault described discourses as ‘practices that systematically form the objects of which they speak’. For example, a textbook has a variety of functions as part of the wider discourse that is “the education system”. The book is used to bring about an effect in those who read it, with its purpose being to educate readers, to train them. Also, a textbook serves to provide limits to specific areas of the discourse. A physics textbook helps to define the boundaries between what is

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13 *Archaeology of Knowledge* at 49
physics and what is chemistry. A discourse, then, can be treated as a group of statements that describes the world, constructs the world and brings about effects in the world. In this understanding, within society as a whole there exist discourses which act upon individuals and affect their relationships with each other and with the world as a whole. Discourses can be seen as a system of speech acts and speech positions that, through their “effectiveness”, produce the world and the subjects within it.

This understanding of discourse is still very broad. It can be, and is, used to characterise a broad range of speech positions, such as the medical discourse. However, it provides an insufficiently detailed picture when it comes to the different speech positions available within a single discourse. That is, although the practices and procedures of health maintenance can be seen as a discourse, it does not explain how this single discourse produces a multiplicity of speech positions. The Western medical discourse can be understood to be a cohesive body of statements used to describe the world, its inhabitants and the relationships between inhabitants. However, merely considering the medical profession as a discourse does not, in itself, describe how the single discourse produces two very broad, yet distinct, sub-categories – those who provide the care (doctors, nurses) and those who receive the care (patients).

The training undertaken by members of these sub-categories of a discourse should also operate discursively, as the subjects of the sub-categories need to be educated by the dominant group of statements. For the purposes of this thesis, the procedures that produce these sub-groups can be classified as “discursive formations”. It is

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14 Foucault examined medicine as a discourse in *The Birth of the Clinic.*
worth noting that this phrase is not unique to this project. Foucault seems to use the terms “discourse” and “discursive formation” interchangeably.\textsuperscript{15} For his purposes, and in the general discussion of the roles of speech positions and statements in the world, this lack of specificity is unproblematic. However, a greater degree of specificity is useful for an in-depth examination of particular relationships between subjects in society.

Discursive formations can be used to describe instances where there is a separable education process evident for an identifiable section of the subject population. Most professional bodies, particularly those where the industry is largely self-regulated (accountancy, medicine, and law), can be viewed as discursive formations. That is not to say that the members of these bodies function exclusively as subject of their discursive formation. For example, engineers and doctors can be understood to operate under the broad scientific discourse, and the rules of science form much of the rules of engineering and medicine. However, when individuals act as doctors or engineers, they use the skills and practices authorised and perpetuated by their professional group.

For Hunt and Wickham, a discursive formation is a ‘system of more or less stable elements of discourse that are linked or associated’.\textsuperscript{16} That is, within a discourse, there can be seen smaller discursive entities which display a degree of cohesion beyond the sum of common elements of the discourse as a whole. A discursive formation, in other words, might be said to exist where there is a body of actors and disciplined actions, and where these rules represents a system of control.

\textsuperscript{15} See for example, ‘History, Discourse and Discontinuity’ (1972) 20 Salmagundi 225
For Foucault, a discursive formation exists wherever a grouping of statements can be described in terms of a ‘system of dispersion’. As mentioned above, Foucault uses “discourse” and “discursive formation” interchangeably, however, the key point for this reading is “control by a form of dispersion”. This is the connection between discursive formations and discursive practices upon which this thesis is based. The structures and patterns of dispersion are taken to be the discursive practices that control, limit and perpetuate a discursive formation. In Foucault’s words, discursive practices are a ‘body of anonymous, historical rules, always determined in the time and space that have defined a given period’. Discursive practices are the rules that represent the limits of the dispersion, ‘the rules that delimit the sayable’, and can be understood as the limits of the “allowed” actions of members of the discursive formation.

In his inaugural lecture at the Collège de France in 1970, Foucault discussed three modes of control that operate to regulate and perpetuate discourses. These categories of control, which are applicable to any discourse or discursive formation, are ‘those which limits its power, those which master its aleatory appearances, [and] those which carry out the selection among speaking subjects’. That is, controls that are external, internal and those that are neither fully internal, nor fully external to the discursive formation. The discursive practices that form a part of any discourse can be seen to operate as these modes of control. These practices regulate the behaviour of the subjects within the discursive formation. When

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17 Archaeology of Knowledge at 38
18 Ibid at 117
19 Kendall and Wickham, Using Foucault’s Methods at 43
20 Foucault, ‘The Order of Discourse’ at 62
21 These discursive controls will be discussed in greater detail in the final section of Chapter Two where the legal practice of repetition of past legal statements will be analysed in terms of its constitutive role in the legal discursive formation.
training the next generation of subjects these subjects pass on the discursive practices they have been trained to apply and thereby perpetuate the formation.

Not all discursive practices demonstrate the three modes of control equally. For example, some discursive practices may be mechanisms of exclusion, restricting access to the discursive formation. Other practices may act as a mechanism for exclusion and also as a form of restricting access within the formation. That is, these discursive practices will apply unequally within the formation, producing a differentiation, another mode of control, within it.

It should be noted that the category of “external discursive control” does not, as its name may suggest, refer to control from outside the discourse, nor does it act on those outside the discourse. External discursive controls are controls that exclude others from the discourse. That is, any discursive practice can only contribute to the construction of subjects of the particular discursive formations of which the discursive practice is a part. Someone outside a discursive formation can not be subject to, or constructed by, any of its discursive practices.

Discursive practices, then, can be understood to be techniques utilised by sections of the population to carry out, maintain and perpetuate their specific knowledges and procedures. This is not to deny the importance that the rest of the society may place on these practices. Most people would consider that there are many benefits that accrue from the practices of those in the medical profession. The use of specific apparatuses (equipment or methods) for diagnosis, for example, is considered to have saved many lives. But the fact that it takes specialised
knowledge to use, and interpret the results from, the equipment maintains subjects of the medical discursive formation as a distinct sub-category of the population.

This thesis presents an understanding of the nature of the law. One of the interesting aspects of that nature for this project is the manner in which the law can change over the centuries while maintaining its legitimacy. In other words, one aspect of the project is the description of the legal mechanisms that allow the law to perpetuate itself whilst still being capable of change. This description is based on a perspective that entails a different understanding of its subjects, the members of the legal profession, from the understanding that is taught in most law schools. This perspective reflects a particular understanding of the relationship between the law and its subjects, and how this relationship is maintained over time. Central to this understanding are the discursive practices that perpetuate the law. The most important of these practices for this project are the use of past judgments in legal argument and the recording of judgments in a particular written form. These will be examined specifically in Chapter Two.

An analysis of these practices provides a particular perspective on the legal discursive formation itself and the construction of legal subjects. As shall be seen in the next section, the symbiotic relationship between these three categories of discursive analysis can be further extended. Discourses, discursive formations and discursive practices can be taken to inform and construct those individuals who operate within the discursive functions and these subjects, in turn, inform, construct and perpetuate discourses.
This section presents a theory of subjectification, or, the roles of discourses in the creation or construction of subjects. The constructed subjects relevant to this thesis are general legal subjects, or ordinary citizens, and the subjects of the legal discursive formation, or legal profession. To establish the understanding of the relationship between the law and the legal profession that is central to this thesis, it is necessary to consider the members of the legal profession as constructed subjects. The processes of construction of the members of the legal profession by the legal discursive practices are similar, in form but not content, as the processes of construction that create the subjects of the wider community.

This understanding of the legal profession rests on the theory that an examination of the discursive practices that form the training of the members of the profession is the best way to “see” lawyers and judges. That is, to understand this characterisation of the law it is necessary to examine how legal practices construct the profession that perpetuates them. The section will discuss these processes of construction as they apply to all discourses before the specific forms of legal construction are undertaken in Chapter Two. The discussion will rely heavily on the work of Foucault but it remains a ‘rude appropriation of text-fragments’.

At the heart of the theory of subjectification is the contention that ‘the self is not given to us’, that there is no acting/speaking subject that exists prior to the effects

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22 Kennedy, Duncan, ‘The Stakes of Law, or Hale and Foucault!’ (1991) 15 Legal Studies Forum, 327 at 327
of discourses. But, ‘it is not enough to say that the subject is constituted in a symbolic system. It is not just in the play of symbols that the subject is constituted. It is constituted in real practices – historically analysable practices’. The discursive practices of a given discourse, or discursive formation, can be understood to produce the permitted actions for the subjects of the discourse. These discursive practices act as norms of behaviour. These practices are not to be understood as commands from a higher authority. Instead they can be understood to operate as accepted and internalised patterns of action. These discursive practices are accepted, in this understanding, because they produce subjects who are constituted to accept them.

These discourses and discursive practices are understood to operate throughout society. Each citizen, from this perspective, is constructed to behave according to internalised forms of behaviour. These practices are maintained, in part, because citizens know they are supposed to abide by them. In society,

under the surface of images, one invests bodies in depth; behind the great abstraction of exchange, there continues the meticulous, concrete training of useful forces; the circuits of communication are the supports of an accumulation and a centralisation of knowledge; the play of signs defines the anchorages of power; it is not that the beautiful totality of the individual is amputated, repressed, altered by our social order, it is rather that the individual is carefully fabricated in it, according to a whole technique of forces and bodies.25

For Foucault, no individual exists prior to discursive inscription, for ‘discursive formations produce the object about which they speak’.26 This is done through the web of power relations that permeate society, through the multiplicity of interpersonal relationships that exist in the rearing of children and adults. From this

24 Ibid at 250  
25 Foucault, Discipline and Punish at 217  
26 cited in Dreyfus and Rabinow, Michel Foucault: Beyond Structuralism and Hermeneutics at 61
perspective, the mechanisms of discursive control ‘homogenise populations through knowledge, separation, observation, and experiment, but do so only by “individualising” people in cells and classroom desks, by examination and experimentation’.  

Foucault was interested ‘in the interaction between oneself and others and in the technologies of individual domination, the history of how an individual acts upon himself [sic] in the technology of self’.  

Those of us who have been trained as students and patients, for example, actively participate in the discourses of education and medicine. That is, through our training as students and patients we behave as we should and in this way perpetuate these discourses. The practices necessary to learn, to control ourselves in the name of our own health (whether in the short term suffering the “indignities” of medical examination, or the longer term, healthy living patterns) are instilled in us for our own good. Western subjects have internalised the medical and educational discourses through a variety of means, including interpersonal interactions with teachers, doctors and other members of the discourses. That is, subjects are embedded in a web of power relations, a skein that is epitomised in the ‘equivocal nature of the term “conduct”. For to “conduct” is at the same time to “lead” others… and a way of behaving’. In other words, ‘the myriad of bodies which are constituted as… subjects [are] as a

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28 Foucault, ‘Technologies of the Self’ in Martin, Luther H., Gutman, Huck and Hutton, Patrick, H. (eds), Technologies of the Self – A Seminar with Michel Foucault, University of Massachusetts Press, Amherst, 1988 at 19
29 Foucault, ‘Afterword – The Subject and Power’ in Dreyfus and Rabinow, Michel Foucault: Beyond Structuralism and Hermeneutics at 220
result of the effects of power’.\textsuperscript{30} That is, in this understanding of society, power \textit{produces} the subject.

It is this connection between knowledge and power that is a central feature of contemporary Western culture. Teachers are given the “power” to train children through the transmission of knowledges. These knowledges include reading and writing and they include knowledges of behaviour within society. Doctors have the “power” to direct patients through the specialised knowledge they have been given in their training. ‘For power-knowledge produces “norms” against which specialists measure “individuals”. In fact, the very power of the representations of “normality” makes “individuals” conform to and thereby reinforce and replicate these “norms”.’\textsuperscript{31}

This use of norms, as a system of both societal and self-governance, is fundamental to Foucault’s understanding of modern Western culture. He described his notion of governmentality, the predominant form of governance today, as meaning, in part:

\begin{quote}
The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security. The tendency which, over a long period of time and throughout the West, has steadily led towards the pre-eminence over all other forms (sovereignty, discipline, etc.) of this type of power which may be termed government, resulting, on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a whole complex of \textit{savoirs}.\textsuperscript{32}
\end{quote}

\begin{flushleft}
\footnotesize{\textsuperscript{30} Foucault, ‘Two Lectures’ in Gordon, \textit{Power/Knowledge} at 98  
\textsuperscript{31} Bove, ‘The End of Humanism’ at 29  
\textsuperscript{32} Foucault, ‘Governmentality’ at 102-103}
\end{flushleft}
Governmentality can be understood as the governance of the whole, through the internalised control and discursive constitution of the individual, for the benefit of the whole. The above quotation uses the translated term “security”. This has been otherwise translated by Hunt and Wickham as “welfare”.33 Their interpretation is useful as it helps to convey a sense of the multifarious institutions, practices and tactics that protect and provide for the physical, spiritual and civic health of the target population. Welfare, from this perspective, reflects the duty of the state to protect and to provide good order for the population.

A “population”, in this form of analysis, can be the entire body of citizens of a nation-state (constructed to be “British” or “Australian”), or a smaller body of people, such as the members of a particular educational discourse. The central point of this use of the term “population” is that there is a separable body of subjects34 that is constructed and transformed by the institutions and practices of a particular discourse. This separable body of subjects is “knowable” and can be the target of inquiry. In this thesis, it is the broader group of legal subjects and the narrower group of the legal profession that are the targets of inquiry.

Each population has been constructed by the practices and procedures of governance that operate in this discourse. Each individual who comprise the population are taken as having been taught to function as a member of this governed population. They are continually observed and judged (both by themselves and other subjects of the discourse) in their performance as part of the

33 Hunt and Wickham, *Foucault and Law* at 54
34 This body of subjects known as “lawyers” can be separable from the entirety of citizens of a nation, or the body of subjects known as “Australians” can be separable from the entirety of citizens of the “Western world”.
population, and they do what is expected of them, as that is their training. From this perspective, these internalised forms of behaviour become the “being” of the members of the population. “Normal” individuals are taken to behave appropriately because they have had the appropriate standards instilled into them and not because that is what they have been commanded to do. They find it difficult to do otherwise, because, from this perspective, they are produced by their training.

From a Foucaultian perspective, these institutions, procedures and practices of governmentality all play a role in the process of subjectification - the ‘way a human being turns him- or herself into a subject’.35 Foucault’s assertion that the ‘juridical mode of governance… is increasingly replaced by… a power that exerts a more positive influence on life, undertaking to administer it, multiply it, and impose upon it a system of regulations and precise inspection’36 is based upon the more active, yet largely unrecognised, role that individuals are taken to play in their creation as subjects. Individuals are part of the process that gives them ‘the rules of law, the techniques of management, and… the practices of self’.37 This shift in the understanding of governance represents a change from a conception of legal discourse as sovereign commands to that of a system of norms. This shift in the understanding of governance moves from one based on the notion of regal power to one based on practices of internalised self-regulation.

The period covered by this thesis includes a time where law can be seen to have acted, in part, as a system of sovereign command. The law in the eighteenth century

35 Foucault, ‘The Subject and Power’ at 208
can be seen to have operated on the basis that all legal subjects were characterised as belonging to specific categories. The members of the categories were guided by norms, the practices of behaviour they had internalised, in the carrying out of their duties. Many of these norms, however, were specific to particular categories of subjects and could not be used as society-wide criteria for regulation. At this point, then, the law can be understood as administered through a set of rules-as-sovereign-command and not via internal self-regulation.

In terms of the articulations of liability discussed in this project, members of the legal discursive formation grouped defendants into categories such as “common carrier” and “surgeon”. These categories were then connected to particular responsibilities and obligations. If the defendants did not comply with these responsibilities and obligations and the plaintiff suffered an injury, then the defendant had to compensate the plaintiff. A defendant was not constructed as an individual, but as a member of a category. If the legal subject was seen to belong to a particular category, then the law commanded a certain set of responsibilities.

Feudal society was, for Foucault, governed along very practical lines. It was a ‘society of laws – either customs or written laws – involving a whole reciprocal play of obligation and litigation’.38 Subjects owed obligations to their immediate lords, and lords owed obligations to the monarch. The rulers of the society, for Foucault, were seen to be a part of the web of obligations. The notion that rulers occupied a ‘position of externality and transcendence’39 relative to those they ruled represents, for Foucault, a characterisation of a form of governance evident after

38 Foucault, ‘Governmentality’ at 104
39 Ibid at 91
the end of the feudal period in Western history. All feudal obligations were reciprocal. That is, the monarch owed them to the lords, the lords owed them to the monarchs, the subjects owed the lords obligations and the lords owed them to the subjects. The types and duties attached to the obligations were specific to the station in life of the person who was under the obligation. The duties owed by the monarch were different to the duties owed by lords, which were different to the duties owed by “commoners”.

This effect of position on duty is also reflected in the fact that the obligations of “commoners” varied according to their station in life. All legal subjects owed duties of fealty to their overlords, they also owed specific duties to other legal subjects. These other responsibilities resulted from their vocation or profession. A person was a blacksmith, a serf, an apothecary or an inn-keeper. If a legal subject failed to live up to the expectations associated with their profession or vocation, then the injured party could seek compensation through the courts. The members of the legal discursive formation then appraised the actions of the defendant and judged them against the standard of the person from that trade or vocation. From this perspective, the members of the court did not construct the defendants as individuals who happened to practice as a surgeon or an apothecary. The members of the legal profession only saw the defendants in terms of their vocation. The station in life of the defendant dictated their responsibilities and, according to this understanding, how the members of the bench judged their actions.40

40 This linking of the eighteenth century legal profession to characterisations of feudal subjects is not meant to be proof that England was still a feudal society in the late 1700s. All that is being claimed is that the lawyers and judges’ basing of their assessment of liability on the station of life of the defendant can be seen to be similar to a feudal system of societal organisation. One possible explanation that is consistent with the form of analysis used here is that, as this project shows, discursive practices change very slowly, and therefore, some of the societal habits that were dominant in feudal times took considerable time to die out completely.
The feudal characterisation of legal subjects changed slowly. By the early to mid-twentieth century the legal construction of legal subjects, from the perspective applied here, could be seen to be “modern”. In most of the cases examined in Chapter Six of this thesis, the members of the legal discursive formation can be considered to have constructed the legal subjects as self-aware, self-disciplined subjects who were expected to live according to the dictates of internalised norms generally applicable in the community. One particular set of expected behaviours were those embedded in the term “reasonable person”. If the legal subjects did not live up to the set of behaviours that was expected from a reasonable person in the position of the defendant, then compensation was payable to the injured party. In the modern period, as understood in this Foucaultian analysis, the members of the legal profession saw the members of society as reasonable, rational individuals. These individuals happened to act in a variety of roles in their working life, but, first and foremost, they were individuals.

The importance of this, from a Foucaultian perspective, is that this means these individuals could be judged against a common standard of behaviour. They could all be judged against the standard of the reasonable person. This was possible, from this perspective, as they were all produced within their society by a substantially similar set of practices that imbued them all with a substantially similar set of internalised norms of behaviour. Modern legal subjects, as they are understood here, have been brought up and trained to be members of society under the governmentalist form of governance. One of the sets of practices that produced the legal subjects was the law. The members of the legal profession gave the legal
subjects guidelines of action in the form of past statements and judged those legal subjects who appeared before them.

From the perspective applied in this thesis, the practices of the law are part of the processes of the construction of the modern subject. Further, the practices of the law were part of the processes of construction of the feudal subject, and therefore, the practices of the law helped in the perpetuation of the feudal system. The practices of the law, and the statements of the judges were also part of the processes of change between the feudal and the modern. Yet, in order for the law to fulfil these functions, from this perspective, it had to maintain its integrity and validity during the periods of stability and the period of change. In order to understand how the law can be understood to operate in this manner, it is necessary to understand how a discursive function can produce change whilst maintaining its integrity. The processes of change within a discourse or discursive formation will be addressed in the next section.

DISCURSIVE CHANGE

This section will present an understanding of the possibilities for, and practices of, change within discourses and discursive formations that is central to this thesis.

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41 The subjects may not have read these statements, however, the effect of these statements are still felt and internalised by legal subjects. For example, legal statements, in the form of legal decisions that limit the construction of a legal contract are not read by all legal subjects, however, those contracts that are constituted legally dominate through the fact most contracts are drawn up by the legally trained and therefore, legal subjects “learn” the construction of legal contracts.

42 I am not suggesting that I will be demonstrating in this thesis how subjectivities in England changed from the “feudal” to the “modern”. That is both beyond the scope of a project this size and beyond the scope of the archaeological method. The shift from the feudal to the modern would be better demonstrated through a use of Foucault’s genealogical method. The distinction between the archaeological and genealogical methods are discussed in Chapter 3 below.
One of the understandings of the law in this thesis is in terms of the continuous/discontinuous nature of the law. To understand how this is possible, it is necessary to consider how discourses can be understood to produce change. Like the rest of this chapter, the section will be a predominantly abstract discussion, with the specifics of change within the legal discursive formation being developed in the next chapter. There is no single model that can be used to describe and delimit discursive change, as every discourse or discursive formation is different. However, there are general mechanisms that can be taken to underlie any shift in the effects of a discourse or discursive formation.

For a discursive formation or discourse to change, from this perspective, there must be discursive practices that allow for change. This is an obvious point, but one that cannot be over-emphasised. As understood from a Foucaultian perspective, any discursive function is only the sum of its practices, so unless the discursive practices include the capacity for change there cannot be any change. The subjects of a discourse reflect the practices that constitute them and do not have any capacity to bring about change unless they are enabled to do so. Only practices that allow for change can produce, within the subjects of the discursive function, the possibility of change. Without such practices, subjects will only repeat past practices.

From a Foucaultian perspective, these discursive practices that allow for change may relate to any of three relationships. They may relate to the interaction of the discourse with other discourses. They may relate to the interaction between different discursive formations which operate within the larger discourse. Finally, they may relate to change within a single formation. Such practices could even
relate to changes in the perception of those events that may be considered to be non-discursive. As there is no set of rules that govern all discourses, there can be no general practice that can isolate any particular type of discursive practice. The descriptions of discursive control discussed by Foucault (internal, external and those neither fully internal or external) are not generally applicable rules, but are similarities between discursive functions. In these terms, discursive practices that allow for discursive change can function either as internal, external or neither fully internal nor external controls.

As was discussed previously, in post-structuralist theory there is no essential Truth in any discursive function. There are no absolutes that are immune from processes of change. Therefore, every practice, theoretically, is subject to disruption. There may be basic relationships that seem to define a discourse, such as the relationship between the doctor and the patient in medical discourse, but there may be practices that appear to run counter to this relationship, such as euthanasia or medical experimentation without consent. Further, within any discourse or discursive formation there are a multiplicity of discursive practices that constitute the discursive function. Some of these practices specifically relate to conduct associated with other practices.

This multiplicity of practices can be understood in the same way that a multiplicity of discursive subjects can be understood. That is, from this perspective, discursive practices can be seen as also functioning under a form of governance equivalent to governmentality. The “population” of practices within a discourse are subject to “various procedures, analyses and reflections, calculations and tactics”. This does not necessarily produce a hierarchy of discursive practices, though the basic
assessment that the set of discursive practices functions as “knowledge” can be seen to “govern” discursive change.

This discussion of discourses reflects post-Enlightenment Western thought. One of the key aspects of this body of thought is that knowledge is not fixed. The body of knowledge in the world grows and changes. Therefore, any discourse or discursive formation is founded on the assessment that no knowledge is permanent. Scientific discourses, in which the belief that theories are valid, but still only theories, until they are disproved, illustrates this point. From the perspective applied here, many of the discursive practices in a discourse relate to the perpetuation of the knowledge of the discourse.43 That is, the practices associated with education and construction of subjects are important. As the “knowledge” of the discourse is changeable, there have to be practices that allow for the transmission of knowledge of that which is no longer the same as that which was known before.

This discussion of discursive change presents the danger of an introduction of a “Truth” about discourse, with that Truth being that all knowledge is subject to change. Derrida refers to the ‘paradox of iterability’. That is, ‘iterability requires the origin to repeat itselforiginarily, to alter itself so as to have the value of origin, that is to conserve itself’.44 This notion of the discursive suggests that, in order for a discourse to maintain its constitutive power, it has to perpetually re-create this “value of origin” through repeated iteration. Every repetition of discursive

43 It is likely, but outside the scope of this thesis to demonstrate, that only discourses that have the capacity to change will reproduce over time. In other words, some knowledges may “die off” because they do not contain a discursive practice that allows for change within their body of discursive practices.
44 Derrida, ‘Force of Law’ at 43
knowledge must have the power of origin. This is required in order to continue the production of discursive subjects and the production of discursive practices.

Given this perpetual practice of origin, discourses and discursive formations can include discursive practices that enable discursive change. These practices of change can maintain this value of origin. Every practice has to exhibit the characteristics both of repeatability and of origin. There is no value for this thesis, however, in considering the source of change, as it is outside the scope of the archaeological method. It is sufficient to discuss how the discursive functions can change, without compromising the validity of the discursive functions. The understanding contained in this section will be developed further, in the context of the legal discursive formation, in the next chapter.

CONCLUSION

The purpose of this chapter was to establish the theoretical background for the remainder of thesis. The goal of this project as a whole is to apply Foucault’s archaeological method to a number of judicial decisions. This entails an understanding of the relationship between the law and the legal profession. One aspect of the project is the examination of the mechanisms through which the law changes and yet maintains its integrity and continuity. The characterisation of the legal profession in this thesis can be considered to expand on Llewellyn’s claim that the law is what legal officials do. This expansion is only possible with a

45 A full Derridean understanding of iterability as it relates to law can be considered to be outside the scope of this project. From Davies’ perspective, ‘as a repetition of the law the case must already be other to it... it is always in itself distinct from the law’: Delimiting the Law at 112. In the Foucaultian understanding of the law as represented by this thesis, a case is not considered to be “distinct from the law”, it can never be “other to the law”. The law is understood as the sum of the practices of the legal profession, therefore, a decision is a necessary part of the law.
discursive understanding of the law and the legal profession. Some care must be taken, therefore, in explaining the basics of such a discursive understanding of the law, the profession and broader society itself.

A Foucaultian discursive understanding of society differs from more traditional understandings in that it is ‘non-anthropological’. There is no search for the author or the individual actor with respect to any event. The removal of the concept of the “free-choosing” individual from the analysis of society provides a particular perspective on the relationships within a community. A history can be reduced to a study of the practices that a subject perpetuates. Or, it can be seen that a history can be expanded to a study of the practices that a subject perpetuates.

If you hold that a discourse consists in the totality of what is said in some domain, then you go beyond reading the intellectual highs of the heroes of science and you sample what is being said everywhere… You inevitably have to consider who is doing what to whom.48

Such an understanding opens up the whole of society to examination.

It was necessary in the first section of this chapter to provide an overview of the theoretical area of knowledge, of a discursive understanding, that is the foundation of the ideas used in the rest of the thesis. Post-structuralism resists definition and, therefore, the goal of the first section was to provide a broad description of some of the perceived commonalities of the post-structuralist perspective upon which this thesis is based. This background allowed for the discussion in the second section,

46 Kendall & Wickham, Using Foucault’s Methods at 33
47 Foucault preferred to discuss the role of the “author function”, rather than the “author”, see ‘What is an Author?’ in Rabinow, P. (ed), The Foucault Reader, Penguin, London, 1991. This point is discussed in more detail in Chapter 3.
an explanation of the relationships between the concepts of discourse, discursive formations and discursive practices.

It is the understanding of discursive practices as constructing discourses and discursive formations that is central to the conception of the law and the profession used in this thesis. The archaeological method is also founded on a discursive understanding of the behaviours of the members of society. The method, to be discussed in detail in Chapter Three, will involve the exhumation of monuments that are constructed through such discursive practices. These practices constitute the subjects of the legal discursive functions. Therefore, the third section of this present chapter included a discussion of the processes of construction and subjectification that might be taken to be common to all discourses and discursive formations. That is, the processes of subjectification apply to the construction of legal personnel by legal discursive practices and the construction of legal subjects in the wider community.

The final section of this chapter focussed on the possibility and practices of change included in discursive functions. The practices of legal change are important in this understanding of the processes of repetition of past legal statements. The specifics of such legal changes will be discussed further in the next chapter. However, the theoretical basis for discursive change needed to be addressed in abstract terms first to define the terms and to delimit the forms of analysis that are to follow. This chapter was necessary to provide a foundation for the discursive description and understanding of the legal discourse and discursive formation that is contained in Chapter Two. Chapter One is the first step to the application of the archaeological method to judicial decisions.
CHAPTER TWO - A FOUCAULTIAN UNDERSTANDING OF LAW AS “OBJECT” FOR THE ARCHAEOLOGICAL METHOD

INTRODUCTION

This chapter will apply the theory discussed in Chapter One to a representation of the legal discourse and legal discursive formation. The representation relies on Goodrich’s contention that ‘the concept of discourse can be applied to any sequence of utterances at the level of the sentence or above’,1 for it is this understanding of discourse that will be applied to the law. This chapter does not include proof of the claim that the law is a discourse, as such a proof would require establishing another meta-narrative about the nature of law. In order to apply the archaeological method, however, there does need to be an explanation of the understanding of the way in which certain legal practices construct the law and the members of the legal profession that underpins the analysis in Part Two.

This chapter does include examples of how the subjects of the law and the legal profession are constructed discursively. The focus of this chapter, then, is not the “law as discourse”, but an examination of the legal practices that allow for the law to operate discursively. As Goodrich stated, ‘to study the common law historically is to study it as… a plural set of practices which developed over long periods of time’.2 These examples include, in particular, those discursive practices that are of importance to this application of an archaeological method to legal decisions.

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This application requires an understanding of the relationship between the legal profession and the law that goes beyond the notion that the law is what legal personnel do. This understanding is based on a particular conception of the functioning of the law in society and the operation of the profession as a self-regulating, self-perpetuating institution. To facilitate this discussion, the emphasis of this chapter will be on the functions of the legal discursive practices that continually recreate both the common law and the legal profession.

One of the key discursive features of the common law, for this analysis, is that it is a predominantly written discourse. The use of preceding judicial decisions, the written words of lawyers and judges, can be seen as central to both law and the organisation of the profession. The fundamental discursive practice of the common law, for this project, is the repetition of past legal statements. This practice will be discussed in depth in this chapter, both as an example of the understanding of discursive practices that underpins this thesis, and as a demonstration of the fundamental importance that texts can be taken to have to the legal discursive formation. The use of previous legal statements is also important to this application of the archaeological method to the monuments of the legal discursive formation, as will be discussed in Chapter Three.

The common law is at the centre of this thesis. More specifically, the focus is on the relationship between the legal profession and the common law. The law is taken to be the product of the practices that govern the behaviour of those who practice it within society. However, the law functions within the wider community. This project examines the statements of law that articulate the relationships of liability that are encouraged between members of the wider community. It is necessary,
therefore, to make clear the way that members of the legal profession are understood to see, and construct, individuals and their relationships through the processes of subjectification. This understanding will be examined in the first section, where the discursive processes of subjectification will be discussed in the specific context of the law.

In Section Two I will present my understanding of the construction of the legal discursive formation, as it is now and as it has been since 1750. To describe the profession as it existed in 1750, the practices of legal training that existed before then also have to be examined. In a broad sense, this section represents a history of the legal profession and its practices, however, it is only a history, not the history. The focus of the “history” produced in this project is on some of the practices of the legal profession. The focus is not on the “facts and figures” that can constitute more “traditional” histories. Therefore, there is, in this thesis, an interpretation of the “past” that uses broad brushstrokes to characterise what can be seen as predominant legal practices of the past half millennium. The contention of the history contained here is that the practices of the legal discursive formation, in particular, the profession’s power of self-governance, have remained largely unchanged since the seventeenth century.

One particular aspect of the legal discursive formation that will not function as part of this account is the relationship between different categories of legal practitioners. Over the centuries there have been classifications such as sergeants, benchers, attornies, solicitors, barristers, pleaders and proctors. For the purpose of this thesis, an analysis of these categories seems unnecessary. The understanding of the legal discursive formation presented here is of a self-contained, self-regulating
profession. All practitioners will be considered to belong to a single classification, “lawyers”, in order to promote this presentation.

Section Three will present my understanding of the mechanisms of change that are present in the practices of the profession. It is the capacity of the legal discursive formation to change while maintaining its integrity that is the distinctive feature of the relationship between the law and the profession for this project. As was discussed in the last chapter, from the perspective applied in this thesis, a discourse or discursive formation can change only when it includes discursive practices that allow for change. This section will address the possibilities of change within the law in general, rather than focussing on the specific practices that allow for change, such as the practice of repetition of past legal statements.

Section Four will focus on that group of the discursive practices which constitute the legal discursive formation that is most important for this thesis. This section will include an examination of the use of written texts as an integral part of legal procedure. This is expanded on in the fifth section which examines the practice of repetition, the specific aspect of the use of texts that, from the perspective adopted in this thesis, is the predominant form of discursive control within the legal discursive formation. It is this practice that is taken to organise the profession and maintain the continuity of the law. It is this practice that, from the perspective applied here, allows for change in the law. This discussion of the use of past legal statements will act as both an extensive summary of this chapter, and a specific grounding for Chapter Three. That is, a discussion of the understanding of the importance of written documents to the law adopted in this thesis provides the
background necessary for the discussion of the method, an archaeological analysis of legal judgments, that follows in Chapter Three.

THE LAW AND THE CONSTRUCTION OF LEGAL SUBJECTS

This section has two purposes. First, it presents a brief “history” of the law and its operation in England over the past few centuries. Second, it begins an application of the theoretical framework established in Chapter One to the study of the English common law. This is done through an examination of the understanding of the relationship between the law as a whole and its legal subjects that is adopted in this thesis. In order to address the relationship between the law and the legal profession, as it is understood here, it is necessary to consider how the broader forms of governance have operated. That is, it is necessary for this explication, to consider, inter alia, the changing relationship between the monarch and the population and the changing relationship between the state and the population. Further, in order to explore this understanding of how members of the legal profession are discursively constructed as lawyers and judges, it is necessary to discuss how members of the community as a whole are constructed to act according to the law.

This section is divided into two sub-sections. The first includes an application of the understanding of the processes of subjectification discussed in the last chapter to the constitution of legal subjects in the law since the eighteenth century. The second section will be the application of this understanding to the specifics of tort law. This requires an examination of the notion of the “reasonable person”. This legal construct will be used to illustrate “governance” through the administration of
norms as it is understood here. As discursive practices are taken to act as norms of behaviour, it is useful to illustrate the operation of such a norm in the law.

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This sub-section presents the law as a discursive function that operates as an integral part of society. In short, it develops an understanding of the way that “citizens” are constituted as legal subjects. From this perspective, the law constructs the legal subjects to abide by the rules, and as they abide by these rules, the law is reinforced. This sub-section will present a “history” of the forms of governance, from law as sovereign commands to governance through the administration of norms.

In Foucault’s understanding of modern governance, governmentality appears to rest both on the notion of the population governing on behalf of the population and on the removal of the power of the monarch to command. This modern “normative” form of governance of England can be understood to have started in 1689. Until the power of monarchs to command in their own right was removed, symbolically

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3 Some legal subjects may “choose” to not abide by the rules. Such a “decision” may be the result of another set of internalised norms, a set that promotes “deviancy” or “rebellion”. The internalised set of norms that is the dominant form of governance in society is not the only such set, it is, however, the dominant set. An alternative interpretation of behaviour that can be described as “deviancy” is put forward by Jeff Malpas and Gary Wickham in ‘Governance and Failure: on the Limits of Sociology’ (1995) 31 Australian and New Zealand Journal of Sociology 37. Their argument is that the failure, or the incompleteness of any system of governance. That is, no discursive practice totally governs the practices of a subject.

4 1689 did not represent a total break in the forms of governance in society. As was mentioned above and will be demonstrated below, the eighteenth century legal system can be understood as still perpetuating the pre-modern, “feudal” system of categorising the legal subjects (for a discussion of Foucault’s understanding of “feudal” see the discussion in Chapter One above). 1689, however, can be seen as the point in time when the obvious symbols of governance, that is the relationship between the Crown and the Parliament, shifted.
and de jure, England could not be considered, from this perspective, to be governed
in what can now be seen as a “modern” form. The symbolic removal of the king’s
head occurred with the English Parliament’s insistence on the signing of the Bill of
Rights in 1689. After James II fled the country, the legislature only agreed to the
ascension to the throne of William III and Mary II if they accepted this document.
A new age can be understood to have heralded, in which ‘sovereignty... was for
practical purposes grasped by the nation’. The Bill of Rights, a deed limiting the
power of the monarchs in relation to the Parliament, prevented the King and Queen
from ‘suspending... laws or the execution of laws by regall authoritie without
consent of Parlyament’. Parliament, therefore, can be understood to have
destroyed the previous notion of ‘kingship by Divine Right’. This “destruction”
can be seen to have been produced through this Bill of Rights, the new oaths of
regal office (to “govern according to the statutes in Parliament”), the Triennial Act
of 1694 and the Act of Settlement of 1700.

By the end of the seventeenth century there can be said to be a ‘relatively clear
division of the functions of government’ with the powers of the monarch limited
by the strength of the legislature. With the Bill of Rights, the royal prerogative
became a

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5 For a discussion of Foucault’s understanding of the “modern” see Chapter One above.
6 1 Will. & Mar. Sess. 2, c.2 (1689)
   Black, London, 1969 at 269
8 1 Will. & Mar. Sess. 2, c.2
9 Keir, The Constitutional History of Modern Britain Since 1485 at 271
10 6 & 7 Will. & Mar. c. 2
11 12 & 13 Will. III, c.2
   67
13 To the extent that the last time a monarch vetoed a Bill passed by Parliament was in 1707
   (Wilson, J. G., ‘Altered States: A Comparison of Separation of Powers in the United States and in
   the United Kingdom’ (1990) 18 Hastings Constitutional Law Quarterly 125 at 135
department of the Common Law, comprising those of its rules which were peculiar to the King and not shared by the subject... Its content is such as Parliament and the courts may define. Its justification is a purely utilitarian conception of the public good, laid down not by the King but by his subjects.¹⁴

The royal prerogative of the individual monarchs, the ‘political will of the sovereign’,¹⁵ can be understood to have been rendered impotent. The underlying power to govern may be taken to have been created in the body of the people, and not in the King. The monarchs, at least formerly, were no longer separate from the people in terms of their possession of extra-legal rights. The monarchs can be understood to have been re-categorised as members of the population with certain symbolic, but not extra-judicial, powers.

This “body of the people” that received the “political will” of the society seems to reproduce the “population” that was central to Foucault’s understanding of governmentality. From this perspective, the “people” self-govern through a system of communal measures, and these measures keep the community together. ‘The norm is the common measure [and] the modern form of the social bond’¹⁶. This “population”, or community, is understood to be constructed and constrained by the myriad of practices and procedures of governance. A population is taken to be made up of individuals created by the operation of discourses and discursive formations.

These individuals may consider themselves to be in control of their own lives, destiny and well-being. But it is the processes of subjectification that is understood

¹⁴ Keir, The Constitutional History of Modern Britain Since 1485 at 271
to construct what is meant by the term “liberty”. From this perspective, legal subjects are free to act according to their construction, to follow the standards set down by the internalised system of norms. This process of subjectification can be seen as creating an almost anarchic\textsuperscript{17} society. ‘[T]he norm affirms the equality of individuals... [it] is not totalitarian but individualising... however, despite the strength of various individual claims, none of them can escape the common standard’.\textsuperscript{18}

This understanding of the construction of legal subjects does not diminish the importance of the law for the community. Following the “decapitation” of the monarchs, the governance of society became the responsibility of the Parliament, Executive and judiciary. From this perspective, the law constructs all three, at least in part. The actions of all the branches of government, in this view, must be considered to be lawful in order to be legitimate. It is the legal practices that provide the mechanisms for this validation of governmental actions, including any suspect ones.

In the modern system of governance, the Parliament can be seen to have taken on the figure-head role of the monarch, without being able to claim the power of sovereign command. From this perspective, Parliament does not establish ‘the fundamental principles of law; it can only set forth regulations’.\textsuperscript{19} This can be understood to represent a shift from rule through command to rule through generally applicable internalised norms. Publicly accepted behaviour is now taken

\textsuperscript{17} In the sense that there is no overseeing governing body separate from society. This form of “anarchy” is, however, by no means chaotic.
\textsuperscript{18} Ewald, ‘Norms, Discipline, and the Law’ at 154
\textsuperscript{19} Ibid at 155
to be the benchmark, as the norm is understood to provide the basis for the measurement of the actions of individuals. The norm, then, can be seen as a 'way for a group to provide itself with a common denominator in accordance with a rigorous principle of self-referentiality'. From this perspective, society functions as a set of self-created, self-referential individuals who are no longer taken to be controlled by the dictates of an external authority, but are seen to be guided by an internalised set of rules of behaviour. The courts, however, still function as the institution of adjudication and, from this perspective, it is within the legal discursive practices that the norms of the society are utilised.

Legal subjects can be understood to be constructed to obey the requests of the police and to abide by the rules of the forums of adjudication. No innate Truth can be ascribed to these practices, they are simply the habits, or norms, of society. The role of the law in the community is continually reinforced, in this view, both through the continued acquiescence and co-operation of the legal subjects and, culturally, through the mass media. Officers of the law are respected; legal careers, whether in the police service or as lawyers or judges, are held in relatively high regard within the community. From the perspective adopted here, this respect is indicative of the power relationships that underlie the law. The legal subjects can be understood to defer to the authority of the legal professional. The law is considered the appropriate form of societal governance, and the legal professions have access to the forms and procedures of the law.

\[20\] Ibid at 154
That legal norms are understood to have been introduced gradually since 1689 does not mean that they are taken to have remained unchanged since then. A ‘norm is a self-referential standard of measurement for a given group; it can make no pretence to bind anyone for an indefinite period’.21 The norms that existed in the earliest part of the eighteenth century are not the same norms that construct legal subjects of today. One of the more recently generated norms is that of the “reasonable person”.

The “reasonable person” can be understood to represent a point where norms and the practices of the legal profession interact. The “reasonable person” is a construct used by members of the legal profession to judge the actions of members of the general public. The general public are taken to have internalised the central tenet of the “reasonable person”, in that they “know” they are expected to consider others when they perform various actions in their lives. Even if they do not consider other people, legal subjects with this internalised norm are taken to know that they should regulate themselves in such a manner. It must be stressed that the “reasonable person” is being used only an example of normative governance and that the “reasonable person” is temporally specific. It is not taken to operate for the entire history of the common law and does not apply to the whole period covered by this thesis. Therefore, all references to legal subjects and “reasonable people” in this section apply only to mid-twentieth century legal discourse.

21 Ibid at 156
There is no precise definition of what constitutes a “reasonable person” in tort law.22 A norm is understood to be a standard against which behaviour is judged and not a rule. Its function as a measure is only useful, and therefore only used, in specific contexts; hence it cannot be no completely described. What follows is an extract from a legal textbook:

Lord Bowen visualised the reasonable man as “the man on the Clapham omnibus”; an American writer as “the man who takes the magazines at home, and in the evening pushes the lawn-mower in his shirt sleeves.” He has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules nor has he “the prophetic vision of a clairvoyant.” He will not anticipate folly in all its forms, but he never puts out of consideration the teachings of experience and so will guard against the negligence of others when experience shows such negligence to be common. He is a reasonable man but he is neither a perfect citizen nor a “paragon of circumspection”.23

Some of the characteristics attributed to the reasonable person, therefore, are rationality, self-governance, and a capacity for foresight.24 These attributes are used

22 One of the features of current tort law is the concept of the “reasonable man”. It is a frequent criticism of the legal profession that it utilises gender specific language. In this thesis, there is a tension between the recognition of this privileging and the methodological need to engage with the exact terminology of the texts of the discursive formation. Therefore, the policy for this project will be to only use gender specific language in direct quotations from legal documents. For the rest of the thesis, the language will be gender neutral. This does not remedy the gender bias, but for the purposes of the integrity of the method, it seems an appropriate compromise. In terms of any other gender bias in the thesis, there is no apparent patriarchal nature in the articulation of the recognition of the legal relationships of liability. However, such an inquiry is beyond the scope of the methodology and the aims of the thesis for there to be a definitive position provided here. However it is noted that it could be possible to argue that the ethic of care evident in the “female” morality discussed by Carol Gilligan in In a Different Voice – Psychological Theory and Women’s Development (Harvard University Press, Cambridge, Mass., 1982) is more present in the reasonable person test of relationships of liability than to the more traditional “rights” based consideration of the legal discursive formation.
by the courts to determine what constitutes an appropriate action in any given circumstance. When a legal subject is sued in negligence, they are alleged to have failed to live up to the standard expected of the reasonable person when the action, or inaction, in question occurred. The ‘reasonable man can pose as the average man, as if all of us can be accurately measured and assessed by a single selected standard corresponding with average, reasonable behaviour’. The reasonable person “can pose” as a standard against which legal subjects are measured and the construct is imposed on the lives of the litigants, as a technique of adjudication. The legal discursive formation uses this standard because it seems “reasonable” to use “reasonableness” as a standard and, according to the approach used here, because this is how legal subjects have been constructed.

This is how the very term “reasonable” is significant in this project. Each legal subject is taken to be expected to live up to the standard of the reasonable person who thinks of others before they act. Thought itself, according to Foucault, is a constructed notion:

“Thought”…can and must be analysed in every manner of speaking, doing, or behaving in which the individual appears and acts as subject of learning, as ethical or juridical subject, as subject conscious of himself and others. In this sense, thought is understood as the very form of action – as actions insofar as it implies the play of true and false, the acceptance or refusal of rules, the relation to oneself and others.

Thought can be understood to be an attribute of legal subjects as they appear in a Foucaultian understanding. Constituted subjects “think” and are aware of the relationships between themselves and others. Modern subjects, constructed through

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recent book, Forell C. A. and Matthews, D. M., A Law of Her Own: The Reasonable Woman as a Measure of Man, New York University Press, New York 2000, has also argued for a “reasonable woman” test, though not in the area of tort law
25 Conaghan & Mansell, The Wrongs of Tort at 37-38
26 Foucault, ‘Preface to The History of Sexuality: Volume 2’, in Rabinow, Foucault Reader at 334-335
the broad discourse of rationality, and understood to perceive themselves to be “thinking” subjects. They are taken to be aware of rules and of relationships between themselves and others.

It is this constructed relationship with others that is central to this understanding of negligence law. There is nothing innate about a person’s consideration for others, but such relationships function as norms of behaviour for the legal subjects. Importantly for this conception of the notion of duty of care, the reasonable person acts within a network of “others”, deals with other people and considers them when carrying out any action. Legal subjects, according to this view, are constructed to consider others. From this perspective, the legal discursive formation is full of such legal subjects who, in turn, impose this norm of consideration for others as the standard of behaviour. This perpetuation of the behaviour reinforces the relationship as a norm of society. The reasonable person can be understood as a construction that reflects the accepted behaviours of twentieth century society. The use of this construction functions, from this perspective, as a discursive practice that perpetuates the law and the legal discursive formation.

In this understanding of Foucault’s work, discourses and discursive formations produce subjects via the use of discursive practices. In English society since 1689, the legal discourse of governance is understood to have produced legal subjects. One of the key discursive practices that produce legal subjects, from this perspective, has been the use of norms. It is the internalisation of these discursive practices that is taken to maintain the subjects, the discursive formations and the discourses. The next section will focus on the discursive practices that are specific to the legal discursive formation. It is these discursive practices that are seen to
perpetuate the law and the legal discursive formation. It is these practices that are taken to produce, and allow for change in, the law. The examination of these practices will also further elaborate the understanding of legal practice that underpins the archaeology of legal judgments presented in the final three chapters of this thesis.

LEGAL PERSONNEL AS CONSTRUCTED SUBJECTS OF THE LEGAL DISCURSIVE FORMATION

This section presents a “history” of the legal profession and the construction of lawyers and judges within the legal discursive formation. This description will adopt a discursive perspective in providing an analysis of the legal profession itself, through a discussion of the training, education and professional organisation of lawyers and judges from the fifteenth century to the present day. Through the understanding of the relationship between lawyers, judges and the written law upon which this thesis is based can be more fully explained. From this perspective, it is the perpetuation of the discursive practices that are central to the methods of training. It is the repetition of these practices that produce a law that is central to the application of the archaeological method in this thesis.

A sketch of the practices that are taken to be central to the constitution of legal practitioners and of legal practice will be provided in this section. This outline begins in the eleventh century, as it is necessary to discuss my understanding of the discursive practices that were being utilised prior to 1750 in order to present my conception of the practices that produced the judgments that were written in 1750.
Central to this presentation is a discussion of the profession and its forms of control. It was these forms of regulation that, from this perspective, were part of the conditions of possibility for the independent discursive formation that is taken to have come into existence in the eighteenth century.

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This first sub-section provides a “history” of the profession as an independent discursive formation. Central to this is a discussion of the circumstances that existed during the seventeenth century that, from the perspective adopted here, created the possibility of the relationship between the crown and the judiciary evident in 1750. This “history” of the profession is focussed upon the power that monarchs had over judges and how this changed over time. This sub-section provides a link between the “history” of the law and the particular “history” of the legal discursive practices that constitute the legal profession that will be discussed further in the next sub-section.

My claim that since 1750 the legal profession constitutes a single independent discursive formation is not intended to suggest that there have been no changes since that time, however the basic features of the discursive formation are taken to have remained the same. The profession can be understood as a self-perpetuating, self-governing minority of the population who construct themselves within the practices of the legal discursive formation. How this self-governing minority

27 This is not the only way to approach the independence of the judiciary. For a more complete analysis of such independence, see Shetreet, S., *Judges on Trial*, North-Holland, Amsterdam, 1976, in particular pp. 2-15.
gained the freedom and independence to work in the manner that they do and have done for 250 years is the focus of this sub-section.

The seventeenth century can be understood to have been very disruptive for the governance of England. The tribulations of the Civil War, the execution of a monarch and the internal politics of the Parliaments resulted in both the actual and the symbolic removal of the king’s head. It reflected the beginning of the end of governance through, what I refer to as, sovereign command. This “chaos” extended to the judiciary. The judiciary was not independent prior to the “Glorious Revolution” as ‘the Judicature originally belongeth to the King’. Judges were appointed by the Crown since before the times of the Tudor monarchs. This changed during the sixteenth and early seventeenth centuries to the point where judges did not depend upon the reigning monarch for their office.

The relationship between the monarch and the courts has had a long and chequered history. From the time of William the Conqueror, the feudal system of justice was represented as the King’s justice - ‘a system of royal justice’. The law can be understood to have represented a form of governance dominated by a strong King or Queen. Over the centuries, this personal responsibility of the Crown began to spread beyond the Curia Regis. During the fifteenth and sixteenth centuries, the monarchs, seemingly content with this transfer of responsibility, rarely participated in the courts. This loss of direct control over the events in the court-rooms can be

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29 Keir, *The Constitutional History of Modern Britain Since 1485* at 28
31 The “Royal Court”, the ‘supreme central court where the business of government in all its branches was transacted’ (ibid at 32).
32 For example, it was noteworthy that during the reign of Elizabeth I, in a dispute between the Queen’s Bench of the Common Law and Chancery, the ‘dilemma was apparently resolved by the intervention of Queen Elizabeth herself.’ Dawson, ‘Coke and Ellesmere Disinterred: The Attack on
understood to have been confirmed in the 1611 *Case of Proclamations* where Sir Edward Coke held that ‘the King did not have the power to create new crimes or new criminal penalties, [or] to define new royal prerogatives...’

Prior to the eighteenth century, any efforts to restrict the power of either the King or Parliament were potentially suicidal for the judiciary, as the judges retained their positions at the pleasure of the Crown. There were exceptions to this, however. There were brief periods when judicial life tenure was an option exercised by the Crown. However, even those judges were coerced with the threat, not of dismissal, but of permanent suspension. It was only after the removal from office of James II (who had ‘removed twelve judges in four years, mostly for refusing to recognise his claim to dispense with statutes’) that Acts were passed that granted life tenure to the judges.

The Act of Settlement contained the provision that ‘judges’ commissions be made *quamdiu se bene gesserint* [so long as he should behave well] and that their salaries be ascertained and established but upon the address of both Houses of

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33 *12 Co. Rep.* 74
34 cited in Wilson, ‘Altered States’ at 149. The relationship between Chief Justice Coke and the non-legal institutions was not one way, Coke was dismissed in 1616. According to Holdsworth, in the early seventeenth century ‘judges were frequently dismissed for political reasons (*A History of English Law*, vol. 5, 3rd edition, Methuen, London, 1945 at 351) suggesting a greater level of political interference in the legal discursive formation than is evident today.
36 *Baker, An Introduction to English Legal History* at 192
37 *12 & 13 Will. III, c.2*
Parliament it may be lawfull to remove them”. This cannot be taken to indicate complete judicial independence, however, as judicial office was still granted by the Crown, rather than Parliament. All judicial proceedings ended at the death of the monarch and were taken up under the Seal of the new monarch. On the death of a monarch, therefore, the new monarch had the option to refuse to renew the tenure of judges. In 1707 judicial office was extended and continued for six months after the death of the monarch.38

Despite this lack of total independence, the passage of the Act of Settlement meant that judges were not subject to summary removal or suspension. There was no longer any direct political interference, in terms of dismissal, in the outcomes of their decisions.39 The independence of the judiciary meant that internal/self-regulation increases in significance. The next sub-section is an examination of the way that judges and lawyers from this time, and since, have been trained. For, from the perspective adopted here, it is, and has been, the practices of the legal discursive formation that have been central to the self-constitution of the legal profession.

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This sub-section addresses some of the discursive practices of the legal profession that are taken to constitute the legal practitioners and to perpetuate the profession as

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38 The Regency Act, 6 Anne c.41
39 The tenure of judges was secured ‘notwithstanding any demise of the Crown’ in 1760 (1 Geo. III c.23). Even given this change in the mid-18th century, it is inappropriate to claim that there is absolutely no political interference in the careers of the judiciary, as judges are still promoted to office by the Crown (the processes of the appointment of judges as a discursive practice will be discussed further later on in this section). However, once judges have taken their place on the bench, there is a lack of direct interference as the threat of removal has been reduced almost to nil.
a discursive formation. The main focus of this sub-section will be on the techniques used in training members of the profession. The understanding of the profession as a self-regulating, self-perpetuating institution requires an appreciation of the relationship between the law as legal statements and the legal discursive formation. For, from this perspective, the discursive practices of the profession create the law in the form of legal judgments. It is the use of legal judgments, in this view, that is central to the application of the archaeological method. It is for this reason that judgments can be treated as monuments of the discourse.

Historians of the legal profession often trace its origins back several centuries. Holdsworth considered that it was from the time of Edward I that the common law became a ‘special subject’, an area of expertise that required a specifically trained set of practitioners.⁴⁰ However, the shape and practice of the profession can be understood to have changed markedly since the late thirteenth century.⁴¹ The contention to be expanded upon in this section is that after the Act of Settlement an independent judiciary headed a self-perpetuating institution of lawyers and legal professionals which presides over and valorises a consistent set of “normal” legal practices.

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⁴¹ There is some debate as to when the profession started as a profession; however, it was in the ‘reign of Edward I… [that] the king’s court took its first steps toward regulating the profession’ (Palmer, R. C., ‘The Origins of the Legal Profession in England’ (1976) 11 *Irish Jurist* 126 at 145). Whether or not the profession began before the 14th century, the fact that the king, through his court, started to control the officers of the court is significant to the relationship between the Crown and the judiciary.
The judges who constituted the newly independent eighteenth-century bench can be understood to be products of that particular set of discursive practices that comprised their legal training. These practices were learned, in this account, initially at the Inns of Court and then reinforced in legal practice. As was discussed previously, the processes of subjectification within discourses and discursive formations can be understood to operate through the discursive practices that “train” the members of the discourse to act according to the standards of the discourse.

[These] discursive practices are not purely and simply ways of producing discourse. They are embodied in technical processes, in institutions, in patterns for general behaviour, in forms for transmission and diffusion, and in pedagogical forms which, at once, impose and maintain them.42

The acceptance by members of society in general, and Parliament specifically, of judges as an appropriate vehicle for societal adjudication meant that the practices of judges, and therefore the techniques used to train judges to be judges, were accepted as “the” form of legal training.43 This acceptance meant that the judges were “left to their own devices”, in terms of their training, so that their internal regulatory practices and legal education determined the nature of the common law.

43 The term “accepted” may imply choice on the part of the executive, the legislature and the society as a whole. This is not intended. The members of those institutions were legal subjects and therefore were constituted by the discourses of governance to act according to the norms that produce the discourse. One of these norms was an “acceptance” of the power of the judiciary to adjudicate. Therefore the legal subjects considered the judiciary in that form to be a valid form of governance. Even when the monarchs disagreed with particular judges during the 17th century, there was still an acceptance that the forms of governance as constituted by the judiciary were valid.
In the seventeenth century the principal institutionalised form of basic legal training was provided by the Inns of Court. These institutions, these “powerful corporations”, can be understood to have been constituted by the discursive practice of lawyers trained at the Inns who, in turn, trained later generations of upcoming lawyers at the Inns. The Inns were not separable from the legal discursive formation, as they were ‘subordinate’ to the judges of the time. Just as twenty-first century universities have to produce students whose training meets the requirements of the courts and the profession, so too did the Inns 400 years ago. In order to provide some sense of the nature of the legal discursive practices of the time, what follows is a brief discussion of the training provided by the Inns of Court.

The chief techniques of instruction at the Inns involved ‘lectures and argument’. This included training in the language of the legal discursive formation and in the “legal” style of argument. As the language of the discursive formation tended to be different from the language of the rest of the population, specific training had to be instituted to teach the idiom. The distinctive nature of the language can be understood to reflect the exclusive nature of the discursive formation and can be seen as a technique to prevent those outside the discursive formation from having access to legal knowledges.

44 From the 16th century onwards, the degree of investment in education of the Inns varied. Therefore a certain proportion of practicing lawyers only ever experienced being educated at the hands of practitioners, without enjoying the benefits of life at the Inns. Whether lawyers learnt from the senior lawyers at the Inns or from senior lawyers in practice, it is particularly effective to have the next generation given hands-on practice by the successful practitioners of the previous generation as a means of perpetuating a discursive formation.
45 Keir, The Constitutional History of Modern Britain Since 1485 at 28
46 Holdsworth, A History of English Law, vol. 2 at 485
47 Ibid at 506
48 The use of legal language as a discursive practice will be discussed in section Four of this Chapter.
The operation of the Inns promoted the ideal of a cohesive profession that was separate from the rest of the population.

The legislation of the Inns of Court in the sixteenth century was explicit. Outsiders or “foreigners” were to be excluded, temperance was demanded, and every detail of diet, dress, religious observance, lifestyle, company and behaviour was regulated.49

This cohesion through common custom can be understood to relate to both the intellectual and cultural aspects of the Inns. That is, in this understanding, future lawyers were trained, via the techniques of norms of self-governance, to display the forms of conduct expected within the Inns and, therefore, expected by the courts and judges. Not only did students have to look and act the part, they had to learn the habits and techniques of past lawyers. This approach to legal training reflected the fact that ‘the common law of England is a Tradition and learned by Tradition as well as by Books’.50 The legal discursive formation perpetuated itself through the creation of a specialised body of knowledge and specialised practices and, as a result, can be understood to have created its own specific history and tradition.

It was recognised at the time that participating in the legal discursive formation required a perspective that was not produced in the rest of the population. For

men are not born Common Lawyers, neither can the bare exercise of the faculty of reason give a man sufficient knowledge of it, but it must be gained by the habituating and accustoming and exercising that faculty by reading, study and observation.51

Listening to the lectures, participating in debates and observing the practices of those already at the Bar can be understood to have produced effective members of

50 Davies, Sir John (1614), quoted in Goodrich, Peter, ‘Poor Illiterate Reason’ at 13
51 Hales quoted in Murphy, ‘The Oldest Social Science?’ at 199
the legal discursive formation from within the confines of the Inns of Court. The training undertaken at the Inns, therefore, served the lawyers well in terms of their professional career. In this understanding, members of the discursive formation had been constituted by internalising the appropriate practices relating to choice of language, manner of argument and substance of writs and procedures. ‘The legal profession… strengthened its fabric by the mode in which they practised and taught it’.52 From the perspective adopted here, the profession perpetuated and constituted itself through its discursive practices, including its means of training and education.

The Inns of Court maintained their position as the primary mode of institutionalised legal education until the nineteenth century.53 At that time universities began to offer courses in the common law for the benefit of students who sought to gain admission to the Bar. Prior to the middle of last century, the only legal courses taught at these institutions were of Civil, or Canon, law, for the benefit of the clergy.54 Even when the major universities did teach the common law, the practices of instruction were not markedly different.55 Legal education still revolved around

52 Holdsworth, A History of English Law, vol. 2 at 511
53 That does not mean that the Inns gave up their role in legal education. During the 19th century, the four major Inns co-operated and formed several committees to address the issue of legal training. ‘The most conspicuous of the [joint committees of the Inns of Court] is the Council of Legal Education, which directs the admission, instruction, and examination of students under the Consolidated Regulations approved by the four Inns’ (Pollock, F., ‘The Origins of the Inns of Court’, (1932) 48 LQR 163 at 167-168). The Inns still operate today and still teach law. Their position within the discursive formation, however, is not as strong as it was at the turn of the 18th century.
54 Blackstone did lecture on the topic of the common law in the middle of the 18th century. His audience was not of prospective lawyers, however, but of gentry who wished to have a grounding in the law (Baker, An Introduction to English Legal History at 195). The practice of teaching law to students who never intended to practise was evident much earlier: ‘many sons of landed gentlemen went to one of the Inns of Court to gain a smattering of legal knowledge to help them in the administration of their estates.’ (Coward, B., The Stuart Age, Longman, London, 1994 at 68).
55 There is some academic discussion that points to the 19th century as a period of transition within the legal profession (for example Pue, W. Wesley, ‘Exorcising Professional Demons: Charles Rann Kennedy and the Transition to the Modern Bar’ (1987) 5 Law and History Review 135). The contention in this thesis, however, is that despite superficial changes, the discursive practices that perpetuate the legal discursive formation have remained predominantly the same.
lectures, usually given by practitioners, and included mooting, or the practice of argument and debate. This training can be taken to have maintained a separable language (the use of Latin maxims persists today) and the traditions of using set ‘carefully delimited’,56 ‘authorised’57 texts, cases and commentaries in the operation and repetition of the common law.

From the perspective adopted here, twenty-first century law students are still constituted to act appropriately within the legal discursive formation. The law school can be seen as a ‘rite of reproduction: an institutionally managed trauma gives birth to a conforming or believing soul’.58 ‘Put at its simplest students are perpetually hit over the head with the iron fist of deference to authority’.59 By the time they graduate, from this perspective, law students have been trained to accept the discursive formation as the appropriate form of communal adjudication. In other words, the practices instituted by the discursive formation to train future practitioners involves the dispersal (to a select group) of ‘a knowledge which… allows for the reproduction, the repetition, of established legal forms’.60

To complement the institutionalised communication of accepted legal knowledge, prospective lawyers have had to gain practical experience before they are considered to be fully trained. Irrespective of the means of formal education for the aspiring lawyers, it has been a requirement since the seventeenth century that they

56 Murphy, W. T., ‘Reference without Reality: A Comment on a Commentary on Codifications of Practice’ (1990) 1 Law and Critique 61 at 62
57 Douzinas, C., McVeigh, S. & Warrington, R., ‘Postlegality: After Education in the Law’ (1990) 1 Law and Critique 81 at 85
58 Goodrich, ‘Twining’s Tower’ at 901
59 Douzinas et al, ‘Postlegality’ at 89
60 Goodrich, ‘Twining’s Tower’ at 902
complete a period of articled clerkship before they can practise in their own right.\textsuperscript{61} This further “hands-on” experience meant that, prior to beginning to practise on their own, prospective lawyers can be understood to be fully prepared to act as lawyers should in carrying out the law.

The Attorneys’ and Solicitors Act of 1728 set out the requirements that had to be met by prospective members of the legal profession. No person was to act as an attorney unless they had acted as an articled clerk for five years, been examined by a judge of the court to which they were applying, and had taken the appropriate oath.\textsuperscript{62} Just over a century later, section 3 of the Solicitor’s Act of 1843 is headed: ‘No person to be admitted a solicitor unless he shall have served a clerkship of five years, and have been examined’. From the perspective adopted in this thesis, this meant that Parliament had accorded to members of the legal discursive formation the rights of self-regulation and self-education.\textsuperscript{63} The rise of university-based legal education in the middle of the nineteenth century resulted in a statute being passed that recognised the validity of that form of training, but prospective solicitors were still required to serve as articled clerks, though in this case for a period of only three years.\textsuperscript{64}

Another form of vocational training that was provided through the discursive formation can be seen to be evidenced in the practices associated with the

\textsuperscript{61}Baker, \textit{An Introduction to English Legal History} at 197 nt. 50
\textsuperscript{62}2 Geo. II c. 23 ss 1-8. As an aside, in terms of the discussion of legal language in the next section, it was specified in the Act that admission was to be written in the English tongue, instead of the possible alternatives of Latin or Law French.
\textsuperscript{63}Again, this did not mean that members of Parliament exercised free will in the passing of this Act. Those legal subjects who constitute the legislature and the executive have been constructed in such a way so as to accept this as the appropriate manner for conducting the legal system. They had no “choice” but to pass the statute that allowed the legal profession to regulate itself.
\textsuperscript{64}Solicitor’s Act 1860 s. 2
appointment of judges. In the Appellate Jurisdiction Act, for example, the Law Lords of the House of Lords may only be appointed after holding ‘high judicial office’ in England for at least two years, or after fifteen years as a barrister. The most obvious reason for this discursive practice is that in order for the courts to run smoothly, new judges must be aware of court practices. The most efficient way of ensuring that judges know the rules is if they have been operating within them for a significant period of time. However, it can be seen that such a requirement also acts as a discursive practice to perpetuate the discursive formation. The court system will change little if those in control of the courts accept the practices of the institution, and they are likely to accept the practices if these practices are normal for them.

Another practice involved in the perpetuation of the profession relates to the choice of candidates for promotion to the bench. As has been mentioned above, judges are appointed by the Crown. However, the Crown can only make such appointments in Council, with the advice of a selection of senior judges. This minimises any possibility for “political taint” in the process and, as the advice taken is from practising judges, it can be understood to privilege legal “bias” in judicial appointments. Again, the use of this tradition can be seen as a discursive practice.

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65 (1876) s. 6
66 For judges in the High Court, the requirement is only ten years practice as a barrister (Supreme Court of Judicature (Consolidation) Act (1925) s. 11 (1)).
67 According to Baker ‘most of the judges appointed… after the seventeenth century conducted themselves with complete propriety in office; if judgeships were occasionally given as a reward for past service or friendship, the tradition of judicial independence was strong enough to prevail over party sentiments once the patent was sealed’ (An Introduction to English Legal History at 193, emphasis added).
68 ‘The reasons why one candidate, rather than another, has been recommended to the Queen remain hidden in the files of the Lord Chancellor’s Department or concealed within the breasts of those senior judges amongst whom “soundings” have been taken.’ Pannick, D., Judges, Oxford University Press, Oxford, 1988 at 66
that perpetuates the legal discursive formation. The profession will maintain its position if the judges are not only trained within the discursive formation, but also selected by members of the formation. Members of the profession are also largely responsible for the regulation of the practitioners. These techniques of self-regulation will be examined next.

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This final sub-section is an examination of the processes of self-regulation undertaken by members of the legal discursive formation. As has been seen above, the Inns of Court played a significant role in the training (the perpetuation of the practices) and the organisation of the profession. A decline in the power of the Inns after the turn of the eighteenth century led to other practices being instituted to act as a form of professional regulation. Institutions, such as the Society of Gentlemen Practisers in the Courts of Law and Equity and the Incorporated Law Society, were formed specifically for the regulation of lawyers.

By 1700, the Inns of Court were accepted as the appropriate institutions for overseeing the conduct of the profession. The self-regulating aspect of the discursive formation can be considered to have been reinforced by the discursive practice that allowed one section of the Inns, the “benchers”, to control both admission to the Inns themselves and admission to practise at the Bar.69 In addition

69 ‘Prior to his admission as a student of an Inn of Court the candidate was required to furnish a statement signed either by a Bencher or by two barristers.’ (Manchester, A.H., *Modern Legal History*, Butterworths, London, 1980 at 53)
to their educative role, the four Inns were the sole adjudicators for admission to the Bar. An applicant had to be accepted by the Inns to be accepted as a lawyer authorised to practise in court.

The regulation of the discursive formation by a body, or bodies, constituted by members of the profession continued on from the eighteenth century. In 1728, the Attornies and Solicitors Act authorised judges to examine applicants in terms of their character before the applicants could practise as lawyers. In the 1730s, the Society of Gentlemen Practisers in the Courts of Law and Equity was formed, with the first record of the organisation indicating that ‘the Meeting unanimously declared its utmost abhorrence of all male and unfair practice, and that it would do its utmost to detect and discountenance the same’. The Society was considered to have imposed ‘professional control’ on the body of lawyers, raising the status of lawyers in the eyes of society as a whole.

Parliament did not recognise the Society of Gentlemen Practisers as an institution of professional control, but it can be taken to have acted as a form of self-regulation in the eighteenth and early nineteenth centuries. These techniques for discursive self-regulation were enhanced later in the nineteenth century by the institution of

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70 There is some debate as to how seriously the Inns took their training responsibilities, see for example Mellinkoff, D., *The Language of the Law*, Little, Brown and Company, Boston, 1963, at 195-196.
72 By the time of the nineteenth century, however, the ‘Victorians themselves spoke of a “many headed” profession’, Cocks, R., *Foundations of the Modern Bar*, Sweet & Maxwell, London, 1983 at 2. There was no single, independent body overseeing the profession, but the mechanisms of self-regulation by the discursive formation were still in place.
74 Baker, *An Introduction to English Legal History* at 187.
75 During this time, the Society changed its name to the Law Society.
the Incorporated Law Society.\textsuperscript{76} The Society (the ‘Society of Attorneys Solicitors Proctors and others…’\textsuperscript{77}) was introduced to maintain the register of Solicitors and the records of the Articles of clerkship.\textsuperscript{78} It was constituted by practising members of the legal profession. The Society was given the responsibility for conducting the examinations undertaken by prospective solicitors and issuing certificates to those who passed the examinations.\textsuperscript{79} As a result, the Incorporated Law Society can be taken to have assumed the role previously delegated to the judges of the individual courts. These practices still represented Parliament authorising practising lawyers to regulate and discipline all lawyers, which can be seen as meaning effective self-governance for the profession.

This discursive self-regulation continues today. The Solicitor’s Act of 1974 provides that for a solicitor to practise they must possess a certificate issued by the Law Society.\textsuperscript{80} The responsibility of the Law Society extends beyond the issue of these certificates and the maintenance of the register of the practising solicitors.\textsuperscript{81} The Society is also empowered to ‘make regulations… about education and training for persons seeking to be admitted’.\textsuperscript{82} This power is not held by the Society alone, but must be undertaken with the concurrence of the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls, thereby maintaining the role of members of the discursive formation in the constitution of future members of the discursive formation.

\textsuperscript{76} This organisation was not directly linked to the institution formerly known as the Society of Gentlemen Practisers.
\textsuperscript{77} Solicitor’s Act 1888, s. 4
\textsuperscript{78} Solicitor’s Act 1888, ss. 5, 7 respectively.
\textsuperscript{79} Solicitor’s Act 1877, ss. 6, 5 respectively.
\textsuperscript{80} Solicitor’s Act 1974, s. 1.
\textsuperscript{81} s. 6
\textsuperscript{82} s. 2
Before addressing the processes of change in the formation, it is worth emphasising the central theme of this section. Since the end of the seventeenth century, there can be understood to have been a separable institution, the legal discursive formation, that has perpetuated and maintained the legal system as an independent organisation involved in societal governance. The main discursive practices that have constituted this discursive formation can be taken to relate to the techniques of training and education and the practices of discipline within the profession. From this perspective, the legal profession has long acted as a discursive formation, as it has possessed control over how future lawyers are taught and how practicing lawyers are regulated.

**PROCESSES OF CHANGE IN THE LEGAL DISCURSIVE FORMATION**

As was discussed in Chapter One, the practices of repetition and reiteration are central to any discourse or discursive formation. However, for a discursive formation to persist despite variations in surrounding discourses and events, it must have the potential for discursive change. From the perspective adopted here, this potential will exist only when the discursive formation includes practices that allow for change. These practices that allow for change must operate, however, in a way that does do not affect the integrity or legitimacy of the discursive function itself. That is, for any discourse or discursive formation to persist it must be able to maintain its integrity while it incorporates change. The relationship between the law and the legal profession discussed in this thesis provides a particular understanding of the continuities and the discontinuities of the law. This section
includes a focus on the possibilities of change, of discontinuity, that, from the perspective adopted here, function within the legal discursive formation.

The first issue that needs to be addressed concerns the nature of change within the legal discursive formation. One of the features of the common law system is its ‘always/already’ nature.83 The law does not provide itself with a point of origin. The ‘law and legal doctrine are presented as timeless and ageless’.84 Each decision is, in a sense, ahistorical. The historical context of any legal statement is treated as immaterial, as long as it is still deemed to be applicable to the case at hand.

The law has changed but has also remained unchanged as a form of adjudication. This is possible as the law can be understood to change incrementally, that is, on a case by case basis. From the perspective adopted here, the law changes slowly through the repetition of single legal statements, usually written in courts of review. These processes are examined in this section.

The “always/already” nature of the law can be understood to co-exist with the practices of appeal that are a major part of the discourse. Every judicial decision, in the account developed here, involves a statement of law. Every appeal seeks to change the legal statement, every appeal seeks a new statement of the law. From this perspective, every appeal seeks to change the law. The appeal system itself, then, can be understood as the main discursive practice that enables change in the legal discursive formation. In more abstract terms, it can be seen as a restatement of the “paradox of iterability” described by Derrida and discussed in Chapter One.

83 ‘Objects of legal governance, like other objects of governance, are “always-already” there, they have a past, possibly with beginnings, but they do not have origins in the sense of a determining genesis’ (Hunt & Wickham, Foucault and Law at 109).
84 Conaghan & Mansell, The Wrongs of Tort at 63
The discursive practices “repeat themselves originarily, to alter themselves so as to have the value of origin, to conserve themselves”. That is, the law, through its constant repetition and re-statement, maintains this power of origin and, as a result, the validity of the discursive function.

From this perspective, at the core of the legal discursive formation lies the discursive practice of the repetition of past legal statements. As I have indicated above, this practice is taken to be wider than the practice that is known as the doctrine of precedent. This will be examined in greater depth in the last section of this chapter. For the moment, however, it is worth noting that this practice is understood to contribute in substantial ways to the “always/already” nature of the law and legal discursive formation. The practice reflects the practices of argument in which previous decisions maintain their legal validity and are used in argument by lawyers and judges in their statements of the law. From this perspective, the principle also informs the relative authority of each legal statement. This practice has been part of the law for centuries. Whatever variations there have been in the practices of the legal discursive formation and the specifics of the application of the legal statements, the use of past judgments in legal argument has remained a constant.

The use of past legal statements relies on the presumption that past decisions are repeatable. That is, words contained in previous judgments must be allowed, by the practices of the discursive formation, to be restated in later legal arguments and decisions. For this to be the case, the judgments have to fit criteria that, within the discursive formation, make them available for repetition. These criteria include the role of the speaker, and the context of the words spoken.
[F]or a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.\textsuperscript{85}

From this perspective, each judicial statement destroys and conserves the law.\textsuperscript{86} Each judgment is treated as a re-invention of the law. Each written decision is taken to constitute a site of both legal continuity and discontinuity. This re-creation, or re-iteration, of legal decisions forms the basis of change in the law.

When judges write judgments they have a choice as to which past legal statements they will use as reasons in their statement of the law. They have a choice as to which previous statements they repeat. This choice is not free. It is controlled by a variety of legal practices (including jurisdiction and the position of the court in the legal hierarchy). One of the significant practices, for the purposes of this project, is the presentation to the court of statements, usually in the form of precedents, by counsel.

This offering of statements by counsel can be seen as an example of Foucault’s understanding of the productive nature of power.\textsuperscript{87} For Foucault, the ‘individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation’.\textsuperscript{88} Therefore, opposing counsel can be considered to be sites of different articulations of power. Further, Foucault also

\textsuperscript{85} Derrida, ‘Force of Law’ at 23
\textsuperscript{86} It has been argued that Derrida was suggesting that a ‘just, free and responsible decision cannot be made entirely without normative guidance’ (Davies, M., \textit{Asking the Law Question}, 2\textsuperscript{nd} edition, Law Book Company, Sydney, 2002 at 348). From the perspective adopted in this thesis, the “normative guidance” can be understood to be the discursive practices in which the judges have been trained.
\textsuperscript{87} Discussed above in Chapter One.
\textsuperscript{88} ‘Two Lectures’ at 98
considered that ‘there are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised’.89 Argument by counsel can be considered to be sites of resistance and the exercise of power within the law.

From the perspective adopted here, the common law is a process in which statements by particular judges in specific cases are valorised, primarily through repetition, until the alternative utterances are largely, but never completely, excluded. This process can be seen as an exercise of power. It is these statements that largely exclude all others that, in this view, come to be taken as the law.

A decision, in which a “precedent” is followed, can be understood as a moment in which a judge chooses to repeat a specific statement of law by a preceding judge as the law. While their choice is affected by the structure of the discursive formation, a decision is as much a process of refusing other possible statements as it is one identifying the law. These other possible statements could have been refused on the grounds that they were not relevant, or the statements could have been rejected as the facts of the two cases were too different, or even that the legal statement in question had no legal weight as it was merely obiter. Another set of statements open to judges when they seek to resist past legal statements is those that relate to “public policy” or the “common good”. Such statements of resistance can be seen simply as a device through which judges can evade the effects of judicial hierarchies and make possible the restatement of otherwise distant or apparently less available statements of law.

89 ‘Powers and Strategies’ in Gordon, *Power/Knowledge* at 142
Some of the training techniques of the profession also provide practices that allow for and perpetuate change. The discursive formation can be seen to function as an hierarchical institution. The members of the legal profession have been trained to learn from senior members of the profession. The members of the profession are also trained to accept “new” legal statements from the most senior members of the judiciary. That is, the students, lawyers and lower order judges have been trained to accept re-formulations in the statements of the law from the courts of review, especially from the “peak” courts of review. The nature of the common law, as it is taught, includes a recognition that precedents, or more generally, statements of law, change and are expected to change. Members of the legal discursive formation are trained to expect, and accept, these changes. Lawyers and judges can be understood to be constituted to incorporate the latest statements of the law, as articulated by the courts of review, into the category of repeatable legal statements. This construction of the members of the legal discursive formation also applies to other relevant legal statements, such as new statutes or delegated regulations.

Members of the legal discursive formation can be understood to be trained under a substantially similar set of discursive practices. This, however, does not mean that they practise law in an identical manner. This slight variation in the construction of the different members of the formation can also be taken to account for a degree of discursive change. Even during the processes of formal legal education, each student may develop an interest in different areas of law and will be exposed to different statements of law. When these students have graduated, the cases in which they may be involved will lead them to search through preceding statements of the law that might assist their clients. Therefore, a variety of responses and precedents will be sought when a legal argument is being constructed in any given fact
situation. This is particularly so if the legal point in question is a new one. These
differences in legal experience and education may produce different legal
arguments for any new set of circumstances, and may produce change in the
discursive formation.

Further, the education of future members of the profession will lead them to
produce different legal arguments based on the same facts. The practice of mooting,
of arguing from an arbitrary position in a hypothetical situation, can be understood
to train students to search out various statements that might apply to a legal
problem. The use of hypothetical fact situations in set papers for examination can
also be understood to train prospective members of the discursive formation to
develop different arguments for any particular fact situation. When these students
become practitioners, therefore, they are already adept at seeking multiple legal
statements for a given set of circumstances. From such statements, they choose the
best statement for their purposes. This legal argument may result in the adoption of
a different statement from the presiding judge from that which might normally be
expected.90 Such legal arguments reflect the discontinuous nature of the law.

All these discursive practices mean that the law can change over time on a case by
case basis. Each legal argument can be taken to present a new ordering of past legal
statements. Each new judgment can be understood as a new valorisation of a legal
statement. Each judgment will engage with and make a set of legal statements.
Some of these will be referred to later as the ratio, some as obiter and some will be
ignored. Each judge in a court of review has the opportunity to repeat any statement

90 One unexpected statement does not change the law, though.
of that past judgment, or they can ignore that judgment altogether. In this manner, the law can change incrementally.

As the formation constructs the behaviours and words of its subjects, the judges and lawyers will repeat the statements available within the discourse in the manner in which they are trained. However, given the variation in the subjects’ education, there may be the occasional “maverick”, who, whilst complying to a large extent with the form and content of the formation, will be considered to be on the “fringe” of the discursive formation. These “mavericks” still function as members of the legal discursive formation, as they perpetuate the necessary discursive practices. They still sit on the bench and hand down decisions in the required manner. Their maverick status, however, stems from the statements that they repeat in their judgments.

The words of these subjects will still be considered part of the formation. These mavericks, however, tend to be the judges who provide a more radical perspective on the case before them. These mavericks tend to be the judges who provide the possibility of the law heading in a “new” direction. The novelty of the direction is still entirely linked to the past legal statements upon which they are basing their judgment. As long as both the act and the content of the “maverick” statements are within the limits of the legal norms of behaviour, the statement will be repeatable by future judges. If the words are spoken in the appropriate context, the statements may be repeated and discursive change may take place as a result of this repetition.

Most “maverick” statements are first introduced into the discourse in a dissenting judgment. Their status as “maverick” means that it is unlikely that they will be
repeated by a majority of judges in any judicial decision. These “maverick” judgments are still repeatable legal statements, however, as they still comply with the criteria for availability for repetition. A dissenting judgment remains a statement of the law produced by a discursively constructed judge. A dissenting judgment can be repeated as a legal statement by a later judge, and may be the ratio of a later judgment. These dissenting judgments cannot disappear and may come to be that which is repeated within the formation, as they are still permitted to be used in future legal argument.

Change can occur in the law and legal discursive formation, from the perspective adopted here, because these discursive functions allow for change. The members of the formation are taken to have been constituted to accept, and participate in, practices of discursive change. Again, this is not a conscious decision on their part. Lawyers and judges are constructed to choose between two (or more) competing legal statements. “Normal” lawyers and judges are constructed to repeat the most often repeated statement or to repeat the statement that will most help their position, given the nature of the circumstances to which the legal statement is to apply. These competing statements may include statutes, majority or dissenting judgments or, occasionally, legal text books.

Any such legal statement can be introduced into legal argument. Therefore, any legal statement can be used in order to win an appeal and this may contribute to legal change. Some judgments are considered more repeatable because of the succinctness of the legal expression or because they have been repeated on many occasions. In short, certain decisions are more “quotable”.
Every new legal statement can include the repetition of exact words or the paraphrasing of previous legal statements. Every paraphrasing of a preceding legal statement can be seen as minimal discursive change. A judge may paraphrase a previous legal statement for the purposes of clarity, or perhaps to include a specific reference to the details of the case for which the judgment is being written. Each example of paraphrasing can be understood to be both a restatement of the law and the production of a new legal statement that is open to be repeated by later lawyers and judges.

Alternatively, a decision could reflect a major inflection in the discourse. The greater the perceived change in the statements of the law, the more likely the judgment will be appealed. The results of that appeal would provide more legal statements that might reinforce or diminish the degree of legal change. Irrespective of its degree, from this perspective, any legal change must be sought in the documents of the discursive formation, usually in the law reports. The practices that relate to the writing of such documents will be examined in the next section. This discussion will further illustrate the practices that are typical of the legal discursive formation and will provide a background for the later exploration of the practice of repeating previous legal statements.

WRITTEN LAW AS DISCURSIVE PRACTICE

This section deals with one of the dominant forms of discursive practice that, from the perspective adopted in this thesis, constructs both the law and the legal discursive formation. It describes the importance of the formation as a written form
of adjudication, as a ‘profession of words’.\textsuperscript{91} The focus will be on the importance of the written in the practices of the legal profession because it is the written judgments that will become the monuments to be excavated in the application of an archaeological method. As Goodrich wrote, ‘to understand the common law… is to try to understand it as a form of inheritance and judgment, repetition and commentary’.\textsuperscript{92} The written, whether it is in the form of judgment or commentary, is fundamental to an understanding of the law.

* The archaeological analysis that is to follow in Chapter Four is, ‘as its name indicates only too obviously, the description of the record’.\textsuperscript{93} Therefore, some discussion is required as to what constitutes the “record”, and more specifically, of what constitutes the written “record” in terms of the law. As in the previous sections, it will be necessary to undertake a “history” of the formation before 1750 to characterise the discursive practices of legal writing that operated in 1750. Therefore, this section will provide a “history” of legal language, law reporting, and of the use of legal commentaries, both pre- and post-1750. This discussion of the practices of law reporting will lead into the last section of this chapter, a more detailed discussion of the practice of repeating past legal statements.

The use of language in the history of the law and the legal discursive formation seems almost irrelevant in the study of law today. And, in the sense that English has been the dominant legal tongue for the past few centuries, it is not a contentious

\textsuperscript{91} Mellinkoff, \textit{The Language of the Law} at vii
\textsuperscript{92} Goodrich, ‘Poor Illiterate Reason’ at 8
\textsuperscript{93} Foucault, ‘History, Discourse and Discontinuity’ at 234, emphasis in original.
issue. However, the regulation of the language of the courts, both written and spoken, can be seen as a particularly good example of a discursive practice. An examination of the changes in the languages of choice of the law seems to provide an insight into the discursive formation.

1066 can be treated as a significant marker in the history of the common law. For the invasion of Britain by William of Normandy can be understood to have constituted a major disruption to previous forms of governance. Not only did William I centralise the administration of justice, he also introduced the Norman language to the forms of governance in England.

While the English law was developing, its main vocabulary was Anglo-Saxon... As a result of the Norman Conquest in 1066, Norman-French became substituted for Anglo-Saxon as the language of the law... The official language of records and Statutes after 1066 was Latin... Statutes came to be drafted later in French, and oral legal language became English in the fourteenth century. Having made their contributions, French died out by the sixteenth century, and Latin ceased to be used for the records in the eighteenth.95

The use of a language that was not that of the majority of the population limited the access that the general population had to the forms and practices of the law. The power that comes with access to the words of the law is unavailable to those who cannot communicate in that language. The autonomy of the legal discursive formation was enhanced by the separation of the language of the general population from the language of the law. This linguistic divide expanded with ‘[c]ourt hand’ becoming ‘more and more specialised until at last only those who had to write it

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94 ‘Yet justice was a source of revenue and a sign of power; it was to the king’s advantage to have as many cases heard by his court [as opposed to the local, manorial courts] as possible. The solution was to send out circuit judges - delegates of the central court - armed with new and efficacious procedures’ Strayer, J. R., On the Medieval Origins of the Modern State, Princeton University Press, Princeton, 1970 at 39

95 Kiralfy, A., ‘Law and Right in English Legal History’ (1985) 6 Journal of Legal History 49 at 50
The creation of a distinct group of practitioners can be understood to have been both promoted, and perpetuated, by the use of a language that was not shared by people outside the association.

The birth of English nationalism in the sixteenth century resulted in an emphasis on the value of an “English” tongue. There was pressure for change as ‘the law of the land should not be hidden in Latin and old French but should be in English so that “every Free-man may reade it as well as lawyers”’. This position was not adopted immediately within the legal profession, however. The use of Latin and Law French was abolished for the period of the Commonwealth. But these exclusive languages returned to use with the restoration of the monarchy. The growth of new legal areas, which did not have a history of French or Latin terminology, and an increase in the number of reports translated into English, however, meant that lawyers who only knew their native tongue could still function relatively effectively as officers of the court. The shift back to the use of English as the official language of the courts occurred in 1731.

The greater use of the English language was encouraged by the invention of the printing press. The ability to mechanically reproduce texts had a marked effect on

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96 Pollock, F., ‘The Origins of the Inns of Court’ at 166 n 2
100 However, even in the early seventeenth century it was likely that the lawyers were thinking in English and translating to Law French just for the record (Bryson, W. H., ‘Law Reports in England from 1603 to 1660’ in Stebbings, C. (ed), Law Reporting in Britain, Hambledon Press, London, 1995 at 121).
101 Holdsworth, A History of English Law, vol. 6 at 572
102 An Act that all proceedings in courts of justice within that part of Great Britain called England, and in the court of exchequer in Scotland, shall be in the English language. 4 Geo. II c.26
legal practices. The introduction of the press can also be understood to have brought ‘more order and method’\textsuperscript{103} to the organisation of public documents.\textsuperscript{104} Most importantly, it became possible to reproduce accurately the writings of reporters and judges on a larger scale.\textsuperscript{105} At an even broader discursive level, it meant that the spelling of words began to be standardised\textsuperscript{106} and a particular dialect was promoted, through publication, as the dominant dialect. This dialect was that of London, and with its connections with the dialect of the East Midlands,\textsuperscript{107} it became what we now call English.\textsuperscript{108} This is not to say that all who speak English can understand the language of the legal discourse of governance. Just as the members of the legal discursive formation are a subset of legal subjects, the legal language can be treated as a separable subset of English.\textsuperscript{109}

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The nature and practices of legal education also changed after the advent of the printing press.\textsuperscript{110} Future lawyers are, and have been for centuries, trained, in part,\textsuperscript{111}

\textsuperscript{103} Eisenstein, \textit{The Printing Press as an Agent of Change} at 105
\textsuperscript{104} For example, when John Rastell produced his “Great Boke of Statutes 1530-1533” he included a chronological register of the statutes from 1327 to 1523, the first time such a history had been made available to the public (id).
\textsuperscript{105} It also created the possibility of books of standard legal forms and legal dictionaries (Graham, H., ‘The Rastells and the Printed English Law Book of the Renaissance’ (1954) 47 \textit{Law Library Journal} 6 at 21-23).
\textsuperscript{106} Bryson, B., \textit{Mother Tongue – The English Language}, Penguin, London, 1990 at 118
\textsuperscript{107} Ibid at 52
\textsuperscript{108} Indeed, it is the shift in the language from Latin and Law French to English that provides another justification for the starting point of this thesis (that is, 1750). An archaeology requires an understanding of the texts in themselves as monuments and, therefore, a translation of a case from another language could diminish its value as a monument, diminishing the value of an archaeological analysis.
\textsuperscript{109} ‘Only the lawyer can exploit the capabilities of the language of the law, he [sic] alone even recognise some of its limitations.’ Mellinkoff, \textit{The Language of the Law} at 454
\textsuperscript{110} Prest, W.R., ‘The Learning Exercises at the Inns of Court 1590-1640’ (1967) 9 \textit{The Journal of the Society of Public Teachers of Law} 301 at 310, although ‘[d]espite the proliferation of printed texts, the aural exercises survived as an integral part of learning the law’ (ibid at 313).
through the analysis of judgments and commentaries. The use of the written word (in the form of cases and legal texts) is one technique for training lawyers in the differences between legal English and lay English. With the introduction of the printing press, the opportunity arose for written judgments, as well as legal commentaries, to be disseminated on a relatively large scale. Not only were these commentaries used in legal training, they also became available to all who could read.\footnote{111} It was not the first time that the written law spread beyond the narrow confines of the profession;\footnote{112} however, it was the first time, since the rise in the power of the legal profession, that legal texts became widely available.\footnote{113}

During the sixteenth and seventeenth centuries, works by noted authors such as Fitzherbert, Coke and Hale, were printed.\footnote{114} The most famous set of legal notes, the Commentaries of Blackstone, were produced in the mid-eighteenth century. ‘The first edition appeared in 1765… the ease of its style and clearness of its exposition made it exceedingly popular’.\footnote{115} Blackstone ‘intended to teach law to laymen’\footnote{116} as well as providing instruction at Oxford. Within the context of the legal discursive formation, Blackstone’s work has been represented as the ‘first textbook of a new legal era’.\footnote{117} Its publication dealt a severe blow to the ‘view that law “cannot be taught out of books”’.\footnote{118}

\footnote{111} ‘Literacy was exceptionally widespread in sixteenth century England; only the bottom of the social ladder remained unaffected’ (Greenfeld, Nationalism at 54).
\footnote{112} ‘[Bracton’s] works…became very popular, so that it was translated into Anglo-Norman in the middle of the 13th century’ (Potter, An Introduction to the History of English Law at 33).
\footnote{113} What is not known is the effect that this availability had on the wider population. Irrespective of any such effects, the practices of the profession meant that outsiders, even with some knowledge of the legal language, remained outsiders.
\footnote{114} These texts started to show a ‘shift of emphasis in legal science from common learning to authoritative case law’, Baker, An Introduction to English Legal History at 216
\footnote{115} Potter, An Introduction to the History of English Law at 39
\footnote{116} Hanbury, H. G., ‘Blackstone in Retrospect’ (1950) 66 Law Quarterly Review 318 at 321
\footnote{117} Baker, An Introduction to English Legal History at 220
\footnote{118} Hanbury, ‘Blackstone in Retrospect’ at 324
Since that time, and particularly since the nineteenth century, legal education can be argued to have become more focussed on commentaries and case notes. From the perspective adopted here, such texts can be treated as the “authorised texts” of the discursive formation. At a practical level, the use of printed texts meant that larger groups of students could be taught efficiently. This can be argued to have suited the development of the university as a site of legal training. In terms of the legal discursive formation, legal education could then ‘deal in a vision of the reading of texts, without the distractions of giving legal discourse any materiality. In this process of reading it is assumed that it is the text, the written text as Holy Book’. 119

The use of Commentaries by legal students and practitioners can be understood to be another exclusionary legal discursive practice. 120 This use of case notes and commentaries may be taken to create a separation, a ‘logical and strict divide between theory and practice, between education and the real world’. 121 This can be argued to have resulted in the removal of the “materiality” of the cases. Treated in this manner, cases and details of the cases can be understood to have taken on an immaterial, ahistorical, or contextless role in the discursive formation. The words, as presented in the cases and commentaries, became important in themselves, without reference to the lives of plaintiffs or defendants. From the perspective adopted here, the claims of the Commentaries became norms, the legal common

119 Douzinas *et al.*, ‘Postlegality’ at 86-87
120 Case law can be read by legal subjects who are not members of the legal discursive formation. The discursive practices of the legal profession do not encourage “outsiders” to read judgments however, and the language used by the judges assumes a level of understanding of the law that is greater than that possessed by most legal subjects.
121 Douzinas *et al.*, ‘Postlegality’ at 87. Of course, the “logical” nature of the divide is a construction of the discursive formation.
standards, against which future fact situations could be compared. For this
technique to be effective there had to be a reliable record of the judgments
delivered in past cases.

The history of reported cases goes back several centuries, but the format, and
reliability, of the earlier reports is markedly different from the law reports available
today. The tradition of the legal profession maintaining a record of cases for their
own use goes back to the reign of Edward I.122 This practice produced the Year
Books, a description of the events in the king’s courts based on eye-witness
accounts. These texts were anonymous. There is no way, therefore, of knowing the
degree of legal training possessed by their authors. Originally, they were in hand-
written form, but within a decade of the introduction of the printing press to
England the Year Books began to be machine printed.123 Further, according to
Holdsworth, the ‘introduction of printing directly affected the accustomed modes of
publishing the reports’ and the Year Books ‘ceased to appear in Henry VIII’s
reign’.124

The end of the Year Books coincided with an apparent change in the practices of
reporting cases. One of the more significant shifts was to the naming of the
reporting authors. The reporters were now known to be ‘mostly eminent judges or
practitioners’.125 The legal background of the writers can be recognised to have
contributed to the utility of the reports for the profession, and, from this
perspective, to the perpetuation of the practices of the legal discursive formation as

122 Prior to that time there was the Record of Writs, but that was a product of both the Chancery and
the legal profession (Holdsworth, A History of English Law, vol. 2 at 525)
123 Ibid at 528
124 Ibid at 542. The last Year Book is of the Trinity Term 27 Henry VIII.
125 Holdsworth, A History of English Law, vol. 5 at 355
they existed then. There were no official reports at the time and the notes taken by
the reporters were primarily for their own use.126 This did not mean, however, that
the collections of cases were not circulated or published.127

Early recording practices had limitations, particularly concerning the material that
was recorded. There was a lack of a standard format in the presentation of the
material, and no standardised approach to the choice of which cases to record. This
is understandable given the purpose of their production, that is, the personal use of
the recorder. As a result, the reports ‘may be taken as a faithful representation of
the author’s personal opinions, and whether or not it was later accepted as an
authoritative source of law, it is not necessarily to be relied on for any statements of
fact it contains’.128

One of the first writers to change their approach to reporting was Sir Edmund
Plowden. He, and in this he was followed by Coke, considered that a law report
should be a ‘reasoned exposition of law’. On this basis he ‘selected for publication
only those cases in which questions of law were raised for solemn argument upon
demurrer, special verdict, or motion in banc’.129 Coke also intended his Reports to
be ‘instructional law books built around actual cases’.130 The records of Plowden
and Coke can be seen as part of a discursive formation that constituted its case law

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126 ‘By the time of Elizabeth I many, if not most, of the judges were keeping reports of some kind’
(Baker, J. H., The Legal Profession and the Common Law – Historical Essays, Hambledon Press,
London, 1986 at 450), suggesting that the judges took notes to assist them in their own future
decision making processes.
127 Holdsworth, A History of English Law, vol. 5 at 364-365
128 Baker, The Legal Profession and the Common Law at 441
129 Baker, An Introduction to English Legal History at 210. A “motion in banc” was a procedure by
which a question of law could be raised after a trial and be argued before the full bench of the court
(ibid at 98-101).
130 Id
to be an ahistorical and objective record of the legal discursive formation. James I’s appointment of two official reporters \(^{131}\) can also be seen to be a recognition of the need for an accurate record of decisions in order to maintain the judicial practices and to maintain the procedures of precedent. \(^{132}\) These practices did not guarantee the quality of the reports, however, particularly in the latter half of the seventeenth century. \(^{133}\)

The quality, or lack of it, of the reports is not, in itself, important. The fact that reported cases from the sixteenth, seventeenth and eighteenth centuries can still be used in a court of law is, in this context, what is important. Any reported case used in counsels’ argument will tend to be assessed by the judges on a number of grounds. Any legal statement that can be drawn from any of the early reports is still considered available for repetition. One of the criteria used by judges in choosing between the available legal statements is the age of the statement. A judge will not refuse to “hear” legal statements, however, purely on the basis that the case in which they occur is two, three or four hundred years old. It must be noted, though, that the greater the age of a precedent, the greater the likelihood that it could be distinguished solely on its facts.

In 1865, a new discursive practice for the official recording of decisions was instituted. The production and dissemination of the official reports were in the

\(^{131}\) Baker, *The Legal Profession and the Common Law* at 453

\(^{132}\) The renewal of the royal practice of licensing printers for ‘all books concerning the common laws of this realm’ can be seen as a mechanism for controlling the number, and therefore the quality, of publications of cases, particularly as it was ‘by special allowance of the lord chancellor, or lord keeper of the great seal of England for the time being, the lord chief justices, and the lord chief baron, or one or more of them, by their, or one of their appointments’ (12&13 Car.2 c. 33 (1662)).

\(^{133}\) ‘The reports of the period 1650-1750 were mostly of an inferior nature’ (Baker, *An Introduction to English Legal History* at 210); whereas, according to Bryson, ‘After 1660, the reports appear to be reasonably full and reliable’ (‘Law Reports in England from 1603 to 1660’ at 113).
control of the Incorporated Council of Law Reporting, assisted by the General Council of the Bar. Again, this can be taken to illustrate the legal discursive formation controlling the discursive practices that construct, and perpetuate, the legal discursive formation and the law itself.

That official reports have been available since 1865 does not mean that the practices of reporting have not changed. Between 1875 and 1940 there were significant changes in the style and content of the reported judgments. The average length increased and there were fewer references to sources outside the English common law. Not all cases were included in the official reports, although all cases were recorded. Only those decisions that were considered to change, or add, something to the body of reported cases were included.

These recording practices continue today. They mean that few magistrates’ decisions are repeated, but a large percentage of the cases taken to the House of Lords are officially reported. From the perspective adopted here, the Law Lords are members of the legal discursive formation who have undergone the most training, or “normalisation”, and who have been taken to have demonstrated particular ability in the legal practices. The recognition of this ability can be seen as another discursive practice of the profession that contributes to the hierarchisation of the discursive formation. Senior judges can be understood to have been given the privileged position to “speak” for the legal discursive formation. They are the judges whose judgments are most likely to be included in the law reports. In other

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135 These other sources had included ‘civilian writers, custom and citations from foreign jurisdictions’ (Hedley, S., ‘Words, Words, Words: Making Sense of Legal Judgments, 1875-1940’ in Stebbings, Law Reporting in Britain at 169-170).
words, from the perspective adopted here, the discursive practice of the reporting of judgments privileges the voices of senior judges.

Most reported cases arise from courts of review. The majority of decisions used as precedents in the arguing of cases, therefore, are from courts of review. In the past hundred and fifty years, these courts have been known as appellate courts. There were no courts of this title prior to the mid-nineteenth century. However, earlier decisions of the courts of first instance were still open to review by higher courts. Therefore, the phrase “courts of review” is used in this thesis rather than the more contemporary “appellate courts”.

The fact that most of the reported cases arise from courts of review produces a particular effect in terms of the importance of a judgment within the legal discursive formation. When a case is argued on appeal, there is no debate as to the interpretation of the evidence adduced at the original trial. That is, cases can be appealed on findings of law, not fact. The findings based on evidence are as accepted by the courts of first instance; questions as to the facts in themselves are not asked on appeal. This means that the language heard in the appeal courts can be understood to be that of the legal discursive formation itself. No expert evidence is heard, no vernacular is used, no foreign languages are spoken (save for the residual Latin maxims that are part of the language of the courts). Therefore, the officially reported cases can be treated as “pure” law and, from this perspective, constitute another expression of the legal discursive formation qua the legal discursive formation.

136 While some appeals can be based on the introduction of fresh evidence, the reported cases that constitute shifts in the common law are, with few exceptions, those in which the grounds of appeal are legal rather than factual.
The written English common law can be understood to be a set of discursive practices that construct the subjects of the discursive formation and the discursive formation itself. Particularly since the eighteenth century, the English legal profession has used a fairly consistent range of writing practices that can be taken to have perpetuated the discursive formation as an independent body for judging defendants. The language used has remained fairly constant, and constantly separable from that of subjects who have not been constructed by the discursive formation. Whilst there have been changes in the specific techniques of training, the practices of education have maintained a focus on the use of written commentaries and the repetition of statements from past judgments. The practices of reporting may have changed over the centuries, but since the Renaissance, there has always been an acceptance of the relevance and validity of past decisions. The next section will focus on the constitutive qualities of the practice of repetition of past legal statements. This will further illustrate the relationship that is constructed through this reading of Foucault’s work between the legal profession and the law. It will also stress the importance of repetition and the utility of an archaeological method in an examination of a series of judgments.

THE REPETITION OF PAST LEGAL STATEMENTS AS THE PREDOMINANT DISCURSIVE PRACTICE WITHIN THE LEGAL DISCURSIVE FORMATION

This section is intended to provide an examination of the role of the legal practice of the repeating of legal statements from preceding judgments in the common law. It is intended to draw together many of the threads of the chapter. The use of previous legal statements can be understood to be a discursive practice that
constitutes and constructs the legal discursive formation. It also can be taken to reinforce the relationship between the discursive formation and the law. The practice is fundamental to that relationship as, from the perspective adopted here, it is constitutive of both the profession and the law.

The role, and use, of past decisions in the operation of the legal discursive formation have been discussed and analysed since the time of Fitzherbert, if not Bracton.\(^{137}\) The practice of referring to past legal statements can be argued to be as old as the profession itself. According to Holdsworth, the practice of following previous decisions dates back at least to 1304.\(^{138}\) Whereas others have argued that it was after the advent of the printing press that ‘the judicial conscience was haunted by suggestions of what a predecessor might have decided’.\(^{139}\)

Usually the practice has been considered in terms of the “doctrine of precedent” or \textit{stare decisis}.\(^{140}\) Those who have discussed these concepts previously have considered them only as interpretive techniques. This perspective, while useful, is inadequate for this understanding of the practice of the repetition of past legal statements. The aim of this section is to establish the importance, for this analysis, of the practice to the common law.\(^{141}\)

\(^{137}\) Baker, \textit{An Introduction to English Legal History} at 225-227

\(^{138}\) Holdsworth, \textit{A History of English Law}, vol. 2 at 541

\(^{139}\) Mellinkoff, \textit{The Language of the Law} at 140

\(^{140}\) It was not until the eighteenth century that the terms “precedent” and “\textit{stare decisis}” entered the English law dictionaries (Mellinkoff, id). It should be noted that I will be using the phrases “\textit{stare decisis}” and “doctrine of precedent” almost interchangeably. I recognise that \textit{stare decisis} is more precisely seen as a narrow, rigid subset of the wider doctrine of precedent. This distinction is less relevant, for the purposes of this sub-section, as I am seeking to compare these narrower characterisations with the wider practice of the repetition of previous legal statements.

\(^{141}\) The variations in the interpretation of \textit{stare decisis} over the years is well covered in Goldstein, Laurence (ed), \textit{Precedent in Law}, Clarendon Press, Oxford, 1987. It is clear, however, that even in the eighteenth century, the courts considered themselves “bound” by certain decisions. In one of the judgments covered in Chapter Four, the court held that ‘If the plaintiffs had sustained the injury by
In this section, I seek to indicate the manner in which the practice of repetition functions as a discursive practice. When understood as a constitutive discursive practice, repetition can be treated as a mechanism of control within the legal discursive formation. The focus in this section is on the operation of the practice of repetition as a form of regulation which empowers judges to speak for, and on behalf of, the law. The argument can be understood to expand on Goodrich’s claim that ‘legal discourse’ is a ‘restricted set of hierarchically defined speakers, together with the internal shielding or valorisation of specific “authorised” texts and the strictly delimited rhetorical settings of legal communication’. This section begins with a broad discussion of what I mean by the practice of the repetition of past legal statements and an analysis of why previous conceptions of the doctrine of precedent can be understood to be incomplete. This will be followed by a discussion of the way in which the application of the wider practice of repetition functions as a discursive practice.

The practice of repetition can be analysed using the framework of Foucaultian discursive controls. Foucault argued for a breakdown of discursive controls into three categories. These are mechanisms internal to the discourse, external mechanisms and those mechanisms that are neither fully internal nor fully external. In this section, the three forms of control will be explored in turn. Each will be examined with specific reference to the practice of repetition. This will explain the centrality of the practice to the understanding of the perpetuation of law adopted in this thesis. In short, the use of previous legal statements is taken to constitute both

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the wilful act of the defendants, then this case must have been governed by that of Tripe v Potter’ (Ogle v Barnes (1799) 8 TR 188 at 191, emphasis added.)

142 Goodrich, Legal Discourse at 174-5
the law and the legal discursive formation. That is, the constraints and controls of
the practice are treated as the constraints and controls of the law.

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This sub-section begins with a description of *stare decisis*. The understanding of
the use of past legal statements adopted in this thesis appears to reflect the
operation of the doctrine of *stare decisis*. However, the practice of repetition that
will be illustrated in Part Two of this project needs to be understood as broader than
the doctrine as usually considered. The distinction between *stare decisis* and the
practice of repetition must be carefully delineated if the application of the
archaeological method, as understood here, and the analysis of the examined judgements, are to make full sense.

Explaining *stare decisis* has been made difficult as a result of the fact that the
specific rules relating to the application of *stare decisis* have been expressed in a
variety of ways.¹⁴³ However, a translation of the Latin phrase provides a starting point. *Stare decisis* (or more fully, *stare rationibus decidendi*) is the call for judges
to ‘keep to the rationes decidendi of past cases’.¹⁴⁴ Though this practice is at the
heart of the case law tradition, there is no readily available judicial interpretation of
what constitutes the *ratio decidendi* (reason for deciding) of a case. Within the
secondary literature, observations as to the nature of the ratio include:

> The *ratio decidendi* of a case is any rule of law expressly or impliedly
treated by the judge as a necessary step in reaching his conclusion,

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¹⁴⁴ Ibid at 100
having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury.\textsuperscript{145}

And

The \textit{ratio decidendi} is the rule or principle of decision for which a given precedent is the authoritative source, whether that rule or principle is then to be treated as binding or only as persuasive in some degree for other later deciders of similar questions.\textsuperscript{146}

These descriptions suggest that there is no simple formula for determining what, in general terms, constitutes the \textit{ratio} of a case. That is, there is no readily available judicial interpretation of exactly what constitutes the application of \textit{stare decisis}, as there is no specificity as to which parts of previous judgments must be followed. This creates a problem in the analysis of the law.

It is only a problem for analysis, however, as the lack of rigour does not prevent the use of the practice. The lawyers and the judges see the rule of \textit{stare decisis}, for example, only as a tool to reach an adjudication, an ‘object’\textsuperscript{147} of the law, a thing to be used in order to discover the law. Using the doctrine of precedent as a tool allows a degree of flexibility with respect to the use of past decisions. The legal training of the members of the legal discursive formation produces law in such a way that all courts have to consider past decisions in coming to a decision in any area of law. The judges “have to consider” these past decisions.

If the doctrine is only a tool that is to be used then some previous decisions can be distinguished on certain grounds, such as the relevance of the past decision to the

\textsuperscript{145} Ibid at 72
\textsuperscript{146} MacCormick, Neil, ‘Why Cases have \textit{Rationes} and what these are’ at 156
circumstances of the case before the court. The decision as to the relevance of a “precedent” is made by the judge, in part, on the basis of the competing legal argument of counsel. The citing of previous cases by barristers is accompanied by their justification for the citation. Justification could be based on a similarity of the facts of the case or by previous uses of the “precedent”. The judge then weighs up all the arguments, including the claims as to relevance of the cited cases, and produces a judgment. A previous decision is only binding if a judge has been “persuaded” by counsel who have argued for its relevance.

This “flexibility of use” of the doctrine of *stare decisis* seems to go against the claim that the doctrine is a “rule” of law. The problem that arises with the theorising of the doctrine is that the law changes yet *stare decisis* suggests that the law is limited to what has gone before. It has been asked before “how this perpetual process of change can be reconciled with the principle of authority and the rule of *stare decisis*”.  

Stone’s answer to this paradox was to recognise the indeterminacy of finding the *ratio* of a previous decision and to argue that it is the “unacknowledged, and even unconscious, creativeness” of judges that solves the problem. In other words, Stone privileges judicial choice over the strict application of an indeterminate principle.

The problem with the “*stare decisis* as a tool” approach is that it moves the problem one step back. The approach does not deal with the nature of the “choice” of the judges. Stone recognises the indeterminacy of *ratios* and also recognises that the use of precedent produces change. Yet, his solution is not consistent with the

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148 Lord Wright quoted in Stone, *Legal System and Lawyers’ Reasonings* at 230
149 Ibid at 304-5
understanding of the manner in which precedents work in the law that is adopted in this thesis. Stone leaves it at the suggestion that the law operates and changes through the actions and choices of judges who appear as agents in change. Agency of this sort is not consistent with the understanding of Foucault adopted here.

There is an alternative to this position that is more consistent with the reading of Foucault used in this project. This other position does not require a great shift in understanding. The two definitions for *stare decisis* that were listed above can be merged to produce a new definition. The new definition is a “*statement* of law, recognised within the discursive formation (whether in the body of the ‘writing’ judge or future judges) as a necessary step in reaching a legal conclusion”. This definition is not for the *ratio* of a case but for any previous statement of law that a judge may use in writing a judgment. The practice of the privileging, within the legal discursive formation, of certain written statements of judges can be seen to use such a definition of *stare decisis*. The statements that are privileged can then be repeated by others within the formation.

These statements are not limited to, but do include, the *ratios* of judgments. Repeated statements may be legal principles and maxims that no longer require case citations. The phrase “duty of care” is one such statement. It can be repeated by any member of the legal profession without any case being linked to it. Other repeated legal statements include ones of definition, such as those statements describing the limits of particular writs. Any phrase that describes an aspect of the law is repeatable under this discursive legal practice. *Stare decisis* is a principle that deals with the repetition of the central “rules” of cases. The legal practice of
repetition discussed in this thesis is not limited to the specific citation of particular rules or *ratios* but to any statement contained within a preceding judgment. This practice of repetition is similar to the doctrine of precedent but can be seen as both being wider than the doctrine and as operating on a more fundamental level that seems more in keeping with a Foucaultian approach. When seen as a tool, *stare decisis* is seen as something to be applied. If the repetition of statements is seen as a practice it is easier to see the myriad of other practices associated with this one fundamental practice. The use of previous decisions is structured, from the perspective adopted here, according to other practices. Whether a decision is taken to be binding, for example, relies, in part, on the way it is brought to the court by counsel. The choice of which set of reports are used to gain the words of the previous statements is also limited by a set of practices. Choosing to see this practice of repetition solely in terms of the doctrine of precedent denies the constitutive power of the practice of repetition of past legal statements that is important for a Foucaultian understanding of the law. It disallows the view that the practice of privileging previous statements creates the legal system as we know it. The common law would not be the same, would not function in the same way, if the practice of repetition was not applied.

Lawyers and judges cannot define the doctrine of precedent because it is “always/already” there. The practice of repetition of previous legal statements also pre-exists the practitioners’ understanding of law. The doctrine can be seen to construct the law to the extent that it cannot be defined, it cannot be explained without recourse to examples of it in practice. Cross and Harris, in the first chapter of their influential text, *Precedent in English Law*, do not include a section devoted to an analysis of the doctrine. This is not a criticism of this learned text, but an
illustration of the impossibility of rigorous definition of *stare decisis*. That doctrine, however, can be seen as an example of the practice of repetition of past legal statements, and is therefore comprehensible in terms of the framework adopted in this thesis. This understanding does not alter the fundamental role that the practice of repetition plays in law but widens the scope of that which can be repeated and denies to judges the role of agents,\textsuperscript{150} which is required by the understanding of Foucault’s work adopted in this thesis.

The constitutive strength of the doctrine of precedent can be understood to rest on its lack of definition - that which can be limited in word can be distinguished as irrelevant or inappropriate. The wider practice of repetition can be understood to operate on a much more practical level. It is because the assumptions underlying the use of previous statements can be understood to be so deeply ingrained into legal practitioners from the beginning of their training that they do not need to be repeated. The strength of the practice can be taken to be based on its width of application. In the following sub-sections the relationship between the practice of repetition and the common law will be examined. This will illustrate the depth of the relationship between the members of the legal profession and the statements of law they produce in the conduct of their work as lawyers and judges that is central to the understanding of the law that is at the heart of this thesis.

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\textsuperscript{150} At least the role of an agent that exercises complete free will is denied to judges in the perspective adopted here. The capacity, allowed to the judge by legal discursive practices discussed in this section, to “select” the most appropriate legal statement to repeat in a given judgment can be seen to reflect a limited form of “agency”.
This practice of repeating previous legal statements is, from the perspective adopted in this thesis, a discursive practice. It is a practice that constructs both the law and, through the processes of subjectification, the members of the legal discursive formation, the legal profession. This sub-section begins an examination of the practice as one of the Foucaultian discursive controls that is carried through the two following sub-sections. In this sub-section the consideration of the practice of repetition is as a practice of external control.

Foucault identified three techniques as important to external control. These are ‘forbidden speech, division of madness and the will to truth’ 151 For ‘it is the power of institutions and not the truth of the discourse that excludes its false competitors’. 152 That is, the claim to truth of a particular discourse or discursive formation is not based on an objective Truth, but on the strength of its discursive practices.

These external techniques for management revolve around the capacity of members of the discursive formation to deny to “outsiders” the opportunity to be heard within that formation. The ability of those with perceived power to exclude people because of their utterance of the “forbidden”, or their lack of knowledge of the “right” speech is, in a ‘society like ours... well known’. 153 Categories such as “the insane”, “the young”, and, in less enlightened times, “women” and “the disabled” act as barriers for entry into discourses of power for people who fit into these categories. Even simple requirements, such as particular education levels, prevent access for some. Their lack of schooling denies them possession of the “right

151 Foucault, ‘The Order of Discourse’ at 55
152 Shumway, D.A., Michel Foucault, Twayne, Boston, 1989 at 104
153 Foucault, ‘The Order of Discourse’ at 52
speech”, which is considered essential for occupying certain positions in our society. The legal discursive formation is a good example of this. Children are not permitted to speak on behalf of the law, nor are others with an “insufficient” education. Even a person who has completed a Bachelor of Laws degree is not permitted to practise as a legal advocate, until they have proven their “value” to the profession through a clerkship.

These external modes of control commence with “forbidden speech” and the “division of madness”. These techniques prevent those within the discursive formation from considering the words of those who are not constructed subjects of that formation. Their words are literally forbidden. Its exclusionary tendencies are perhaps the most obvious mechanism through which the practice of repetition can be understood to shape the discursive formation. The practice is the privileging of past legal statements. When judgments are written, the words of the temporary visitors to the formation, such as witnesses, the words of the permanent subjects, counsel, and the legal statements of past judges are considered. No other statements are included in the formulation of the decision. Even the words of visitors are limited. Witnesses can only provide information requested by counsel, certain types of evidence (hearsay, unqualified opinion) are also excluded from judicial consideration.

An apparent exception could be made for secondary sources, such as academic works. However, even these secondary sources are not totally “outside” the discursive formation, as the writers are usually trained lawyers, or academics with legal qualifications. The end result, from the perspective adopted here, is that only those who have been recognised within the legal discursive formation as having the
ability to speak of the law are given the power to “speak” in legal judgments. The
effect of this, for this analysis, is that those within the legal discursive formation
are only allowed to pay heed to the words of sanctioned subjects. Outsiders are
considered un-knowledgeable and, from a Foucaultian perspective, exhibit
“unreason” or “madness” if they presume to speak of law.

The third mechanism of external discursive control, the “will to truth”, is more
subtle. Within the positivist discourse of Western culture ‘the division between true
and false is neither arbitrary nor modifiable nor institutional nor violent’.154 It
simply “is”. This dichotomy between truth and falsehood is not “natural” in the
world. It is a discursive construct. A construct that ‘rests on an institutional
support… [on] whole strata of practices, such as pedagogy... books, publishing,
libraries; learned societies… [and] laboratories’.155 From this perspective, the
discourses of the “human” and “natural” sciences constantly reinforce the notion of
a truth and their processes further reinforce this will to truth.

The pedagogy of the law, with its centuries of reports and writs, can be understood
to preach a legal and juridical Truth. Justice will be found in the words of
judgments. Any point of adjudication can be settled through recourse to previous
recorded adjudications. The law reports hold the Truth to the law of the land; the
discursive formation functions on the belief that the legal statements of past judges
are Truth.156 In the rare situation where a factual situation does not readily fit into a
past judgment, the subjects of the discursive formation, the barristers and judges,

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154 Ibid at 54
155 Ibid at 55
156 Except in cases where their statements are appealed. In that case, the words of the judges of the
final court of review in that particular case are held to be the Truth.
will negotiate a suitable solution, still based on previous judgments. While the ‘common law must expand to keep abreast of modern life’, from the perspective adopted in this thesis, it only does so on the basis of past decisions, on previous legal statements.

This “will to truth” is understood to extend further than just the “objective” truth claims of the discourse. ‘For Foucault… the ethical substance, the prime material of moral conduct, is the “will to truth”’. This final mechanism of external discursive control produces the Truth of the legal discursive formation. From the perspective adopted here, this exclusionary practice has to be part of the constitution of the subjects for it to be effective. The practice of repetition, in this view, compels those within the discursive formation to behave according to the doctrine. Lawyers will seek out the appropriate precedents. Judges will expect to be told of the appropriate precedents and, in turn, will repeat some of the legal statements contained in these precedents. This is the “right”, or “truthful”, way to conduct the practice of judicial adjudication. In this way, the practice of repetition can be understood to function as an external form of control internalised by those within the law.

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This sub-section deals with the internal modes of control of the discursive formation. The internal techniques of discursive control include, in Foucault’s

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157 Hanson v Wearmouth Coal & Sunderland Gas [1939] 3 All ER 47 at 54 per Goddard LJ.
words, ‘principles of classification, of ordering and of distribution’. These principles relate to the practices of assigning roles, or classifying individuals, and are particularly evident in the sciences (for example, Linnean categorisation). More broadly, categories in general are taken to have been formed through the histories of the discourses and have been kept as ‘ritualised sets... which are recited in well-defined circumstances’. This sub-section will make explicit the role of repetition of past legal statements in the perpetuation of this categorisation. It will describe the practice of repetition in terms of the processes of ordering within, and therefore underlying, the legal discursive formation as it is understood here.

The practice of repetition includes the practices associated with the doctrine of precedent. This quotation by Lord Campbell in *Beamish v Beamish* exemplifies *stare decisis* as a mechanism of internal control:

> The law laid down as your *ratio deciden*, being clearly binding on all inferior tribunals, and on all the rest of the Queen’s subjects, if it were not considered equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority.161

The doctrine of precedent is a technique to place judges, at all levels, into an appropriate category, with each of these categories being assigned particular powers. Judges are considered to sit on inferior or superior benches. While there is a category of judges, which represents the ultimate judicial authority, even that

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159 Foucault, ‘The Order of Discourse’ at 56
160 Id
161 9 HLC 274 at 338-339
162 The judicial hierarchy is another aspect of the discursive formation that has changed over the past 250 years. However, from the 13th century onwards, ‘every court of record was subject to the surveillance of some other tribunal to ensure that in giving judgment it did not err on the face of its record’ (Baker, *An Introduction to English Legal History* at 157-158). The procedures have changed, but there has been an internal structure to the discursive formation that allowed decisions to be revisited.
Court must abide by the processes of ordering by which all other Courts are regulated. It would appear that the hierarchisation of the judicial system would fit into this category of internal control, and to an extent it does. However, the hierarchy of courts fulfils another form of control which will be further explained in the next sub-section.

The doctrine of precedent, understood here as the practice of repeating past legal statements, is a form of categorisation that goes beyond the labelling of the courts and their positions. Previous cases are also differentiated and this affects the treatment of past cases. In short, past judgments are not treated equally. Reported judgments are treated differently from unreported judgments and official from unofficial reports. Within the category of recognised precedents, there are also those that contain statements that cannot be overlooked and those that contain statements that can be overlooked (in legal discourse this can be understood in terms of the binding/persuasive dichotomy).

The practice of repetition does not prohibit judges from using any past legal statements, but the internalised form of “forbidden speech” means that they have to explain their repetition of a statement from an unreported or unofficial judgment. No statements in preceding judgments are excluded from future adjudications. This limitation with respect to particular legal statements can be understood as an internal control, rather than an exclusionary external control, as it only affects the weight given to a particular statement of the law. In the case of the reported/unreported dichotomy, an oft-quoted reported judgment will be treated differently from an unreported judgment. In terms of the use of either official or
unofficial reports, it is the statements contained in the official reports that are more likely to be repeated.

The decision as to whether a statement in a precedent is binding is to some extent a function of the specific decision event. A judge’s apparent “agency”, from the perspective adopted here, will be constrained by the categories of the courts (their relative positions), the categories of evidence and facts (relative fact situations) and, perhaps most importantly, on the particular characteristics of the judge’s training. That is, the years of training provided by the discursive formation will substantially affect a judge’s decision. For example, a judge who worked as a barrister specialising in corporate law before reaching the bench may have a different perspective of the law from a judge who worked predominantly in criminal cases. This different perspective may affect their willingness to repeat certain legal statements in their writing of their judicial decisions. A judge will also make a decision in the knowledge that if her/his decision is “wrong” then procedures within the formation, the appeals process, will “correct” the “mistake”.

It is the operation of procedures of organisation that are understood to produce discursive formations and institutions. In law, from this perspective, procedures organise, and therefore construct, the use of past decisions. If the practice of repeating past legal statements is the basis of adjudication, then mechanisms and procedures that control the selection of statements must be in place, which will also have the effect of limiting the number of past cases that have to be addressed. The

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163 A judge’s agency cannot be taken, in the perspective adopted in this thesis, to be “true agency”. Given Foucault’s notion of subjectification, discussed above, a subject of a discourse does not have the capacity to make a “free choice”. A subject of a discourse is limited in their choice to actions made available by the practices of the discourse.
classification of law into criminal/civil/administrative/tort divisions and the
division of decisions into reported/unreported/official/unofficial, then, are
necessary for the regulating of the practice of repetition. As mentioned above, the
hierarchisation of the judicial system is linked with this form of internal control.
The hierarchisation that operates for internal control can also be seen as a process
of what Foucault described as rarefaction. This mode of control will be more fully
explained in the following sub-section.

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This final sub-section explores those processes of discursive control that are neither
fully internal, nor fully external forms of control. That is, those processes of
‘rarefaction…of the speaking subjects’. 164 As Foucault put it:

none shall enter the order of the discourse if he does not satisfy certain
requirements or if he is not, from the outset qualified to do so. To be
more precise: not all regions of the discourse are equally open and
penetrable: some of them are largely forbidden (they are differentiated
and differentiating), while others seem to be open to all winds and put
at the disposal of every speaking subject, without prior restrictions. 165

A principal technique for creating these restrictions is the hierarchisation of the
court system. The “speaking subjects” mentioned above can be understood to
comprise everyone in society who is capable of speech and not just those who are
constructed within a particular discourse. Within the legal discursive formation
only a few “speaking subjects” from the community at large are heard. Some claim
a place as litigant. Some are encouraged to act as jurors. Some become witnesses.
While these “speaking subjects” are not refused entry to the practices of the

164 Foucault, ‘The Order of Discourse’ at 61
165 Ibid at 61-62
discursive formation, their access is limited. That is, subjects such as witnesses and jurors are allowed into the courts but not the law.

There are some “speaking subjects” who, through their success within the educational discourse, have the option to participate directly in the legal discursive formation. That is, given sufficient academic achievement, these “speaking subjects” attend university,¹⁶⁶ graduate and then, after a period of further applied training, gain acceptance into the discursive formation as lawyers. Of these, a few “speaking subjects” are given certain privileges by those through whom power passes within the discursive formation (Queen’s Counsel, magistrates, judges, Law Lords). Positions within the legal discursive formation are not equally open and accessible, even to those within the formation.

As was mentioned in the previous sub-section, the judicial hierarchy can be understood to represent a form of internal control – classification and ordering, but it can also be taken to represent a form of external control, as it limits the availability of contact with those outside the discursive formation. The regulation of the practice of repetition can be understood to be a manifestation of this privileging of positions. Given the written nature of the law, changes to the law can be understood to be brought about through the production of written legal statements, and the privileging of some of these writings reflects the authors’ positions within the law. Witnesses or jurors, whilst potentially integral to the outcome of the case in which they are involved, will not be included as individuals in the records of judgment, because, from the perspective adopted here, they are not

¹⁶⁶ I recognise that it is still possible in most jurisdictions to enter into a five year clerkship, but it is less common. It still requires a certain level of education, the significant difference is in the focus of the training rather than its relationship with the discursive formation.
constituted as members of the formation. It should be noted that this, in part, is due to the Truth claim that the courts of review are the “speakers” of the law. However, this emphasis on the “higher” courts is indicative of the distribution of power within the law. It also can be seen to function as a mechanism for denying outsiders a direct voice in the law that is carried forward in judgments.

Even statements from the officers of the court, the barristers, are rarely included in final judgments, and statements by those who provide the instructions to the barristers are even less likely to be included. At the court of review level barristers are very important to the content of a judgment, as they provide judges with the arguments and the citations which tend to form the basis of the final decision.167 Yet, the hierarchisation within the discursive formation and the methods of reporting severely limit any repetition of the statements of barristers. While some reports do include counsel’s arguments immediately preceding the judges’ decisions, in practical terms (and in definitional terms), the practice of repetition relates to past judgments, not past arguments. The regulation of the practice of repeating previous legal statements can be understood to dictate that the words of barristers are not taken into account in the practice. The power of the discursive formation, from the perspective adopted here, flows through the words of the judges alone.

The difference between the amount of attention paid to the decisions of magistrates and to those of judges can also be taken to reflect the process of rarefaction to

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167 Counsel who appear before courts of review are also a product of the processes of rarefaction. That is, such counsel tend to be “Queen’s Counsel” (or their equivalent). This “rank” is awarded only after the barrister has demonstrated her or his capacity to perform, to a high level, the discursive practices necessary to appear as counsel in a court.
which Foucault refers. The magistrates, even though superior in terms of numbers, are not usually amongst those adjudicators whose decisions are recorded in law reports. The “further up” the judicial hierarchy she or he is, the greater the potential for a judge’s decision to be included in the legal record for future availability as a “precedent”. The limiting of the potential for repetition of the words of magistrates also acts as a process of rarefaction of the language accepted into the discursive formation. Magistrates and the courts of first instance deal almost exclusively with questions of fact and the comparison of specific evidence with often repeated statements of law. Witnesses do not speak the language of law, but that of their own processes of subjectification.168

The practice of repetition is almost exclusively concerned with the judgments of the courts of review. Thus, the practice can be understood to generate “law” because questions of facts have been largely dispensed with by the time the case has passed the courts of first instance. The statements of witnesses are not included in a judgment. The statements of law that are repeated in later judgments becomes, from this perspective, the law. Thus, the discursive practice of privileging written statements generated within a delimited range of courts can be understood to be bound up with the hierarchisation of the court system. Through the processes that differentiate and assign values to different statements, the practice of repetition also functions as the third, and final, form of discursive control, that of rarefaction. That mode of control which is neither fully internal, nor fully external.

168 The defendant will speak the language of their upbringing, the police prosecution will speak the language learnt in the training of the officer and the expert witnesses will speak the language of their specialty.
This exploration of the manner in which the practice of repetition functions within the legal discursive formation suggests that it is central to the construction, and the continuation, of procedures of adjudication. In particular, in this section I have attempted to show how the practice controls the interaction between different members of the legal discursive formation. These practices regulate judicial proceedings and limit the actions of the profession in terms of legal argument and legal judgment.

It is now possible to view the practice of repetition as more than an interpretive tool of the legal profession. The practice of the repetition of past legal statements has contributed to the constitution of the law as we now know it. This section provides some understanding of the operation of precedent in the law, recognising the importance of the practice of repetition in the structure of the common law. The practice can be understood to derive its strength from its “always/already” nature. From the perspective adopted here, the practice of repetition is the aggregate of several discursive practices that constitute those people who operate as the legal profession. The legal discursive formation is understood to be the sum of its discursive practices, with the privileging of past judgments as the most fundamental of these practices.

The fundamental nature of the practice seems evident in a number of ways. First, through the exclusionary technique of only recognising the voices of trained in the law, and the internalisation of this practice by members of the legal community. Second, through the internal control techniques of ordering and classification. Third, through the processes of rarefaction. The law is structured, in this account, according to the workings of practice of repetition. While no practitioner would
deny the importance of this practice, this section takes that assumption further and suggests that the practices that govern the repetition of previous legal statements provide the foundation of the law. The law would not exist in the same way if the practices associated with the repetition of past legal statements were of lesser importance. These practices can be understood to possess the power of legal origin and to be fundamental to the function of common law as law.

CONCLUSION

This chapter applied the discourse theory developed in Chapter One to some of the specific features of the law and the legal discursive formation. The chapter provided a perspective on the law, legal profession and the relationship between the two based on the concepts of discursive practices and of subjectification. It is this understanding of legal discursive practices that will be used for the application of the archaeological method in Part Two. The focus of this thesis is an application of this method to a number of decisions from the English common law dealing with civil liability for acts in which property or a person is damaged. Part One was intended to provide the background needed to exercise the method in Part Two. Part Two will attempt to excavate relevant judgments and analyses the way in which the members of the legal profession “see” the defendants who come before them.

In this chapter, the first section dealt with the law in general, with a closer look at the construction of the legal subjects. In short, legal subjects are understood to be constructed to behave in particular ways, according to particular norms. These norms are produced, in part, through the processes of subjectification. That is, the
subjects participate in their own processes of construction, and more importantly, they practise self-regulation. It was necessary to discuss this process of subjectification in order to explore the understanding of the impact of the law on the wider community and the impact of legal training on lawyers and judges that is adopted within this thesis.

The second section was a “history” of the legal profession. In particular it was a “history” of some of the practices of the legal profession. From the seventeenth century, the profession can be seen as a self-regulating, self-perpetuating institution independent of the Crown and other procedures of governance. The particular legal discursive practices of the law are understood to construct and limit the institution as it is and as it has been. These practices relate to the processes of training and education of the members of the legal discursive formation. Lawyers and judges carry out their legal duties in the way they were constructed to carry them out. As the profession is a self-perpetuating institution, one generation of lawyers trains the next generation. In this way, practices can be preserved and the continuity of the law can be maintained.

The legal discursive practices internalised by lawyers and judges dictate how they carry out their professional duties. The practices, therefore, can be understood to construct the legal judgments that members of the legal profession produce. These written judgments both perpetuate the law and are sites of rupture within the law. The third section of this chapter examined these processes of change in the legal discursive formation. The law can be understood to change incrementally on a case by case basis. Lawyers and judges are taken to have been trained to repeat single statements of the law in the form of precedents. The section also highlighted how
counsel, in their arguments to the court, act as sites of power and of resistance with respect to the perpetuation of the legal discourse. The legal statements that are repeated usually come from judgments of courts of review. Change can be seen to be accepted, as the members of the discursive formation are considered to be constructed to accept the new statements of law that arise from the decisions of higher courts.

Section Four included an examination of certain legal practices associated with writing, focusing on the use of commentaries and law reports. The most important of the legal discursive practices is the construction of the law as a written discourse.\(^{169}\) The efficacy of past legal statements may be improved if they are written down and made available for mass distribution. The technology of mass production can be understood to have encouraged the use of legal writings as the basis of legal education and production of law. Law students are trained through the use of past cases, textbooks and commentaries. Lawyers use books of precedents to construct legal documents. All statements produced in court are recorded in written form and the final decision is produced as a written judgment.

The final section included a discussion of the importance of the use of previous statements in the practices of law. The practice of repetition involves the privileging and acceptance of past decisions as statements of “law”. This practice can be understood to contribute to the hierarchisation of the legal profession, which

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\(^{169}\) This chapter was not aimed at “proving” the law is a single discourse or a number of discourses. The purpose was to illustrate the discursive practices carried out by members of the legal discursive formation in such a manner as to enable an application of the archaeological method in the second Part of this thesis. There is an understanding, throughout this chapter, that there are similarities between the eighteenth and twentieth century practices. However, it will only be after the application of the method, as understood in this project, that there can be a discussion as to whether there existed one legal discourse since 1750 or a number of discourses.
determines the importance placed upon particular writings of particular judges. It is not a “natural” condition of society that the community accepts the words of a very select group when it comes to contemplating and possibly compensating for any damage to the person or goods suffered by a member of that community. It is the practices of the law and the processes of subjectification that can be understood to ensure the acquiescence of the population. The practice of repetition can be taken to show the intrinsic relationship between discursive practices and the perpetuation of a discursive formation and, therefore, the perpetuation of one of the principle structures of a society in which the rule of law exists.

The practice of repetition can be seen as fundamental to the relationship between the law and the legal profession. The practice constructs and limits both the profession and the law. The practices of repetition, learned during the training of practitioners, limit the legal statements that are available to the judges in writing their decisions. The sum of these precedents, that is all written legal judgments, can be understood to be the law. The writing of these judicial statements can also be understood to be the “law”.

The second Part is intended to provide a demonstration of the relationship between the law and the discursive formation through an application of the archaeological method as I understand it. This analysis of the past judgments is intended to show how certain key phrases have been carried forward and modified as the law. That is, the practice of repetition, as it has been described in this chapter, will be “teased out” of the judgments excavated in the later chapters of this project.
Further, drawing on the discussion of the processes of subjectification, Part Two will attempt to provide an illustration of how the members of the legal profession perpetuated a particular construction of the legal subject in the eighteenth century and how they perpetuated a different construction of legal subjects in the twentieth century. Therefore, the nineteenth century can be broadly characterised as a period of change in terms of construction of legal subjects by the lawyers and judges.

The law did not lose its legitimacy, despite this shift in the relationship between the profession and the wider society shown over the period covered by this thesis. Particularly in the nineteenth century the law can be seen as undergoing significant legal change whilst the fundamental practices of the law remained the same. The processes of discontinuity and continuity in the law and legal discursive formation can be understood to be possible because the legal practitioners are constructed subjects and behave as they are trained to behave. Part Two will highlight the change in the legal construction of liability through the legal practice of repeating past legal statements. That is, Part Two will illustrate how lawyers and judges can produce shifts in the law whilst maintaining the legal practices that are at the heart of their legal training. Part Two will provide these outcomes through the application of my understanding of Foucault’s archaeological method.

170 The point needs to be emphasised that these arbitrary classifications of centuries are not used to represent marker points with respect to specific changes in the law. The reference to centuries is only a technique of convenience to highlight broad practices that can be attributed to dominant features of the practices of law in that period.
PART TWO
INTRODUCTION

This Part provides something of a more practical application of the central ideas of the thesis. It is in this Part that the archaeological method, as it is understood in this thesis, is applied to a number of decisions in negligence law. This application builds upon the understandings, which were discussed in Part One, of the roles of discourses and discursive practices, the processes of subjectification and the centrality of the practices associated with the repetition of past legal statements in the law and legal profession. The analysis that accompanies the use of the archaeological method, as understood here, will pay particular attention to those legal statements that are repeated over time and those that are repeated for a while and then cease to be repeated.

Both the law and the legal discursive formation change over time, but they change together, as they are produced through the same discursive practices. In this Part, the focus will be on how certain aspects have changed whilst maintaining the continuity of law that provides this form of governance with its legitimacy. The particular change that will be considered is the shift in articulations of liability for injury caused by the negligence of legal subjects that occurred between the eighteenth and twentieth centuries. This change in the legal construction of liability also suggests a change in the way in which the legal subjects of society come to be “seen” by the members of the legal profession.

An application of the archaeological method may be one in which written documents are taken to be discursive “monuments”. These monuments are seen to
be worth excavating in their own right. There is no need to look, and no value from a Foucaultian perspective in looking, behind the words to the minds of the authors of the monuments. In this discursive understanding of the law, “authors” and documents are seen to be the products of the same discursive practices. Chapter Three will focus on the method, both in the abstract and in terms of its application to legal writing in this thesis. In that chapter the specific characteristics of the method, as understood in this project, will be highlighted and the selection of decisions to be excavated will be explored in depth.

The archaeologies are presented in Chapters Four, Five and Six. Each chapter will include an excavation of judicial decisions from a particular century (Chapter Four deals with the eighteenth, Chapter Five with the nineteenth and Chapter Six with the twentieth century). These decisions will be analysed and discussed in chronological order. The “excavation” of each decision is intended to reflect the requirements of the method as understood in this project. Each excavation will involve a “sifting” of the judgments of the members of the legal discursive formation in order to isolate the statements of the law that have been repeated from earlier judgments.

The aim of this archaeology is not to deduce the ratio of each decision, the aim is to highlight those statements that are repeated from earlier decisions. The bulk of the excavation, therefore, will be taken up with a thorough description of the words of the judges. However, the words of counsel are also important as, in many cases, statements are first introduced into the court by counsel. Therefore, in an examination of the use of legal statements by judges it seemed appropriate to look
at the statements of those members of the profession who, in many cases, provided
the judges with statements to repeat.

Given that they are not governed by a “truth” that determines their actions, each
archaeologist may need to provide their own goal for their “dig”. In this
archaeology, “the law” being examined, the judgments chosen, and the words
privileged in my analysis of those judgments, reflects my interest in constructions
of liability for negligent actions. It can be said that there is no “natural” articulation
of this liability in the world. Any attribution of liability for negligent actions can
therefore be seen as a construction. In law, members of the legal profession can be
understood to be constructed so as to repeat specific articulations of liability. These
articulations have changed. The processes of change in this context may be
illustrated through the use of the archaeological method. At least, my desire is to
generate an archaeology of cases that provides some insight into constructions of
liability for negligence in the English common law of the eighteenth, nineteenth
and twentieth centuries.
CHAPTER THREE - THE ARCHAEOLOGICAL METHOD AND ITS APPLICATION TO A HISTORY OF “THE LAW”

INTRODUCTION

Part One was an attempt to provide the theoretical basis for this thesis. This chapter will develop this discursive understanding in a description of important aspects of the method to be employed in Chapters Four, Five and Six. Foucault’s archaeological method is based on a discursive understanding of society. That is, the use of the method, at least as it is understood here, relies on the understanding that all citizens can be seen as being constructed by discourses and discursive formations. All interpersonal interactions are constituted, from this perspective, through the discursive practices of those discourses. An archaeology of the English common law, or an excavation of a section of it, may be founded, therefore, upon a discursive understanding of that law and its operation within society.

This project is one of the first uses of the archaeological method outside the corpus of Foucault’s own work.1 This project is also one of the first attempts at the application of the method to an active discourse.2 That is not to say that the

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1 In his first publication, *Madness and Civilisation* (Routledge, London, 1971), Foucault referred to the project as a “history”. The next two, *The Birth of the Clinic* and *The Order of Things – An Archaeology of the Human Sciences* (Vintage, New York, 1973), Foucault explicitly labelled “archaeologies”. The techniques used in the three are related, however those used in the latest, *The Order of Things*, were the most refined. His next book, *The Archaeology of Knowledge*, he considered to be an explication, a ‘clearly defined’ articulation of the method (*The Archaeology of Knowledge* at 15).

2 The two other applications of the archaeological method that I have encountered – Giulianotti, R., ‘Drugs and the media in the era of postmodernity: an archaeological analysis’ (1997) 19 *Media, Culture & Society* 413 and Dillon, S., ‘The Archaeology of Victorian Literature’ (1993) 54 *Modern Language Quarterly* 237 – did not have the same focus as this project. Dillon’s work was not an archaeology of a current discourse and Giulianotti’s did not examine the archive of the media over a period of time. In addition, neither of the authors undertook an in-depth discussion of the archaeological method itself.
academic world has ignored the method. Indeed, there have been many critiques of and commentaries on the method and its practices. Yet, this project is one of the first to try to examine the monuments of the law using Foucault’s archaeological techniques.3

This thesis is a point of inflection in the archaeological method as a discursive function in its own right. The starting point for the method described here is Foucault’s description of the method. The use of Foucault’s techniques in this thesis has also been affected by other writers’ interpretations of the archaeological method, in particular that of Kendall and Wickham.4 Therefore, the method used here is not identical to Foucault’s and has been developed in the light of opinions and criticisms of the archaeological approach that were encountered in the preparation of this thesis.

The method as presented in this chapter is not a “definitive” description of an archaeology. Nor is the application that follows in Chapters Four to Six a definitive application of the method. The explication, and application, of the techniques contained in this thesis are only one part of a web of documents relating to Foucault’s historical perspective.

In both the Foucaultian and traditional sense, an archaeology is an excavation of monuments. From the Foucaultian perspective adopted here, an archaeology is an exploration of texts that form a discourse, a discursive formation or set of

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3 As was noted in the Introduction, Les Moran undertook a genealogical exploration in his Homosexual(ity) of the Law, however this thesis is among the first to examine the common law with the archaeological method.

4 Using Foucault’s Methods.
discursive practices. As the focus is on “formations and transformations” the examination necessarily takes place over time and takes into account the schisms and continuities that may be evident over an extended period of time.

The description of the method that is provided in this chapter is divided into three sections. The first deals, in a more abstract fashion, with the practices that constitute the method as I understand it. The discussion will draw upon the understanding of discourses, discursive formations and discursive practices that was presented in Chapter One of this thesis. This section begins with an examination of the discursive basis of the method. This will be followed by a discussion of the discursive practices, as they apply to the production of written texts by subjects of the discourse, and of the documents that are written by these subjects. These documents become “monuments”, or objects to be excavated and described by an archaeologist. The role of archaeologists themselves, their constructed nature and the choices that must be made in the writing of an archaeology, will also be examined in this section.

The second section will focus on the characteristics of the method as understood here. The method is constituted by a specific set of practices, which produce a specific set of consequences. An archaeology can be seen as a descriptive enterprise and, therefore, is not an attempt to trace a causal connection, or even progression, in the events and monuments described. Similarities and differences in the monuments may be highlighted by the archaeologist in order to account for changes in the discursive formation. Documents are taken to be monuments, or artefacts, worth examining in their own right. They are not treated as representative of an unwritten Truth. Further, an archaeologist does not look behind the
documents to intuit the truths that past authors are seeking to express or communicate. From this perspective, an archaeology provides an annotated description of past documents.

The final section of this chapter begins with the application of the method, as described in the previous two sections, to a history of the law. In particular, the section will include an explanation of the choice of classifications to be used in the last three chapters of the thesis. In order to do this, this section will return to the concept of the common law as a written discourse and the legal profession as a discursive formation largely constructed through a set of discursive practices associated with the production of written texts.

From a discursive perspective, the repetition of past legal statements in judgments and legal arguments is one of the fundamental practices of the legal profession. An application of a legal archaeology may, then, use decisions of courts of review as its raw materials. Specific judgments, if such an approach is adopted, can be excavated and used as the monuments upon which a project is focused. In addition, the words of the counsel who presented arguments to the court can be included in the excavation of judgments, as it is these members of the profession who offer particular legal statements to the judges who may choose to repeat them in delivering their decisions.

This chapter supplies the description of the method that will be applied in the balance of this thesis. The choices I have made with respect to the judgments selected are also explained. As the legal field covered in this project is wide, from the historical writs of actions on the case and trespass to the more contemporary
area of negligence, a selection process was necessary to determine which monuments were to be covered in this archaeology. The choice of cases to be examined was a reflection of the understanding of the relationships between the law, the members of the legal profession and their writings that are central to this thesis. This chapter is an attempt to explore this understanding and how it is reflected in the archaeologies generated in the chapters that follow.

THE ARCHAEOLOGICAL METHOD

The purpose of this section is to describe, at a theoretical level, the basic functions and techniques of Foucault’s archaeological method as I understand it. Initially, the broad relationship between the nature of the archaeological method and discourses in general will be examined. Then the relationship between the discursive formation and monuments outside that particular formation will be considered, situating the method in the wider world. In the third sub-section, I will examine the nature of the raw materials of the excavation. In the final sub-section, I will introduce the role of the archaeologists themselves and their participation in the process of writing “history”. In short, the method, as understood here, requires that each writer has to self-consciously, and explicitly, engage with an archive of monuments in order to produce a narrative.

There are two preliminary points that can be made before any discussion of the archaeological method begins. First, it should be noted that Foucault utilised two different, yet connected, forms of historical exploration. Foucault considered both the archaeological and the genealogical techniques to be forms of ‘effective
history', with similar practices associated with both methods. It may be noted, therefore, that much of the literature on Foucaultian historical analysis is applicable to both archaeology and genealogy.

Either method can be termed “effective” or “general” history. The latter term was the one used by Dean in his summation of the difference between Foucault’s methods and traditional, or “total”, histories:

A total history seeks a governing principle of a civilisation, epoch or society, which accounts for its coherence; it seeks to establish an homogenous network of relations and causality... and it is able to divide history into definite, cohesive, periods and stages... A general history... seeks series, divisions, differences of temporality and level, forms of continuity and mutation... [and] opens up an attention to detail... which is indispensable if [we are] to move beyond caricatures of historical periodisation passing for a science of social development.

For the purposes of understanding Foucault’s methods, the distinction between genealogy and archaeology is less important than a recognition of the aims of both as compared to the aims of traditional histories.

The second preliminary point concerns the status of the method itself. It has been argued that the archaeological method is ‘less a discipline than a domain of research’. Further, Shumway has suggested that Foucault was only concerned with ‘strategies or things like them: techniques, technologies, etc’. Such understandings may indicate that there can be no certainty as to the exact nature of the

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5 ‘Nietzsche, Genealogy, History’ in Rabinow, *Foucault Reader* at 87
6 Foucault used the term “general history” in *The Archaeology of Knowledge* at 9
7 Dean, *Critical and Effective Histories* at 93-4. This passage was brought to my attention by Kendall & Wickham, *Using Foucault’s Methods* at 24
8 Deacon, R., ‘Theory as practice: Foucault’s Concept of Problematisation’ (2000) 118 *Telos* 127 at 128
9 Shumway, *Michel Foucault* at 14
archaeological method. Indeed, Shumway inferred from Foucault’s concern with strategy that Foucault was ‘not saying that historians should always do x, or that discourse is always like y. Rather, the strategies are employed because they are useful for Foucault’s ends’. The archaeological method, then, can be seen as a range of strategies and practices that may be utilised by an archaeologist to highlight the discourse and discursive practices that are of interest to that archaeologist. This chapter, therefore, focuses, not on a definitive understanding of the method, but on those strategies suggested by Foucault that I feel are appropriate for an examination of “the law” and of decisions of English courts of review.

According to Foucault, an archaeology is ‘the appropriate methodology [for the] analysis of local discursivities, and “genealogy” would be the tactics whereby, on the basis of the descriptions of these local discursivities, the subjected knowledges which were thus released would be brought into play’. Courts of law produce objects such as judgments and orders. In this case, “the law” can be seen as a local, internally cohesive, discursivity. If the object of examination in this thesis was a history of individual rights within English society, however, then genealogy may be a more appropriate method. A genealogical analysis may be appropriate as it may

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10 Id
11 Another commentator has argued that Foucault’s historical methods do not stand distinct from other historical techniques, rather that ‘archaeology is a useful supplement and, in some cases, a necessary corrective to standard approaches to intellectual history [as] it can hardly stand as a substitute for such work’: Gutting, G., ‘Introduction’ in Gutting, G. (ed), The Cambridge Companion to Foucault, Cambridge University Press, Cambridge, 1994 at 14
12 Two Lectures’ at 85
allow an examination of statute law, common law, political practices and the constitution of political subjects.\textsuperscript{13}

An archaeology can be seen to focus on the importance of discourses and discursive formations, being ‘the systematic and analytical description of particular discourses’,\textsuperscript{14} or ‘discursive formations’.\textsuperscript{15} Discursive formations, as was suggested in the previous chapter, are subject to certain controls over their self-definition and self-perpetuation. For Foucault, an ‘archaeological critique analyses the discursive limits of the truth axis’\textsuperscript{16} of any discursive function. Therefore, an archaeology may examine the changes in the construction of the truth of a discursive formation, through an examination of the products of that formation.

The “will to truth”, the discursive creation of “the truth”, is one of the methods of control that function within a given discursive formation. The aim of the archaeological method is to describe such ‘rules of formation’\textsuperscript{17} of a discursive formation. This aim is accomplished through the examination of an “archive” of a discursive formation, with the archive being the set of statements ‘actually pronounced’.\textsuperscript{18} Thus, an archaeology will examine and describe the practices of a particular formation at a given time in order ‘to isolate the level of discursive practices and formulate the rules of production and transformation for these

\begin{footnotesize}
\begin{enumerate}
\item As I highlighted above, I recognise that a thorough description of the shift from an understanding of the feudal subject to an understanding of the modern subject would also need a genealogical analysis. That is why the change from “feudal” to “modern” is not central to this project.
\item Dean, \textit{Critical and Effective Histories} at 34
\item Foucault, \textit{The Archaeology of Knowledge} at 157
\item Simons, J., \textit{Foucault & the Political}, Routledge, London, 1995 at 30
\item Foucault, \textit{The Archaeology of Knowledge} at 167
\item Foucault cited in Flynn, T., ‘Foucault’s mapping of history’ in Gutting, \textit{Cambridge Companion to Foucault} at 29
\end{enumerate}
\end{footnotesize}
practices’. These practices can be taken to construct both the formation and the subjects of that formation. An archaeology will examine the knowledge of a discursive formation, as that knowledge is the practices of the formation. This knowledge can be understood to be perpetuated and reproduced by subjects who, themselves, are constituted by the discursive practices.

If discursive practices create a discourse and the documents produced by the subjects of the discourse then an archaeology involves an examination of the practices of a discourse through an examination of its documents. The method looks at the ‘rules for the repeatability of statements’; that is, the method looks at the practices that dictate the availability of statements for repetition. Further, the method ‘describes… statements covering the sayable and the visible’.

The archaeological method can be seen as an attempt to answer the question: ‘how is it that one particular statement appeared rather than another?’ From this perspective, the method can be seen as a “problem-based inquiry”. According to Kendall and Wickham, ‘Foucault’s approach to history is to select a problem rather than an historical period for investigation’. That is, the focus of an archaeology of law can be “how did a particular judgment come to be constituted by a specific set

20 ‘Archaeological research examines not the meaning or truth, but the positivity of discourses’, Deacon, ‘Theory as Practice’ at 128
21 Kendal & Wickham, Using Foucault’s Methods at 33
22 Id
24 It has been suggested that ‘Foucault’s histories typically begin from his perception that something is terribly wrong in the present’: Gutting, ‘Introduction’ at 10. In other words, the method acts as ‘social critique as well’, ibid at 32
25 Using Foucault’s Methods at 22, italics in original.
of legal statements?” rather than a more traditional history of law that may examine a particular period of the law. This approach to the archaeological method means that the focus of the method is the monuments of the discourse. In examining the monuments, however, the practices of the discourse are also visible.

Discourses and discursive formations have primacy in the understanding of society that is central to this thesis. Those who adopt the archaeological method, therefore, can be understood to reject the notion of a “sovereign” subject ‘anterior to discourse. It can be considered that it is not the individual who imparts meaning to discourse, rather it is the discursive formation that provides an array of “subject positions” which individuals may occupy’. Subjects are not considered to exist prior to their constitution within a discursive formation. Their actions as members of the formation can be understood to be constituted solely by the discursive practices that function within the discursive formation to which they belong. An examination of the individuals as individuals acting within a discursive formation will not provide a complete picture, however, of the power relationships operating within the formation at the time. These relationships are to be found in the statements themselves, and in particular, in the patterns of dispersion of these statements - “the rules of formation” of the discourse.

That is not to say that a discourse or discursive formation can be considered in vacuo. Foucault specifically linked his archaeological analysis with ‘non-discursive domains (institutions, political events, economic practices and processes)’. The

27 The Archaeology of Knowledge at 162. Some writers have interpreted this as linking archaeologies with non-discursive practices (for example Sheridan, A., Michel Foucault – The Will to Truth, Routledge, London, 1980 at 106), this, particularly in the context of the specific relationship between discourses and practices used in this thesis, may be misleading. For no
archaeological method encounters those events from outside the examined discourse in order to ‘show how the autonomy of discourse and its specificity nevertheless do not give it the status of pure ideality and total historical independence.’ Archaeology is not a practice in which a discursive formation of the past is isolated in order to produce an idealised, complete specimen for contemporary study; it is an attempt to re-describe the discourses and discursive formations of life as they existed for the constructed subjects of the past. Therefore, the method must reflect the engagement by members of the formation with “outside” events.

These external events can be taken to include actions or statements from anyone who has not been constructed within the discursive formation under consideration. In a discursive understanding of society, however, these outside occurrences cannot be considered external to the discursive practices of the discursive formation. If these events are to form part of the “truth” of the formation they must be considered in terms of the discursive formation itself. From the perspective adopted in this thesis, if an event is to be incorporated into the discursive formation it must fit the criteria that allow events to be integrated into the formation. These criteria can be understood to form part of the set of discursive practices of the formation. These criteria allow the internalisation of the external event by the members of the discursive formation. This internalisation can be seen as an interpretation of the outside event according to the discursive rules of the formation. It is only these

practice, in the understanding developed in this project, is non-discursive. A practice may be constructed by a different discourse than a discourse that is being examined, but it is not “outside” the discursive.

28 *The Archaeology of Knowledge* at 164-165
interpretations that can be examined in an archaeology, as it is understood in this thesis.

Interpretation may be seen as the means by which non-discursive events are integrated into a discursive formation. This interpretation can result in discursive rupture or discontinuity, when the discursive practices of a formation allow for such a discontinuity to be recognised. If the events that fit the criteria for discursive change occur then the members of a discursive formation will integrate this change into the discursive practices and discursive formation. If such an event or change occurs and the formation is constituted through a set of writing practices, then the event or change may be evident in the written texts of that discursive formation. It is these recordings that may become the focus of an archaeology.

These recordings, statements, or texts play an integral role in the archaeological method. For the predominant technique is ‘the questioning of the document’.²⁹ Foucault saw this as representing a shift from the standard practices of historians. Traditionally, historians ‘have asked not only what these documents meant, but also whether they were telling the truth, and by what right they could claim to be doing so’.³⁰ That is, historians questioned the integrity of texts as a reflection of the past. An archaeological treatment of texts ‘transforms documents into monuments... the condition of archaeology [is] the intrinsic description of the monument’.³¹

These monuments can be understood to be excavated and examined for what they themselves are, these documents cannot be treated as if they refer to the Truth.

²⁹ Ibid at 6
³⁰ Id
³¹ Ibid at 7
Indeed, the documents are examined for what they reveal about the knowledges, the discursive practices, that constructed the discursive formation within which they were generated. The ‘dictum’ of the archaeological method is that ‘we should try to make intelligible discourses by means of their own terms’. The archaeologist does not read a document to ascertain any Truth that lies behind the text, but as part of an attempt to explore a formation as it is constituted through its statements.

An archaeology is ‘gray, meticulous and patiently documentary’. The method is only concerned with the collation and description of the documents, the monuments, of the discursive formation. The intention is to ‘take statements as objects of study in their own right, making no effort to use them as means to revive the thoughts of the dead’. Not only is there a refusal to look to the mental processes of the subjects who made the statements under consideration, those who adopt the method also refuse ‘to treat discourses as the sign of something else, be it unconscious wishes or the development of capitalism’. Each document is taken as an artefact in its own right. It is examined for what it says in itself, rather than as a sign of, or symbol for, some deeper truth.

If a document is not read as referring to something behind it, ‘eschewing any quest to go “beyond”… to find deeper meaning’, then there is less of a need to read

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33 Foucault, ‘Nietzsche, Genealogy, History’ at 76
34 ‘For Foucault, the archaeologist is engaged in collating statements on a particular subject’ (Giulianotti, ‘Drugs and the media in the era of postmodernity’ at 416).
35 Gutting, G., Michel Foucault’s Archaeology of Scientific Reason, Cambridge University Press, Cambridge, 1989 at 231
37 Kendall & Wickham, Using Foucault’s Methods at 33
continuities into a series of documents. Documents produced in a single discursive formation will reflect both its practices of continuity and discontinuity. That is, viewing documents in terms of continuity and discontinuity reflects a conception of a history which is as much discontinuous as continuous.

It can be argued that one of the purposes of the archaeological method is to highlight both the constant and inconstant nature of “the past”. Foucault, for example, described his own project as ‘restoring to our silent and apparently immobile soil its rifts, its instability, its flaws’.38 Foucault’s methods were concerned with ‘changes… [but] these changes may occur against a background of significant continuities’.39 The archaeological method, then, ‘takes as its model neither a purely logical schema of simultaneities; nor a linear succession of events; but it tries to show the intersection between necessarily successive relations and others that are not so’.40 The past, to an archaeologist, is a set of events, some of which reflect discursive continuities and some of which reflect discursive ruptures.

The method treats each period as “the present” for the authors of the time. The archaeologist sees each period as “a present” in a series of “presents”. But the shift from one present to another is not “progress”, a “development” or an “evolution”. One of the key characteristics of the archaeological method is an emphasis on the non-teleological aspects of historical narratives. The legal discursive formation, then, cannot be understood in terms of a necessary connection between one point of legal history and another or a logical progression from one point to another. Indeed the core proposition of this thesis (that the construction of legal subjects in England

38 Order of Things at xxiv
39 Gutting, Michel Foucault’s Archaeology of Scientific Reason at 247
40 Foucault, The Archaeology of Knowledge at 168-9
since 1750 has not been constant) combined with the denial of the possibility of a guiding “invisible hand”, make an archaeology the most fruitful method for examining the history of English forms of governance. This is because an ‘archaeology is much more willing than the history of ideas to speak of discontinuities, ruptures, gaps, entirely new forms of positivity, and of sudden redistributions’.41

It can be argued that Foucaultian archaeologists recognise that there have been changes in the way that people interact. They do not attempt to “smooth down” these eruptive events in order to write a seamless story. For the archaeologist, the past can be seen as a series of moments, a series of “present days”, which can be separated into periods for the purposes of analysis. It is available to an archaeologist to accept, therefore, the present as it is, and to accept the past, as evidenced in the remaining monuments, as it was. From this perspective, an archaeologist must develop these separations with the knowledge that such categories reflect the intervention of the archaeologist, and not the truth of past times.

Archaeologists may seek to render this reconstituted past unfamiliar to their audiences. Once the ‘internal rationality of a particular set of discourses and practices’ has been established, the archaeologist ‘has the option of making them seem more or less familiar’.42 Rendering the past unfamiliar is a technique for rupturing a reader’s sense of continuity. This unfamiliarity may undermine a

41 Ibid at 169
42 Dreyfus H., & Rabinow, P., *Michel Foucault: Beyond Structuralism and Hermeneutics* at 256
reader’s preconceived views about the events of the past and their relationship to the present.

Archaeologists can be understood to recognise the constructed nature of the world. They also can be considered to recognise that the world was not always constructed as it is now. Discourses and discursive formations have changed and for the subjects constituted through them, the world itself is different. An archaeologist’s task, therefore, may be to do her or his best to ensure that no assumption of teleological progress is implied in an archaeological analysis, and no projection occurs back into the past which normalise it in relation to the future.

The interpretation of an event in the past would be different for a past discursive subject from its interpretation for a modern discursive subject. These interpretations are important to archaeologists. Archaeology, as effective history, can be seen as focussing on the “event”, which can be the ‘usurpation of power, the appropriation of a vocabulary turned against those who had once used it... the entry of a masked “other”’. These are the events around which discursive formations can be understood to change. The processes around which one vocabulary comes to displace another is sometimes bloody and sometimes painless. The ‘idea of a single break suddenly, at a given moment, dividing all discursive formations... cannot be sustained’. In an archaeology there is no grand narrative to account for history, there are only separate histories for each discourse or discursive formation, as the subjects of each discursive function can be understood to engage with the world and the events of the world according to their internalised discursive practices.

43 Foucault, ‘Nietzsche, Genealogy, History’ at 88
44 Foucault, The Archaeology of Knowledge at 175
Every monument, from the perspective adopted in this thesis, can be seen to reflect continuity and discontinuity within a discursive formation. Every new recording can be considered to produce a new account of an outside event with which the subjects of the discursive formation engage. As each and every monument contributes to the perpetuation of a discourse or discursive formation all can be studied in an archaeology. Constraints such as time and space, however, mean that archaeologists must engage in a process of selection. Even within the limited record of history as contained in a single discipline there are hundreds, thousands or tens of thousands of documents that could merit excavation. Archaeologists must be understood to play an active role in an archaeology, and archaeologists know that they have an active role in their archaeologies.

The appropriate relationship between the archaeologist and the discourse chosen to be examined is not clear. For Dreyfus and Rabinow, unless the archaeologist ‘understands the issues that concerns the thinkers he [sic] studies, he will be unable to distinguish when two different utterances are the same serious speech act and when two identical utterances are different speech acts’. This may be taken to imply that the archaeologist, from this perspective, needs to be at least partially trained in the discursive practices of the discourse to be excavated. An alternative consideration could be that an archaeologist needs a degree of separation from the discourse in order to recognise the role of the discursive practices in the manufacture of the “Truth” of the discourse.

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45 Dreyfus & Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* at 88
46 It has been suggested that an archaeologist should remain an ‘outsider who must bracket the self-understanding of discourse participants’ (Fleming, M., ‘Working in the Philosophical Discourse of Modernity: Habermas, Foucault and Derrida’ (1996) 40 *Philosophy Today* 169 at 171). In terms of Foucault’s own archaeologies, his *Madness and Civilisation* may have been informed by his training in psychology, however, his *Birth of the Clinic* does not appear to be linked to any medical training on his part.
Irrespective of the relationship between the discourse and the archaeologist, an archaeology is “much more willing than the history of ideas to speak of discontinuities, ruptures, gaps, entirely new forms of positivity, and of sudden redistributions”. It is important to recognise that just because the archaeological method allows for the “restoration of rifts and instability” it does not mean that discontinuities are the sole focus of an archaeologist. Foucault said of himself that “no one is more of a continuist than I am”; while his stories of the prison and the medical profession reflect continuities as well as discontinuities. The archaeological method is only a method. It can be understood to be the role of the archaeologist to highlight either the ruptures or the seamlessness of a particular discourse.

As the past is understood to be both continuous and discontinuous, an archaeologist can choose either as the focus of her or his project. ‘In the face of… assumptions of continuity, Foucault asks not that we assume precisely the opposite – that there is no continuity in history – but rather that we treat any assumed continuity with suspicion’. The choices made by an archaeologist will provide the outline for the narrative of an archaeology, potentially consisting of discrete time periods which have been selected to provide some form of comparison or to provide a point of conflict. These periods can extend over a few years or over many centuries.

47 It has been suggested that to ‘found a theory of history on discontinuity would be to think in terms of a foundation, a continuity’: Shumway, *Michel Foucault* at 19
48 ‘Questions of Method’ in Burchell, *et al*, *The Foucault Effect* at 76
49 Archaeology ‘foregrounds discontinuities, gaps, ruptures and the new forms of positivity… [y]et it does not neglect repetitive and uninterrupted forms for they too, like the multiplicity of differences which arise with transformations, are subject to the rules of formation of positivities’, Smart, B., *Michel Foucault*, Routledge, London, 1985 at 50
50 Shumway, *Michel Foucault* at 20
depending on the discursive formation involved and the choices made by the archaeologist.

The choices of an archaeologist with respect to the narrative of a particular project may reflect a degree of genealogical intuition. An archaeologist’s understanding of a particular problem may not be limited to one “local discursivity”. It is likely that the archaeologist’s understanding will be informed by a number of discourses, that is, by the “tactics whereby, on the basis of the descriptions of these local discursivities, the subjected knowledges which were thus released would be brought into play”. However, an archaeologist may choose to examine the role of one discursivity in order to construct a narrative that may inform a more general examination of the broader tactics of subjectification through the operation of knowledges.

The view that archaeologists make choices may be taken to suggest that they have a degree of personal autonomy. This is not intended. An archaeologist can be seen to be as constructed as the subjects about which they write. This understanding builds on the perspective that for ‘Foucault, there is no privileged standpoint of objectivity; he must begin as a situated subject writing from a perspective that he can problematise from within, but not leave’.51

Archaeologists, and the narratives they produce, can be understood to operate within similar discursive constraints to those within which the subjects of the discursive formation that is the focus of an archaeology operate. As the method

does not involve looking “behind” the monuments, the process may be more transparent than in traditional histories. The effects of the discourse that constructs an archaeologist will be evident, and may be engaged with, in the choices made by that archaeologist in the limits of her or his archaeological excavation. An archaeologist and the archaeological method are necessarily discursively constructed, but this constitution may be acknowledged in the process of explaining a project.

Archaeology can be seen to derive from the recognition of the discursive nature of society, and the role that discursive practices, in particular writing practices, play in the perpetuation of social institutions. The active involvement of an archaeologist must be recognised, as the method does not provide limits for analysis. An archaeologist looks at monuments as artefacts in themselves, it is the archaeologist who constructs the narrative around the documents.

For Kendall and Wickham this narrative could be, amongst other possibilities, an analysis of the ‘positions which are established between subjects in regard to statements’ or it could be a description of the ‘institutions which acquire authority and provide limits within which discursive objects may act or exist’. For this thesis, the outcome of the application, the narrative, is of lesser importance than the application itself.

This section has described the method in abstract terms. The techniques to be used in the legal archaeology that makes up the bulk of this thesis will be explored in the

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52 *Using Foucault’s Methods* at 33
53 Ibid at 26
final section of the chapter. The next section emphasises some of the specifics of the application of the method, in order to describe what can be included within an archaeological narrative.

THE CHARACTERISTICS OF THE ARCHAEOLOGICAL METHOD

This section highlights three traits of the archaeological method, as understood here, that shape the conclusions which may be drawn from archaeological research. The traits reflect the view that an archaeology can be seen as a ‘purely descriptive enterprise’ and Foucault’s view that effective history did ‘not resemble the evolution of a species and does not map the destiny of a people’. These two statements indicate the central features of the archaeological method that will be addressed in this section. First, the method can be understood to only generate a description, or redescription of “events”. Second, an archaeology must involve an attempt to avoid any implication of progress and must seek simply to document change. And finally, archaeologists only “deal” with the discourses and discursive formations that construct subjects, and not with people, either individuals (as individuals) or a geographically constituted group. These three aspects of the method will be discussed in turn in this section.

That the method can be seen as “purely descriptive” limits the sorts of inferences that are to be drawn from the material with which an archaeologist deals. That is, as highlighted in the Introduction to this project, an archaeologist must attempt to

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54 Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* at 56
55 Foucault, ‘Nietzsche, Genealogy, History’ at 81
56 This is not easy as every archaeologist is “situated” and looks “backward”. 
limit the use of “second order” judgments.\textsuperscript{57} Certainly, an archaeologist must avoid giving the impression that she or he is looking behind the “surface” of the monuments to ascertain the thoughts or motivations of the authors who produced them. Such thoughts and motivations are not important in the formation and perpetuation of discursive formations. The method requires the attempt to present of documents as they were,\textsuperscript{58} without any reference to their authors as individuals. The method ‘describes statements in a non-anthropological manner, as a means of avoiding the search for authors’.\textsuperscript{59} It is a technique that reflects an attempt to present the archive of a past discursive formation. This “presentation” is not intended as an “uncovering” of any Truth. Any revealing that appears to be produced by the method is an unintended consequence of the presentation of the documents in an account of the discursive formation.

That the method is predominantly descriptive may give rise to possible accusations of “superficiality”. The aim of the method can be understood to involve the presentation of the documents as they were written, it is ‘content to remain at the level of appearances’,\textsuperscript{60} as the manner of their writing is the product of the discursive practices of the time. The method is to be “gray, meticulous and patiently documentary”, the focus is to be on the words as they were written. Each word is as important as any other. A consequence of this may be that many more words have to be highlighted and described than will be dealt with in a standard history. The discourses of the past can only be described in as effective a manner as possible if the practices of the time are sought to be observed minutely.

\textsuperscript{57} Once again, this is hard to do.
\textsuperscript{58} This can be an attempt only, the presentation of documents as they were cannot really be done, in part because some documents are highlighted as worthy of discussion.
\textsuperscript{59} Kendall & Wickham, \textit{Using Foucault’s Methods} at 33
\textsuperscript{60} Id
The understanding of archaeology as description, however, leaves open possibilities for the identification of trends and patterns over a period of time. Patterns may be evident in an archive, however, it must be recognised that it is the reading of the archive (either by the archaeologist or the reader of the archaeological narrative) that is generating these classifications.\textsuperscript{61} The purposes of archaeologists will guide their decisions as to which categories they employ and which monuments they examine. The authors of the original documents have no “say” in these decisions. If any narrative is to be produced, the monuments are described by the archaeologists and then allocated a position in their archaeological narrative.

Each monument can be taken as a statement from the discursive position of its author. Each monument may be understood as the recording of knowledge, the record of another interpretation of the events seen, experienced or described by that person. ‘Effective history is [an] affirmation of knowledge as perspective’.\textsuperscript{62} An archaeologist must attempt to see each of the past monuments as reflecting a different perspective, and try to avoid the temptation to fit them into pre-conceived notions of a better account of the past.\textsuperscript{63} The archaeologist must seek to present an account of the archive, a record of the perceptions and the constructions of the writers of the past. The method requires that an archaeologist does not seek to

\textsuperscript{61} It has been recognised that an archaeology of ‘mute statements’ and an emphasis on ‘pure description’ must still be based on a degree of interpretation with respect to the ‘choice of descriptive categories’ (Dreyfus & Rabinow, \textit{Michel Foucault: Beyond Structuralism and Hermeneutics} at 85).

\textsuperscript{62} Foucault, ‘Nietzsche, Genealogy, History’ at 90

\textsuperscript{63} The training of an archaeologist in any discipline will make this attempt very difficult to achieve. That is, training is built up on the privileging of some past experiences and perspectives. Further, the interest in the “historical dimension” of a discipline (as archaeologists are likely to have, otherwise, why would they seek to undertake an archaeology?) may affect the chance of success of the avoidance of pre-conceived notions of the past.
judge these perspectives.\textsuperscript{64} These perspectives may be collated for descriptive purposes, but such a collation should try to avoid overwhelming the acceptance of the documents as perspectives.

This attempt to take the words of the past as they are written can be understood as an effort to minimise the complexities of analytical historical research. The removal of as many layers of inference as possible in historical analyses results in a reading of the past that may be less susceptible to accusations of prejudice based on the pursuit of teleology or progress.\textsuperscript{65} Part of the discipline of the archaeological method is the attempt by the archaeologist to avoid the view that the selection of documents is based on any free will on her or his part. That is, the choices made by the archaeologist are to be understood to be dictated by the discursive constitution of the archaeologists. This does not mean that the archaeologist does not have to account for her or himself. In the presentation by the archaeologist, however, there should be an explanation of the choices she or he has made in developing her or his archaeology. This is an attempt to reflect the effective historian’s role as a describer of the past and not an interpreter of the past.\textsuperscript{66}

That archaeologists use their own categories in their accounts means that there ought not be the implication of causal relations between the events of the past and the present. The archaeological method is explicitly ‘not intended to uncover great

\textsuperscript{64} But few people can really avoid judgments when reading a document or perceiving the world.
\textsuperscript{65} But nobody can quiet achieve it. To borrow Barthes’ metaphor, the reading of a history can be seen as slow progress through the many layers of onion skin, each layer representing another inference, interpretation or pre-conception that is a product of the reader, rather than being evident in the texts. (Barthes used this metaphor specifically in relation to texts, however, Deacon suggested that Barthes ‘could as well have been writing about history’, ‘Theory as Practice’ at 129).
\textsuperscript{66} The potential for success in such a description is not known, however.
cultural continuities, nor to isolate mechanisms of causality’. The past, from this perspective, is to be described and redescribed. An archaeologist is to seek to avoid the implication of “mechanisms of causality” that might otherwise be created by writers, and readers, of the present. If there is no assumption of continuity behind the grand “chain” of events that are taken to constitute history, then there is no need to create a chain of causation to bind the disparate happenings.

The desire to avoid ascribing causality is, in part, based on a desire for a less layered reading of documents of the past. The imposition of a mechanism of causality upon the documents of the past adds yet another layer to a reading. To construct the past as a cause of the present reduces the number of interpretations of monuments that can be developed by other readers. The goal of an archaeologist is the presentation of monuments of the past. An archaeology, from this perspective, is an attempt to provide a description of the past as free as possible from its relation to the present. It is certainly an attempt to avoid a description of the past in any form of necessary relation with the present of the archaeologist.

The relations between monuments in an archaeology may be suggested in terms of the words used, the forms of expression found in, and the content of, the monuments, in other words, in the ‘ordering of statements’. It is the writing practices and the products of the writing practices that are of interest to archaeologists and not the author of the document. As the archaeological method

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67 Foucault, *The Archaeology of Knowledge* at 162.
68 Foucault in his archaeologies ‘is not denying change, but, rather, is denying the standard interpretation of change as necessarily having a cause’: Simpson, ‘Archaeology and politicism’ at 28. The training of the archaeologist, and the reader, may make this rejection of the necessity of a causal connection very difficult.
69 Kendall & Wickham, *Using Foucault’s Methods* at 27.
rests on the acceptance of a discursive interpretation of society, the method is limited with respect to what can be said about individual action. The discursive framework does not allow for the presentation of individuals who have autonomy with respect to their writing practices.

This lack of autonomy, however, is not necessarily a complete lack of choice, from this perspective. For example, within the medical discursive formation a doctor presented with a particular set of symptoms may have the “choice” to administer drugs, recommend counselling or do nothing. The outcome of a doctor’s decision-making process will be delimited by her or his training and her or his experiences as a doctor. In other words, her or his actions are understood to be constructed by the discursive formation. Subjects can choose from amongst a set of possible actions, from this perspective, but these options are those made available within a discursive formation. More importantly, the discursive practices may tend to favour certain choices over others, therefore, any “choice” made by a subject is likely to be favoured by processes internal to the discursive formation.

For these reasons, an archaeology may be understood to be an examination of the end product of choices made by subjects of a discursive formation. These monuments reflect discursive practices and, therefore, reflect a discursive formation. Authors are not treated as individuals with a free will but as subjects who write what is to be expected of someone of their position within the discursive formation. Understanding the relationship between the discursive formation and the

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70 It can be considered that there are always a number of discursive practices available to a subject of a discourse, in the same manner that there are a number of “strategies and tactics” that constitute the form of governance that Foucault referred to as “governmentality”. In addition, one of the discursive practices that can be considered to construct the subject can be seen to hierarchise the available practices to “direct” the subject to exercise the most appropriate practice.
subject, according to Foucault, ‘is a matter of depriving the subject (or its substitute) of its role as originator, and of analysing the subject as a variable and complex function of discourse’. 71 From this perspective, subjects are to be constructed as within discursive formations; with the thoughts and actions of subjects taken as constructed by practices that operate within the discursive formation. Documents, in this understanding, are products of the multiplicity of discursive practices that constitute both the subject and the discursive formation in which subjects find themselves.

The document can be understood as a reflection of the discursive practices that construct the subject. That is not to say that an archaeologist can fully describe subjects from their records (partly, because some discursive practices are not in written form) but that, within a given discursive formation, the document, as discursive practice, can be understood to constitute the author who, in turn, produces the document. Authors, from this perspective, do not have complete freedom as to the content or style of what they write, as least what they write as members of the discursive formation. The author, from the perspective adopted in this project, is limited by the practices of the discursive formation in which she or he participates.

The importance of this lack of authorial autonomy for the archaeological method is that the excavated monuments can be understood to represent the subjects and the discursive formation as they were. The writers are taken to be products of discursive practices and these documents reflect the discursive practices that result in the production of texts. The purpose of an archaeology is an attempt to show the

71 Foucault, ‘What is an Author?’ at 118
past as close to how it existed in the past as possible. It is an attempt to treat the moment of the writing of these historical documents as the present time of the authors. For the purposes of the archaeology, authors do not exist outside the documents they produce and, consequently, archaeologists seek to reduce the number of prejudices that “colour” their reading of monuments.

As will be seen in the next section, the application of the archaeological method, as I understand it, to the history of the English common law provides a description of the monuments of the past. Certain similarities and differences may be highlighted by the archaeologist, but they are similarities and differences that are supposed to emerge from the documents themselves (rather than from my prejudices). Each monument can be understood as a discursive event which can be classified in one manner or another, depending on the project of the archaeologist. There must also be an attempt to avoid the attribution of a teleological, or causal, connection between the documents, as each and every monument is understood to reflect continuity and discontinuity. From this perspective, each monument is important in itself. Indeed, each document could be treated as a separable artefact of the discursive formation, as it is understood to be a product of that formation and only a product of that formation.

THE APPLICATION OF THE METHOD TO “THE LAW”

In the final section of this chapter I will discuss specific aspects of my application of the archaeological method to “the law”. I will seek to lay out the framework, and

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72 The attempt can never be wholly successful as no writing, from this perspective, even by a self-reflexive archaeologist is outside a discursive formation.
(at least, to the extent that I can) the reasoning behind the framework, for the three chapters that are to follow. This thesis is an attempt at an archaeology of a number of decisions from the English common law. These decisions contain differing statements concerning liability that suggest changes in the law and in the construction of the subjects of the legal discursive formation. This archaeology is an attempt to provide a history of how the members of the legal discursive formation “saw” legal subjects and relationships of liability within their community. This project can not include all cases that included statements which related to legal recognition of inter-personal relationships, however, so some explanation is required as to how the cases to be examined were selected.

This project is an application of the method to “the law”, or, more precisely, it can be seen as an attempt at an application.\(^{73}\) That means that it is not intended to constitute a definitive application. It is not definitive in at least three ways. First, it reflects my understanding of Foucault’s archaeological method. Second, the Foucaultian techniques used in the application are being “tried out” on the English legal monuments discussed; future applications may reject or refine the techniques used here. The third manner in which this application is not a definitive application is that the choice of monuments excavated in this thesis is not the only choice that was available. The commentators who have considered the archaeological method have not discussed in detail the creation of an “archive” of a discourse. The choice of monuments examined here, therefore, reflects my understanding of “the law” and the archaeological method.

\(^{73}\) Indeed, given the difficulty associated with being an archaeologist presenting an archaeology, discussed previously, it may well be understood to be doomed to failure.
This archaeology examines a number of written decisions from the courts of review in England over a period of 220 years. It would be just as appropriate, in terms of the method, to examine all the written documents produced in a single case, starting from the originating statements of claim (or writs, notices or applications) through to the final judgments of the last site of appeal in that case. Either set of monuments (and any other set of legal documents) may be appropriate for an application of the archaeological method, as either set is constructed through the practices of a specific discursive, the English legal profession. Almost any set of “court” documents can be seen to present a focus on an ‘historical slice (however extended that slice might be)’ rather than an “historical process”. I have chosen to examine a number of decisions over an extended period of time, however; in part, in order to reflect upon the legal practice of repeating statements and in order to discuss what appears to be changes in the manner in which defendants were “seen” over the period covered by this thesis.

The discussion of this application of the archaeological method to the history of “the law” will begin by re-visiting the written nature of “the law”. The law can be understood to be administered by the legal profession, the discursive formation, which is controlled through specific discursive practices. The most significant sets of practices that construct the legal profession relate to the writing of judgments

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74 The choice of examining a number of monuments over an extended period of time can be seen to follow Foucault’s own analysis in *The Order of Things* where he examines the ‘intellectual conditions of possibility during the Renaissance, the classical age and the modern era’ (Shumway, *Michel Foucault* at 20).  
75 Kendall & Wickham, *Using Foucault’s Methods* at 31  
76 According to Kendall & Wickham, an emphasis on an historical process would be more indicative of a genealogical, rather than an archaeological, analysis.  
77 My interest in showing the apparent changes in how defendants were “seen” can be understood as an intrusion of my “genealogical” intuition. Such intuitions may, however, be a necessary part of any archaeology.
and the privileging and repetition of statements from past judgments in the articulation of the law.

To briefly recap the conclusions of the first Part, English society can be understood as a collection of legal subjects, that is, people constructed within the discourses of governance. A sub-group of these citizens undertake specialised training in the administration of the English law. This sub-group is the English legal profession. Their training can be understood to predispose them to accept legal discursive practices as appropriate forms of professional behaviour. Both the law and the legal discursive formation can be seen to exist as predominantly written modes of governance. The principal legal discursive practices of the discursive formation operate through, and are directed to the production of, the written text.

As was discussed in the section on the repetition of legal statements in Chapter Two, the discursive practices of privileging past judgments can be understood to be one of the techniques of discursive control that operate within the English legal discursive formation. The precise practices that surround the use of previous decisions have changed over the centuries. Since the times of the writ system, statements in preceding judgments have been considered relevant to the case in hand. In addition, the citing of “principles” from previous decisions has been a technique of legal argument since the eighteenth century. Thus, when examining a history of a certain class of cases, such as in tort, contract or trusts, it is important to be aware of previous decisions within that area. These past cases can be understood to be the law as it was to the judges of the time, these judgments can be taken as the law in documentary form.
At its simplest, the English common law can be seen as changing through the processes that surround the repetition of legal statements. Those who constitute a court of review must refer to past cases in making their judgments. These past cases are put to them by counsel appearing before them to present legal argument. Any account of a particular area of legal discourse, therefore, may benefit from attention being paid to past statements, the treatment of past statements and the role of counsel in putting forward the statements. Archaeologists may, and judges do, see themselves as following a “chain” of past judgments. This “chain” can often extend back several centuries, as every judgment refers back to previous judgments in which reference will be made to even earlier judgments. In this context, this process can be continued until judgments based purely on the writ system are encountered. Such a “chain” of judgments has formed the basis of my legal archaeology.

Each judgment can be seen as a monument of the legal discursive formation. Each can be understood to have been written by a member of the legal discursive formation with the knowledge that it may be repeated in future judgments. Each can be taken to have been written according to the discursive practices of the formation. The purpose of this archaeology is to provide an ‘intrinsic description of the document itself which results in the establishing of unities, sets, series, series of series and relations’. As a means to achieve this, this archaeology of the legal discursive formation will involve providing an intrinsic description of the cases.

78 It is likely, however, that an archaeologist would follow the “chain” further back than a judge would, as the judge is interested in the law as it is for the particular case she or he is overseeing, while the archaeologist may be interested in the “chain” in terms of how the law was for the judges who wrote the judgments in the “chain”.

79 That is, if the judgment is being written in a court of record.

80 McDonell, D., ‘On Foucault’s Philosophical Method’ (1977) 7 Canadian Journal of Philosophy 537 at 543
themselves. This description will include the facts that gave rise to the original suits and the legal statements that justify the decision made by the judge. From this description commonalities in the facts and the legal statements will be highlighted in an attempt to identify at least some of the “unities, sets and series” of negligence law.

The previous section highlighted the characteristic of the method that suggests a “superficiality” of description. This is true of the method, as it is understood here, when it is applied to legal judgments. The cases that are examined in detail in this thesis are looked at in great detail, but I have tried to ensure that this is always “at the level of appearances”. From my perspective, the point of the method is not to attempt to guess at the essence, or the ratio, of a judgment, nor is it to attempt to guess at the “true” meaning of the words of the judges. The aim of the method, as I understand it, is to try to describe, in detail, the monuments of the law.

The “superficiality” of description may appear to some readers to be similar to that of an overly long case-note. The difference is that a case-note can be understood to be an interpretation of the case that is part of a process for establishing the use of a particular decision for future legal work, or more particularly, for establishing the state of the law as it is now. The purpose of an archaeology, as understood in this thesis, is different. The words are taken at face value, at a non-interpretive level. This reflects the fact that one of the aims of an archaeological analysis is, as far as possible, to limit the use of “second order judgments”. It is from a quantity of these descriptions that an archaeological narrative can be told.
In this thesis, an archaeological narrative can be seen as either an analysis of the ‘positions which are established between subjects in regard to statements’[^81] or a description of the ‘institutions which acquire authority and provide limits within which discursive objects may act or exist’.[^82] In other words, from the detailed descriptions that are presented in the following chapters a narrative will emerge that can be seen as an analysis of the relationship between the judges and their judgments or as a description of the institution that provides limits for the actions of the judges and defendants. Either narrative relies on taking the judgments at face value, rather than interpreting the decisions for future legal application as seems usual in a case-note.

The legal practices that construct judges in their writings also construct them in their interpretation of the facts and the legal subjects who come before them.[^83] Judges can be understood to have been trained to respond to facts and legal statements in particular ways. It is unlikely, to choose an extreme example, that an employer who shoots an employee will be subjected to a hearing under the rubric of unfair dismissal, despite the fact it is through what may be seen as the inappropriate actions of the employer that the employee is no longer working. If legal counsel disagree with a court’s characterisation of legal statements as they relate to a case in which they are involved they may appeal to a more senior court to re-assess the decision. The hierarchical relationships of the common law courts, and the possible benefits of seeking leave to appeal, can be understood to reflect an

[^81]: Kendall & Wickham, *Using Foucault’s Methods* at 33
[^82]: Ibid at 26
[^83]: It is arguable that it is standard legal practice to not consider judges to be “authors” of judgments. That is, lawyers, when dealing with past decisions, do not concern themselves with who wrote the judgment (with the possible exception of “maverick” judges). Irrespective of “standard legal practice”, it is important to stress the manner in which the archaeological method suggests that members of a discourse are to be considered in an application of the method.
acceptance on the part of members of the profession that all courts do not decide cases in the same manner.

Despite what can be considered to be similar educational backgrounds, judges are not identical. Processes of subjectification within the legal profession and elsewhere do not produce intellectual clones. Each law student has a particular history before entering into the specialised training of the legal profession. No legal subject was a tabula rasa prior to their complicity in the perpetuation of the legal discursive practices.

Legal training compounds these differences by encouraging students to construct different legal arguments to argue a case in moots or in examinations. Law students, who can create multiple legal arguments for a single set of facts, become lawyers and judges who can repeat legal statements in order to achieve a variety of effects. This variety in the judicial “perspective” is reflected in the discursive practice of majority decisions. The differences in the constitution of the members of the legal profession can be understood to contribute to the production of the non-unanimous decisions handed down in courts of review. If all judges and lawyers were constituted identically, there would be many fewer disagreements when it came to the adjudication of a particular case. Despite the lack of clarity that results from these split decisions, all judgments can be still considered to contain statements of the law that are available for repetition by later judges.

Importantly, in this context, it is through these differences in statements of law in the judgments that change may be produced. The varying interpretations of cases referred to by counsel can contribute to the production of different decisions
handed down by judges involved in the same case. Each of these individual judgments contains statements of the law for the use of future lawyers and judges. The continued use of dissenting judgments, and of words that are described as *obiter dicta* within single judgments, provides a mechanism through which the legal discursive formation can change. A dissenting judgment ‘sometimes plants a seed which later comes to fruit in a reversal of judicial authority’.84 For example, the need for a shift towards a greater freedom in terms of political expression may be discussed by a number of judges in what is otherwise taken to their *obiter*, before a court of review decides that such an increase is appropriate as a matter of “public policy”.

That is not to say that dissenting judgments always become the basis for a new dominant statement of law in that area. Some statements will be made in only one decision and never repeated. Others will be considered for re-statement and may be explicitly incorporated in legislation or removed from legal consideration by statute. However, it is the recording of these different statements that allows judgments to functions as monuments in a history of the English legal discursive formation. The excavation of past dissenting judgments and *obiter* can be understood to be a means for tracing the continuities and discontinuities within a particular area of the English legal discursive formation.

Statutes and judgments from different jurisdictions may also be adduced during counsels’ arguments. These “outside” documents may be used in statements by the bench. This thesis is an archaeology of a part of the English common law, therefore

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the cases to be excavated are English cases. However, English case law does not sit in isolation from the law in rest of the United Kingdom and related international jurisdictions.

What is important, in terms of the articulation of the law within the English legal discursive formation, is how and when the cases from other jurisdictions are included into the English common law. Such “foreign” judgments can be treated as belonging to non-discursive domains. Non-discursive domains can be understood to include monuments that are not produced by the practices of the discourse in question. Decisions from other jurisdictions will be written according to the legal discursive practices of the professions of those other jurisdictions. A judgment written, for example, by a member of the U.S. Supreme Court is written according to the discursive practices of the U.S. legal profession. These external judgments are legal statements in the other jurisdictions but they cannot become part of the English common law until they are repeated as legal statements by members of the English legal discursive formation.85 For this reason, “outside” cases will be discussed only to the extent to which they are repeated as legal statements by the English judges in their decisions.86

85 The closer the practices of the other jurisdiction are to English legal discursive practices, the more likely it will be that the statements from the other jurisdiction will be repeated into English law.
86 Another example of an “outside” legal discourse that has relevance to some of the decisions examined in this thesis is the Scottish legal discourse. Cases that appear before the House of Lords sitting in their Scottish jurisdiction are decided according to Scots law. The legal statements that are repeated in argument are more likely to be from other Scottish cases and the lawyers that appear for either party are trained in Scots law. The procedures that had to be followed before the case was heard by the House of Lords are different for the Scots and English jurisdictions. (Many of the practices are, however, the same, otherwise the Law Lords could not hear the case.) Therefore, judgments that are written for Scottish cases can be understood to be based on different practices from judgments written in English cases.
The first of the cases to be discussed in this thesis was decided in 1750 and the last in 1972. The decisions have been divided into those handed down in the three centuries covered by this thesis. Thus, Chapter Four contains cases decided in the eighteenth century, Chapter Five the nineteenth and Chapter Six cases decided in the twentieth century. This presentation was chosen, in part, as a result of my understanding of Foucault’s methods. For, as Dillon has suggested, ‘Foucault’s Archaeology of Knowledge so thoroughly obliterates our notions of where historical unities like “periods” begin and end that it does seem that we specialise, teach and write in periods mainly for professional convenience’. 87 Therefore, the classification of cases into centuries is an attempt to avoid any reference to pre-conceived “unities”.

The choice of this method of presentation is also an attempt to remove any emphasis on any particular decision. That is, to present this archaeology in terms of “periods” or “unities” would require these periods to begin, or end, with particular cases. However, a presentation based on “marker cases” may, to legally trained eyes, promote other pre-conceptions, given the focus on “marker cases” that seems entrenched in normal legal training. 88 In an attempt to avoid unnecessary layering, the decisions excavated in this archaeology are organised in terms of centuries.

Some of the changes evident in the statements of law over the period include the introduction of the word “duty” and the later introduction and persistent repetition of the phrase “duty of care”. Other differences that emerge from this description

87 ‘The Archaeology of Victorian Literature’ at 237
88 Kendall & Wickham refer to the recourse to ‘powerful figures’ in historical analysis as possibly inappropriate use of Foucaultian techniques (Using Foucault’s Methods at 119). Therefore, to link a Foucaultian understanding of the law to “powerful” or “marker” cases may be a similarly inappropriate use of Foucaultian techniques.
include changes in statements associated with the scope of legal liability. In short, during the eighteenth century, legally recognised relationships of responsibility can be understood to have been limited to prescribed and delimited relationships. In other words, during this time, only particular classes of defendants were “seen” by the judges as capable of being held liable. Whereas in cases decided in the twentieth century the category of defendants who could be considered to be liable appears to have been much wider.

The process of the selection of the decisions excavated in this thesis was mentioned in the Introduction to this project, however, more detail is necessary to make sense of this archaeology. A sequence of cases was chosen, rather than included through a process of random selection, to foreground the discursive practices associated with the repetition of legal statements. A single case was chosen as a starting point for this archaeology. A “web of decisions” to which this case was connected was then examined. That is, the judgments that were cited in the judgments in that decision were identified. The cases that were cited in these judgments were then identified. This process was repeated until a “web of decisions” that extended back beyond 1750, the other limit for this thesis, could be created. Again, it needs to be stressed that the “web” includes all cases cited in the judgments, that is, both decisions that the judges followed and those that they either mentioned or distinguished were included in the list of cases available for archaeological discussion. Further, the “web” that was constructed included all judgments in a decision, whether the judgments were part of the majority of the court or whether the judgment was in dissent.
A sequence of cases was chosen to demonstrate the practice of repetition. Any case that could have been chosen, particularly if it was decided in a court of review, would have a substantial “web” of cases that constituted some of the conditions of possibility for to that decision. The existence of such a “web of decisions”, or a sequence of cases is not intended to imply an evolution in the law, or that the final decision was a teleological outcome of a process of legal change. The existence of a “web of decisions” only demonstrates that the English common law operates through, and changes with, the use of past legal statements.

Indeed, it is also hoped that an analysis of a “web of decisions” will highlight the non-linear nature of the law. That is, my intention is to show that the legal statements in *Herrington* are not caused by the preceding judgments, more that the preceding judgments constituted conditions of possibility for the later decision. In addition, the use of the “web” will hopefully demonstrate that the changes in the law in the period covered in this project were not a reflection of a smooth transition from one form of liability to another. Some judgments are accepted and others are rejected. Some articulations of liability are repeated and some are not. The decision to focus on a “web of decisions” was intended to highlight how discontinuous the statements of law can be, within a particular web of decisions.

The use of the word “web” is also intended to suggest a perspective on the nature of the use of “precedent” in the law. That is, legal statements can be understood to be taken from earlier cases, without a full understanding of the circumstances of the

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89 An associated point is that it could be very difficult to present an archaeology of legal judgments that did not have a degree of linearity. That is, if there were to be a number of different judgments examined, they would necessarily be over a particular period of time. If the analysis of these judgments were to be presented in a manner that was not chronological, it would require a different form of second order judgment to create this different form of presentation.
decision in which the statements occurred. In some cases, a legal statement is not repeated with approval in a particular judgment because the facts of the earlier case are too dissimilar, however, in many cases, a legal statement is repeated without a discussion of its historical context. That is, “precedents” are taken to be “ahistorical”. In other words, precedents are used in order to attempt to indicate how the “law” is at the time of the repetition of the statement, not to explain how the law was at the time of the making of the statement.

Once a final decision was selected and the “web of decision” of that decision established, the other 18 cases to be excavated had to be chosen. The first case examined, Dale v Hall⁹⁰ was decided in 1750, which was a time that the English legal discursive formation can be understood to have been established. The other cases that were selected for discussion were chosen on the basis of two main criteria. The first was that the words of the judges had to be clearly distinguishable from the words of the reporters and counsel.⁹¹ The second criterion was that the judgments were to be spread fairly evenly across the period examined. This was done in order to avoid any suggestion that the account provided here involved an attempt to deliberately avoid cases decided during a particular period.

⁹⁰ (1750) 1 Wils KB 281
⁹¹ Of course, this criteria was more relevant for the 18th century judgments.
The cases chosen were selected with two ends in mind. First, to allow for an application of the method as I understand it itself. A simple category of monuments (negligence decisions over a particular period written by a discrete and relatively easily describable discursive formation, the English legal profession) made this attempt at the application of the method less complex than it might have been. The second reason for selection reflected my preconceptions concerning the narrative that I thought I could produce. That narrative can be seen either as an account of a shift in the way that judges “saw” the defendants that came before them, or an examination of one of the conditions of possibility for the twentieth century “duty of care”, through a discussion of the practices associated with the repetition of statements of law.

The introduction of the word “duty” can be seen to mark the beginning of a shift in the way in which judges “saw” the defendants who came before them. The capacity of judges to “see” legal subjects as rational individuals, who could be judged according to universal internalised norms, is contingent on judges

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92 In choosing cases I encountered a real tension with respect to the “notoriety” of some of the decisions. The repetition of statements from some of the decisions has made them “notorious”. The danger I felt was that I would reproduce “marker cases” ideas, but I could see no way to avoid this. Some of the cases examined in this project are relatively well-known and some are not. Scott v Shepherd (1773) 3 Wils KB 403 and Vaughan v Menlove (1837) 3 Bing (NC) 468 were chosen because the legal statements contained in the judgments have been repeated often. Other decisions in the third period, such as Bolton v Stone [1951] AC 850 are recognisable both for the level of repetition of the statements and for their relative “youth”. Other cases, such as Ogle v Barnes (1799) 8 TR 188 have virtually disappeared from current understandings of the law.

93 I recognise that choosing decisions from the area of “negligence law” can be seen to be including the use of a “second order judgment” in the application of the archaeological method. However, any problems associated with the use of the judgment were felt to be outweighed by the benefits that may be achieved through the use of a class of decisions in terms of the construction of a narrative around changes to the articulation of liability in the law.

94 At this point, genealogical intuitions may be understood to have “coloured” this project.

95 For the purposes of this application of the archaeological method, legal statements including the word “duty” can be “marker statements”, however, the judgments in which the statements are included do not have to be considered to be “marker cases”. For the statements, rather than the cases, are intended to be the focus of this project.
recognising attributes and norms that were separable from those that could be understood to have been a function of the station in life of the defendant.96 A “duty” can be taken to be an obligation expressed as a norm. That is, a “duty” may be understood as an obligation that can be expressed separately from the obligations that might be imposed as a result of the station in life of the defendant.

The narrative produced by the application of the method as understood in this thesis emphasises the contingent nature of legal change. I do not mean to imply some form of legal evolution in this story. The introduction of the word “duty” can be seen as a condition of possibility, rather than a cause, of the “duty of care”. The fact that the “duty of care” became part of English law years after the use of the word “duty” does not mean that such an outcome was inevitable. I do not mean to suggest that contemporary negligence law “evolved” from eighteenth century descriptions of liability. The eighteenth century judges can be understood to have described liability in the terms that they were trained to describe liability. Just as twentieth century judges can be taken to have described liability in the terms of the discursive practices in which they were trained.

This application of the archaeological method, as it is understood here, produces narratives that allow for the articulation of the separable positivities within the ‘continuity’97 of English law. My attempt to practise ‘utter unconcern for the staple

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96 This shift in the way that judges “saw” the defendants that came before, and in particular, the judges’ interest in the “mentality”, the inner life of the defendants, was also discussed by Foucault in ‘The Dangerous Individual’, an interview in Kritzman, L. (ed), Michel Foucault – Politics, Philosophy, Culture, Routledge, New York, 1988, 125
of conventional history’,\(^8\) is intended to provide some scope for an appreciation of the changing interactions between legal institutions and individual subjects. These changing interactions and articulations can be characterised through the use of discourse theory and the idea that all subjects are constituted by the discursive practices in which they have been trained.

The view that judges and counsel are legal subjects who have undergone specialised training and who utilise sanctioned legal discursive practices to perpetuate both the law and the legal discursive formation is at the heart of this legal archaeology. As the judiciary produce the judgments that can be seen as the monuments of the discursive formation, they can be understood to reproduce the discursive practices of the legal discursive formation. The lawyers who appear before judges, also legal subjects with specialised training, participate in the discursive practices associated with the repetition of legal statements by seeking out and repeating “precedents” in their arguments before the bench. In this way, these statements of law are available for repetition by the judges when writing their judgments.\(^9\) These judgments may then become the artefacts that may be excavated by a legal archaeologist, some of which will be excavated in the remainder of this thesis.

CONCLUSION

An archaeology, as understood in this project, is an excavation of the monuments generated within a discourse or discursive formation. This method can be


\(^9\) In addition, judges themselves may seek out their statements for repetition in their judgments.
understood to be based upon a discursive understanding of society and the legal profession. This chapter, which was based on the discursive understanding put forward in Part One, presented a method for historical analysis of documents produced by members of the English legal discursive formation that incorporates such an understanding.

The archaeological method can be understood to involve the reading of the documents produced within a discursive formation as monuments which reflect the discursive practices of the formation. The method may take these documents, therefore, as artefacts in themselves. From a discursive perspective, the document and the author of the document can be seen as products of discursive practices. Such an acceptance of the documents as artefacts in themselves may enable a deeper acknowledgment of a history that comprises both continuities and discontinuities than is enabled by other, more traditional, approaches to the writing of the history of law. From the perspective adopted in this thesis, every document has the potential to be part of the processes of change in the discursive formation and, therefore, every document produced by a subject of a discursive formation may be of value to an archaeologist.

The role of an archaeologist is not intended to be presented as that of some impartial observer, as archaeologists themselves can be seen to be products of the discursive practices that construct them. As the past of a discursive formation is a multitude of documents, the categorisation of these into periods of change or constancy can be understood to be an act of the archaeologist. It is an imposition of categories onto the documents of the past. Such classifications may be suggested by
the words in the documents and may be inferred from the monuments, but these categories are explicitly generated by the archaeologist.

As an archaeologist is not to “look behind” the documents, she or he is not authorised to assume or imply a chain of causation that runs through the “history” presented in an archaeology. There may be a connection between the monuments, but there can be no argument that one event “caused” another. As an archaeology, from the perspective adopted in this thesis, is to be a purely descriptive exercise, it disallows conjecture with respect to the motivations, or states of mind, of “authors”. All that can be known, according to this view of archaeology, is what has been recorded. These records are to form the subject matter for an archaeology.

The remainder of this thesis is an attempt to support the view that recorded legal judgments can constitute the subject matter for a legal archaeology. These judgments can be seen, if the archaeology avoids complete failure, as reflecting the state of the legal discursive formation at the time of their recording. Judges, and therefore their judgments, are to be taken as a product of the discursive practices that constitute the legal discursive formation. The legal practice of judges using previous judgments in making their decisions is to affirm the importance of records. The practice of majority judgments, and, by implication, minority, dissenting judgments, can be understood to be one of the sites of continuity and discontinuity within the legal discursive formation. Those who dissent are also

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100 As has been suggested throughout this chapter, the goal of a “purely descriptive exercise” is one that may be impossible to achieve. The simple fact that an archaeologist wishes to construct an archaeological narrative of a particular set of discursive practices in itself adds a “layer” of interpretation to the archaeology.
important because it is in the words of the dissenting judges that there is some "room" for a discussion in which possible changes in the law may become possible.

The archaeological excavations that follow in the next three chapters are an attempt to show the relationship between the law and the legal discursive formation. The excavations are also intended to suggest that changes have emerged in the articulation of liability and that there has been a shift in the construction of the legal subjects. These excavations are based on a discursive understanding of society. This discursive understanding allows for the possibility that the law and the legal discursive formation change whilst maintaining their integrity. As it is presented in this thesis, the archaeological method can be understood as an effective form of historical description that can help illustrate the continuous and discontinuous nature of the law. The balance of this thesis is an attempt at the application of this method.
CHAPTER FOUR – THE ARCHAEOLOGY: 1750 - 1800

INTRODUCTION

This chapter is an attempt at an archaeological excavation of the period 1750 to 1802. It is a close examination of five decisions of the English courts in which statements about relationships of liability were made. Before starting the excavation, I have developed some explanatory notes to provide a background to the cases. First, I offer a fuller discussion of the process involved in the specific selection of the cases excavated in this chapter. Second, I provide a brief description of the writ system of law and the use of previous decisions that were practised at the time. Third, I discuss the practices of case reporting in the period covered by this chapter. These sections are included to provide some background to the practices of law of the eighteenth century. The specifics of judicial procedures have changed in the past 200 years, so these brief descriptions are intended to assist in an understanding of the judgments that are excavated in this chapter. A description of how the cases will be discussed in this archaeology will complete this introductory section.

The technique used for selecting the cases to be used in this legal archaeology was to examine cases that were cited in a recent decision. The decision in *British Railways Board v Herrington* was the case used for this process. The decisions to be examined in all three periods were chosen from the web of decisions associated with *British Railways Board v Herrington*. Five decisions are to be examined in this chapter; an analysis of these cases indicates a significant level of consistency in the legal statements articulating liability.
Most of the cases written in the period covered by this chapter were not suited to an archaeological examination. The reports of these cases were either too brief to allow for discussion of the law as presented by the courts in those cases, or the decisions were reported in such a way that it was difficult for me to differentiate between the words of the bench and the comments of the reporter. For a legal archaeology, as understood in this project, it is important to know the speaker of the particular words contained in a judgment. That is, it is important to know whether particular statements are statements offered to the court by counsel, are statements by judges contained in their judgments, or are “impressions” of the judgment written by the reporters. The words of each of these categories may have importance to a legal archaeology (however, it is only the words of counsel and judges that are the focus of this particular archaeology) but it can be considered to be important to be able to differentiate between the “speakers” of words. Therefore, for the purposes of this archaeology, cases where the statements were not differentiable were excluded.¹

The decisions most suited to the project were those where the court was asked to rule on a question of law. That is, the most useful cases, in terms of the method used in this thesis, were decisions of courts acting as courts of review. As was mentioned before, there was not a separate category of negligence decisions in English law in the eighteenth century. In order to examine cases that were similar

¹ Given the predominant aspect of the practice of repetition of past statements of law can be understood to be the repetition of statements made by judges, it is more important to be able to differentiate the words of judges from those of counsel or reporters. As a result of the reporting practices of the eighteenth century, however, many of the reports of the time did not clearly distinguish the words of counsel from those of reporters. If I was to only examine cases in which the words of the reporters, counsel and judges were clearly distinguished there would be very few cases available for excavation. Therefore, I felt it was more important to be able to focus on the words of judges (thus enabling the examination of decisions over a greater period of time) than only to excavate reports in which the words of counsel were clearly distinguishable from those of reporters.
in content to those in the later chapters, the decisions that I deemed most appropriate were those in which the central question related to the question of a relationship of liability between plaintiff and defendant. From the cases that fitted the above criteria those that used the clearest language in their description of the relationship were chosen for examination. The final criterion that I used was that the decisions were spread fairly evenly through the period.

One of the characteristics of eighteenth century law was the use of writs in the court procedures available to those who sought redress for damage done to their person or property. “The law”, in this understanding, only allowed a limited number of actions to be brought and each of these actions was to be specific in its application. That is, a plaintiff had to bring their grievance to the attention of the court with the appropriate writ. The plaintiff would be non-suited if their counsel brought the wrong action and the case thrown out of court. This was so even if facts were introduced that would have proven the defendant liable under another writ. Much of the legal argument of the time appears to have involved a debate about the appropriateness of the plaintiff’s writ.

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2 Other cases that did fit the criteria but that were not examined in this thesis included Beckwith v Shordike (1767) 4 Burr 2092, Day v Edwards (1794) 5 TR 648, Merryweather v Nixon (1799) 8 TR 186, Pasley v Freeman (1789) 3 TR 51, Payne v Rogers (1794) 2 H Bl 350, Wilkinson v Coverdale (1793) 1 Esp 75

3 This was as part of an attempt to cover the period as well as possible within the constraints of a project of this size.

4 In terms of the writs, two types are important for this chapter. These are “trespass” and “action on the case”. The former “was the remedy for injuries accompanied by immediate violence, whether to… property or to the person” (Halsbury’s Laws of England, vol. 1, Butterworths, London, 1907 at 43-44). Actions on the case were either “actions in respect of wrongs similar to those the subject of trespass, but unaccompanied by immediate violence; or general actions on the case, which provided a remedy for all wrongs which would otherwise have been remediless” (ibid at 40).
Some of the argument around the use of writs included reference to how each writ had been used in previous cases. The use of previous legal statements was already established as an important discursive practice by this time. If counsel for either the defendant or the plaintiff argued that a previous court had allowed a certain application of a writ, then the present judges would consider that past decision in their own judgments. Past statements of law functioned as part of legal argument. As the judges spoke for the law, if the counsel reminded them of previous legal statements, then the judges were compelled to at least consider those statements. As these statements were only used as evidence in argument, they were not considered binding. Judgments included references to precedents but judges were not constrained by them.

Another important factor in the practice of repetition was that there was no rigid court hierarchy. That courts were not organised into a rigidly defined hierarchy of courts meant that there was no single “higher” court that functioned as the final arbiter of matters legal. That did not mean there was no appeal process, however. The Court of the King’s Bench, for example, did hear proceedings in error from lower courts. Also, many situations allowed judgments to be delayed until a point of law had been clarified by a full court.

One of the matters that needed consideration in the use of previous statements was the reputation of the reports cited. There were no official reports in the eighteenth

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5 The use of past decisions in the judgments examined in this chapter demonstrate the practice. In addition, Baker has noted that by 1600, even a majority opinion would have the “effect of settling the law” with respect to a particular issue: An Introduction to English Legal History at 227
6 Ibid at 155-161
century and a number of reporters provided the service.\(^7\) Certain of these reporters acquired a better reputation than others. This was not necessarily a reflection of the greater accuracy of their reports and can be understood to indicate that the legal discursive practices of the time included those that meant that statements contained in certain sets of reports were more likely to be repeated than those contained in other sets of reports.\(^8\) The words of the judges, as recorded in any of these reports, could have been taken to be statements of the law, notwithstanding the reputation of the reporter. The judges of the time can be considered to have been constituted through a multiplicity of different discursive practices. One set of these were the practices relating to the reception of precedents into legal argument. Legal practices were such that a particular set of reports could be given precedence over others. Any and all reports were available for use in legal argument, including different reports of the same judgment as each provided a statement of “the law”.

The decisions explored in this chapter are *Dale v Hall*, *Slater v Baker*\(^9\), *Scott v Shepherd*\(^10\), *Forward v Pittard*\(^11\) and *Ogle v Barnes*\(^12\). The cases are dealt with in chronological order.\(^13\) Each discussion has been broken down into two sections. The first covers the background of the decision, including the facts as presented to court, which gave rise to the original action. This section also includes a discussion of the legal question or questions as presented to the court. As each of these

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\(^7\) For a greater discussion about the role of reporters and the practices of reporting judgments, see section 3 of Chapter 2, above.

\(^8\) In the earlier part of the eighteenth century, some reports were “so bad that judges forbade their citation”: Baker, *An Introduction to English Legal History* at 210

\(^9\) (1767) 2 Wils KB 359

\(^10\) (1773) 3 Wils KB 403, 2 Bl W 892

\(^11\) (1785) 1 TR 27

\(^12\) (1799) 8 TR 188

\(^13\) The use of a chronological order is not intended to imply anything. To re-order the cases would make little difference, in terms of the characterisation of dominant statements of the law, except that later cases cite earlier cases, therefore, a chronological order was chosen.
decisions are either appeals, or points of law that were seen to be in need of clarification prior to judgment in the court of first instance, all the cases turn on a question of law and not fact. Despite the centrality of the legal points, the facts are useful for presenting the relationships of liability as described by the judges. Importantly, the first section will also include the statements of law presented to the court by counsel, as it is often these statements that judges will use in their judgments. The second section of each discussion will focus on the judgments themselves. Each judgment will be examined statement by statement. This is intended to assist in a presentation of the judgment in terms of each of the statements of law it can be understood to have contained.\textsuperscript{14}

The final section of the chapter will draw together the statements of law made by the judges in their decisions. Two features will be highlighted. First, the use of previous legal statements in the judgments will be discussed. This practice of repetition can be understood to ensure the perpetuation of the law and also allows the law to change, although there seems to be little evidence of change in the judgments examined in this chapter. Second, the manner in which the defendants are “seen” by the judges will be considered. The use of language by the judges in their characterisation of the defendants and their liabilities illustrates the relationship between the law and the profession, that is, the construction of the judges through the processes of subjectification. The way judges “see” the defendants may also suggest, over the length of the thesis, a shift from a form of

\textsuperscript{14} In the discussion of the judgments, there is little reference to the names of the judges who wrote them. This is done in order to highlight the refusal of “authorship” in Foucault’s work.
governance that, from a genealogical perspective,\textsuperscript{15} can be seen as “feudal” to a form that can be seen as “modern”.\textsuperscript{16}

\textsuperscript{15} This genealogical perspective is not essential to this thesis and may be considered contentious. Some readers may prefer to refuse categories of “feudal” and “modern” as descriptions of the different visibilities present in some of the decisions examined in this project.

\textsuperscript{16} For purposes of reducing confusion in this and subsequent chapters, a standardising practice will be followed when referring to the litigants. In all cases, the parties will be referred to as either the plaintiff or the defendant. In some of the examined cases, the different judgments use either appellant/respondent or plaintiff/defendant. To avoid confusion, only the latter categories will be used.
This case was argued before the Court of King’s Bench. The plaintiff sought a ruling that the court of first instance was wrong in law on the question of the admissibility of certain evidence. The plaintiff requested a new trial. The original trial was between the defendant, a shipmaster, and the plaintiff, who provided consideration to the defendant in exchange for the defendant carrying a shipment of hardware from one port to another. The action was the result of the goods being damaged by water that came in through a hole made by rats in the keel of the ship. Payment of 24l. was sought as compensation.

At the trial, the plaintiff did not declare that the defendant was a common carrier, but argued that there was a separate agreement between the two parties for the transport of the goods in return for consideration. The issue before the court was one of non assumpsit, a categorising of the rights and obligations owed to each of the parties. Evidence was presented at the trial, but not all the evidence was considered relevant. This contention was at the heart of the plaintiff’s request for a new trial. The evidence in question was introduced by the defendant to establish that he had taken all possible care with the goods. The plaintiff’s evidence dealt only with the condition of the cargo when delivered to the ship and the nature and extent of the damage suffered. All the evidence was put to the jury, which found for the defendant.
At the later hearing, counsel for the plaintiff argued that the evidence submitted by the defendant at the first trial was inadmissible. Counsel for the defendant countered that it was admissible because the plaintiff did not declare against their client as a common carrier, but sued on the basis of a single contract. This meant that the alleged breach of the contract was a failure to take sufficient care of the goods. This choice of action by the plaintiff’s counsel meant that negligence was at the heart of the issue and, therefore, that the defendant’s evidence was relevant and admissible. Further, counsel for the defendant claimed that the plaintiff failed to prove negligence and that the disputed evidence showed that there was no negligence on the defendant’s part.

THE DECISION

The judgments were unanimously for the plaintiff and a new trial was granted. The first judge stated that the evidence of the defendant was inadmissible. He ruled that the law holds that all who undertake to transport goods safely, in return for consideration, are liable for any damage that is sustained during the transportation. ‘This is no more than the law says; everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody’. This liability extends from the time that carriers take goods into their custody. The only exceptions to this is where the damage is sustained through an ‘Act of God, or the king’s enemies’.

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18 Counsel were named as Mr Clayton and Mr Ford. No specific legal statements were attributed to counsel for the plaintiffs in the body of the report. There was, however, a reference in a footnote to a case, Goff v Clinkard (no citation was given) cited by counsel.
19 1 Wils KB 281, 282. Counsel for the defendant were Sir Thomas Bootle and Serjeant Bootle.
20 Id, per Lee, C.J., with whom Wright J. concurred. Emphasis in the original. No specific judgments were referred to in the statements of the judges.
The second written judgment did not discuss the issue of the admissibility of evidence. The decision was based on the law protecting the property of the hirer of the carrier. The judge ruled that though the plaintiff had not declared against the defendant as a “common carrier”, his claim was ‘the same in effect’. The protection of goods arises out of contract, and the ‘promise to carry safely need not be proved; [as] the law raises it’. The contract was breached, as the goods were ‘so negligently kept… that they were spoiled’.  

21 Id, per Dennison J., with whom Foster J. concurred.
This case was argued before the Court of Common Bench. The defendants sought a judgment from the court to set aside the jury’s verdict in the court of first instance. This appeal was based on two grounds. The first was a matter of the joinder of action between the two defendants. The second was based on the contention that the case should have been brought under the writ of trespass *vi et armis* and not under contract.

The action was started after the plaintiff had suffered a broken leg and the defendants, one a surgeon and the other an apothecary, had been employed by the plaintiff to heal him. The plaintiff’s condition worsened after their treatment. At the original trial, evidence was introduced for the plaintiff to the effect that both of the bones in his leg were broken. For the first nine weeks, the plaintiff was under the care of another apothecary, John Latham. After that time, there was evidence that the leg was healing and that a callous had formed as part of that process and the plaintiff was allowed home. The evidence of another witness was that, at that stage, the plaintiff could walk with the aid of crutches. Another witness also said that the plaintiff was capable of bearing his weight on the leg at that time.

Mr Latham gave testimony based on his visits to the plaintiff after the plaintiff had gone home. It was at this time that the defendants started their treatment of the plaintiff. The evidence placed before the court, undisputed by the defendants, was that the defendants broke the callous on the leg and fixed ‘an heavy steel thing that

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22 (1767) 2 Wils KB 359
had teeth’ to the plaintiff’s leg. This instrument was designed to ‘stretch or lengthen the leg’. After the attachment of this device, the plaintiff was for three or four months afterward ‘still very ill and bad of it’. The plaintiff sued the defendants, alleging that they ‘not regarding their promise and undertaking, and the duty of their business and employment, so ignorantly and unskilfully broke and disunited the callous of the plaintiff’s leg after it was set, and the callous formed, whereby he is damaged’. 23

The defendants were joined in the action, despite the fact they were in different professions. Evidence adduced at the original trial was to the effect that one of the defendants, when offered payment after one of his visits, had said that they should be paid together when their business was done. Also, there was evidence that they had worked together on the plaintiff.

One of the issues that was repeatedly referred to at the original trial related to the reputation, and by logical extension the level of knowledge and expertise, of the defendants. One defendant had been the first surgeon of St Bartholomew’s Hospital for 20 years. Two other surgeons called as witnesses spoke of his good character, with one stating that the defendant was ‘eminent in his profession’. 24 There was no record of evidence as to the reputation of the apothecary.

Evidence was also brought before the court as to the common practice in the treatment of broken legs. One witness gave the opinion that if the patient could bear his weight on a leg that was in the process of healing, there would be no need to

23 Id
24 Id
break the callous. Another surgeon swore that in the event of a leg that is not healing straight, the appropriate remedy is the compression, rather than the extension, of the limb. A third surgeon repeated that the extension of the leg would constitute bad treatment.

At the original trial, counsel for the defendants tried to contest the joining of the parties. They argued that the claim seemed to be against the surgeon, with little evidence as to the liability of the apothecary. The court dismissed this argument, leaving the matter to the jury to decide, with the observation that it was the apothecary who sent for the surgeon. The apothecary had only been summoned to remove the bandage and at that stage the plaintiff was not in any pain. The jury found for the plaintiff and awarded £500 against the defendants jointly.

The defendants appealed on the issue of the joinder of the defendants and on the choice of writ. On the first ground of appeal, counsel for the defendants argued that there was no evidence against the apothecary, save for his calling for the surgeon. As the apothecary never professed ‘any skill about the leg’, they argued, the jury must have found him guilty without any evidence. They also argued that the judgment against the surgeon must be unsound, as all the witnesses before the court at the trial agreed that the surgeon did not want for knowledge and ‘is celebrated for his knowledge in his profession as well as his humanity’.25

The second ground of appeal was based on counsel’s claim that the evidence brought before the court did not apply to this action upon a joint contract. Counsel for the defendants admitted that the evidence showed that the callous was broken

25 Id. Counsel were not named in this report of the decision.
without the patient’s consent and not that there was a lack of skill on the part of the defendants. As the action should have been based on the question of consent, the appropriate suit would have been trespass *vi et armis*. Counsel asked the question ‘if the plaintiff should not be content with the present damages, but bring another action of trespass *vi et armis*, could this verdict be pleaded in bar?’. The court did not hear from the plaintiff’s counsel.

**THE DECISION**

The Court of the Common Bench brought down a unanimous decision for the plaintiff. The single judgment addressed the two grounds of appeal separately. On the issue of the joining of the defendants in the action, the court held that, as they acted jointly, they were jointly liable. Whenever anything was done for the plaintiff, the apothecary assisted the surgeon. The members of the court placed particular emphasis on their joint effort in breaking the callous. The request to be paid jointly at the end of the treatment also suggested a joint exercise.

As to the surgeon defendant’s abilities, the court considered him to be of good character, but ‘cannot well conceive why he acted in the manner he did; but many men very skilful in their profession have frequently acted out of the common way for the sake of trying experiments’. The court restated the evidence that prior to the intervention of the two defendants the plaintiff was at home, free from pain and able to walk with crutches. The court questioned the surgeon’s application of the

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26 Id
instrument, when the plaintiff had only sent for him to remove the bandage, and repeated the suggestion that it was for experimental purposes.27

As to the second ground of appeal, the question as to whether the issue could be pleaded in bar to an action of trespass *vi et armis*, the court held that it may be pleaded in bar. As their discussion on this point, the court held that it was reasonable for a patient to be told ‘what is about to be done to him’. The failure of the two defendants to obtain consent, which is ‘the usage and law of the surgeons’, showed ‘ignorance and unskilfulness… what no surgeon ought to have done’. The judgment stated that it ‘seems to be admitted’ by the defendants that the plaintiff ‘ought to receive satisfaction for the injury’, but that the defendants claimed they should have been sued as trespassers *vi et armis*. The court held that it is not necessary for the bench to ‘look with eagle’s eyes to see whether the evidence applies exactly or not to the case, when they can see the plaintiff has obtained a verdict for such damages as he deserves’. In this case, it appeared to the court that this was the defendants’ attempt at experimenting with a new instrument. If this was true, then it was a ‘rash action, and he who acts rashly acts ignorantly’. Despite the fact that these two defendants may be as skilful as any in their profession in England, in this ‘particular case they have acted ignorantly and unskilfully, contrary to the known rule and usage of surgeons’.28

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27 Ibid at 362. No judges were named in the report and no references to precedents were included.
28 Id.
This case was argued before the Court of Common Bench. The decision is the opinion of the court on a question of law that was raised in a jury trial. At that trial the jury found for the plaintiff and awarded damages. That verdict was not absolute, however, as judgment could not be executed until the question of law was considered by the present court.

At the trial the plaintiff brought an action for trespass and assault declaring that the defendant assaulted him ‘with sticks, staves, clubs and fists and then and there threw… a lighted squib, consisting of gunpowder and other combustible materials, [which] struck [him] on the face therewith, and so greatly burnt one of [his] eyes that … [he] afterwards wholly lost his said eye’. The incident happened in a ‘market-house, which is a covered building, supported by arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled’.

The evidence brought before the court indicated that the defendant did not throw the squib directly at the plaintiff. The defendant threw the squib within the market-house. The device landed on the stall of a William Yates, where a ‘James Willis

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29 (1773) 3 Wils KB 403, 2 Bl W 892. This case is the only case addressed in this Chapter that was recorded by two different reporters. Both records will be referred to in this section. The decisions in the web of decisions that centred on British Railways Board v Herrington cite both reports. That is, both versions are considered worthy of citation by members of the legal discursive formation. For this archaeological excavation, then, both reports are monuments worthy of examination. Any differences between the two records will be indicated where appropriate.

30 3 Wils KB 403 at 403
31 2 Bl W 892 at 893
instantly, and to prevent injury to himself and to the said wares… took the said lighted serpent or squib from off the said standing, and then threw it across the said market-house’. The squib then landed on the stall of James Ryall, who in turn, picked up and threw it to another part of the market-house. It was the result of Mr Ryall’s throw that the plaintiff was hit in the face by the squib. On this evidence, the jury found for the plaintiff, subject to the opinion of the Court of the Common Bench as to whether this action was legally maintainable against the defendant.

At the original trial, counsel for the defendant had argued that bringing the action under trespass *vi et armis* was wrong in law. This argument was continued before the present court. Counsel’s argument was that the damage to the plaintiff was not ‘done immediately by the defendant, but was consequential, and probably might not have happened to the plaintiff, if the squib had not been secondly thrown by Willis, and afterwards by Ryall’. As the damage was consequential, rather than immediate, counsel for the defendant argued that the appropriate action was trespass upon the case. Counsel for the plaintiff responded with the claim that a person who commits a tortious act is answerable in trespass *vi et armis* for all the consequences of their act. Counsel highlighted one previous decision, *Underwood v Hewson*, as evidence for this statement of law. This was the point on which the court was asked to rule. That is, they had to determine whether the defendant was answerable under an action for trespass *vi et armis* for all damage caused by his actions, or only that damage which was done as an immediate result of his action.

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32 3 Wils KB 403 at 404-5
33 3 Wils KB 403 at 406. Counsel for the defendant was Serjeant Burland.
34 1 Str 596.
35 3 Wils KB 403 at 405. Counsel for the plaintiff was Serjeant Glynn.
THE DECISION

The Court found for the plaintiff. However, the judgment was not unanimous. The four judgments delivered in this case will be addressed in turn.

The first judge to be reported found for the plaintiff. The question before the court was repeated as

whether, upon the facts proved at the trial, which have been reported, and before stated, this action of trespass of assault and battery *vi et armis* doth not well lie against the defendant? Or whether it should not have been an action upon the case against him, upon a supposal that the injury done to the plaintiff was consequential and not immediate?36

The judge found that action of trespass *vi et armis* did lie against the defendant. According to the judge, the ‘nature of the act, the time and place when and where it was done, make it highly probable that some personal damage would immediately happen thereby to somebody’. Therefore, despite the fact that there were actions of others between the act of the defendant and the damage to the plaintiff, the defendant’s throw was ‘of a mischievous nature’ and he is ‘answerable in this action’. Further, ‘as the injury done was not inevitable, this action lies well against him’. The judge cited precedents to support that point and stated the law to be ‘if the act in the first instance be unlawful, trespass will lie; but if the act is prima facie lawful, and the prejudice to another is not immediate, but consequential, it must be an action upon the case’.37 This distinction the judge attributed to the Lord Chief Justice Raymond in *Reynolds v Clarke*.38

36 Ibid at 407, per Nares J.
37 Ibid at 407-8
38 (1724) 1 Str 634. The judge in the present case also referred to, with approval, the decision cited by counsel for the plaintiff, *Underwood v Hewson*. 
That is, the judge held that trespass would lie if the initial act was unlawful. In terms of the writ that was pleaded, the judge did ‘not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient’. The defendant ‘gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of mischief was communicated to it by Willis and Ryall’.39 ‘If a man doth an unlawful act, he shall be answerable for the consequences of it’. The judgment finished with reference to the words of the decision in *Slater v Baker*:

> “we will not look with eagle’s eyes to see whether the evidence applies exactly or not to the case, when they can see the plaintiff has obtained a verdict for such damages as he deserves” so I am of the opinion the plaintiff ought to have judgment.40

The second judge reported found for the defendant. He stated that ‘if the injury received from the act of the defendant was not immediate, but a consequence, trespass *vi et armis* will not lie, but must be an action on the case’. This statement of the law was also attributed to the Lord Chief Justice Raymond in *Reynolds v Clarke*. In that case the law was characterised by the use of the example of a log and a highway.41 If ‘I throw a log of timber into the highway, and another man tumbles over it, and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass, because it is an immediate wrong’.42

For the judge reported second, the difference in his use of *Reynolds v Clarke* from that of the judge first reported was that for the judge reported second ‘the

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39 2 Bl W 892 at 894
40 3 Wils KB 403 at 409
41 Anecdotally, this example is still repeated by torts law lecturers today.
42 2 Bl W 892 at 894-5, per Blackstone J.
lawfulness or unlawfulness of an act is not the criterion between the two actions, for a man may become an immediate trespasser *vi et armis* by doing a lawful act’. This understanding was supported, in part, by reference to *Underwood v Hewson*, the judgment cited by counsel for the plaintiff in argument. The issue of the intervening actors prevented the defendant from being held liable, as the action was not immediate. ‘The first act in the present case was unlawful; but the squib by the first act did not strike the plaintiff, the first act was compleat when it lay on Yates’ stall’, and as both Willis and Ryall were ‘free agents’, the injury ‘was the consequence of, and not done immediately by the first act of the defendant’.43

In the eyes of the second judge reported, both Ryall and Willis had ‘exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves… not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person; - nothing but inevitable necessity’. Various cases were then cited to support this view. The judge continued, the ‘defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act’. His own immediate act was the ‘throwing [of] the squib to Yates’s stall. Had Yates’s goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for the actions of other men’.44

The statements of law from *Slater v Baker* were then discussed, but the decision in that case was distinguished. It was held that the court in *Slater v Baker*, when citing the lack of necessity to look through “eagle’s eyes”, was saying that it did not have

43 3 Wils KB 403 at 409-410
44 2 Bl W 892 at 896-7
to do so because the plaintiff had already been awarded damages. Although the jury had awarded damages to the plaintiff in the present case, the award was subject to the current decision, ‘there being no compleat verdict in the present case, the court will not, like another sort of birds [sic], shut their eyes against the light’.45 After an “eagle-eye” consideration of the choice of writ pleaded in this case, the second judge decided for the defendant.

The third judge reported found for the plaintiff. He agreed with the first judge reported in that ‘wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequence be in the nature of trespass’.46 The judge argued that neither of the intervening actors could be held liable as they had acted in ‘defence of themselves and their goods, being in a state of fear, without power of recollection’. Given that this was the case, then if the action did not lie against the defendant, then the ‘plaintiff who has been greatly injured will be without remedy’. Therefore, as the ‘defendant is the only wrongdoer… judgment must be for the plaintiff’.47

The last judge reported also found for the plaintiff. Again the focus of the judgment was on the appropriate forms of action. He stated that the ‘distinction between actions of trespass on the case, and trespass _vi et armis_ should be most carefully and precisely observed, otherwise we shall introduce much confusion and uncertainty’.48 The judge considered the law to be that trespass _vi at armis_ lies if a

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45 3 Wils KB 403 at 410
46 2 BI W 892 at 898, per Gould J.
47 3 Wils KB 403 at 411.
48 Id, per De Grey CJ.
person is injured through the use of force. In the present case, therefore, the question concerns whether the plaintiff was injured ‘by force from the defendant? Or whether the injury was received from, or resulting from a new force of another?"  

The judge held that the throwing of the squib by the defendant was unlawful at common law, that the squib had a ‘natural power and tendency to do mischief indiscriminately; but what mischief, or where it would fall, none could know’. As the two other people included in the chain of action ‘did not act with, or in combination with the defendant… [and] for fear of danger to themselves’, their actions were merely a ‘continuation of the first act of the defendant’. As ‘no man contracts guilt in defending himself”, Willis and Ryall were not guilty of any trespass. Therefore ‘all the injury was done by the first act of the defendant’. The judge held the defendant was liable for the injury suffered by the plaintiff.

49 The judge later repeated the qualification that ‘if the injury be immediate and direct, it is trespass  

vi et armis, if consequential, it will be trespass on the case’ 3 Wils KB 403 at 412, 2 Bl W 892 at 899.  

50 3 Wils KB 403 at 411.  

51 Ibid at 412-413
This case was argued before the Court of King’s Bench. The judgment was on a question of law that was raised in a jury trial. The jury found for the plaintiff, subject to this opinion. The question concerned ‘an action on the case against the defendant as a common carrier, for not safely carrying and delivering the plaintiff’s goods’. The facts as presented were that the plaintiff delivered 12 pockets of hops to the defendant to be carried by the defendant’s road wagon. Prior to the goods being transported, a fire broke out 100 yards from where the hops were stored. The fire burnt with ‘inextinguishable violence’, spread and destroyed the plaintiff’s hops. The plaintiff did not allege any negligence on the defendant’s part, but that the fire ‘was not occasioned by lightning’.53

Counsel for the plaintiff argued that a carrier is liable for damage to goods they carry in all cases, save for acts of God or of the King’s enemies, as, they claimed, was decided in Dale v Hall. The only doubt about this rule coming from the construction of the words “act of God”. Counsel suggested that, with a reference to Amies v Stephens,54 the phrase meant ‘an effect immediately produced without the interposition of any human cause… [or] a natural, not merely an inevitable accident’.55

52 (1785) 1 TR 27
53 Ibid at 27
54 1 Str 128
55 1 TR 27 at 28. Counsel for the plaintiff was named as N. Bond.
Counsel for the defendants disagreed with the statement of law presented by the plaintiff’s counsel. The view put forward was that a carrier is only liable ‘for damage and loss occasioned by the acts or negligence of himself and servants, that is, for such damage and loss only as human care or foresight could prevent’. As the question of negligence in this case was ‘expressly negatived’, counsel argued, the defendant should not be held liable. Past cases were cited and counsel stated that there was no precedent ‘which says that a carrier is responsible for mere accidents. He only engages against substraction, spoil, and loss, occasioned by the neglect of himself or his servants’.  

Counsel for the defendants added that if the court should be of the opinion that the carrier is answerable for all loss except damage occasioned by an act of God, then the fire in this case would be an ‘accident not within the words, [but] within the reason of that ground’. Events such as lightning and tempest are not the ‘immediate acts of the Almighty: they are permitted but not directed by him’. These occurrences are ‘not held to charge a carrier… [as] they are not under the control of the contracting party’. Therefore, if lightning and tempest are included in the exception to the liability of carriers, then a fire, such as the one in this case, should also exempt the carrier from liability for the damage suffered by the plaintiff.

Counsel for the plaintiff, in reply, cited a number of previous decisions to counter the arguments of counsel for the defendants. Counsel for the plaintiff included a

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56 Ibid at 28-30. Counsel for the defendant was named as Borough. Two of the past cases cited were Rich v Kneeland (Hob 17) and Coggs v Bernard (2 Ld Raym 909).

57 1 TR 27 at 31-32. Counsel also used statements from Dale v Hall as evidence of his understanding of the law, on the basis that in that case there were ‘clear facts of negligence’. 
statement from *Dale v Hall* and referred to, among others, *Goff v Clinkard* to argue that defendant was liable for the loss suffered by the plaintiff.\(^5\)

**THE DECISION**

The decision of the Court was unanimously for the plaintiff and was delivered in a single judgment. The law was stated as being that there are ‘events for which the carrier is liable independent of his contract’. Also, arising from the contract the carrier is ‘liable for all due care and diligence; and for any negligence he is suable on his contract’. The law also attributes a ‘further degree of responsibility by the custom of the realm… a carrier is in the nature of an insurer’. A carrier is liable for all loss or damage, ‘for every accident, except by the act of God, or the King’s enemies’.\(^5\)

The judgment then addressed the interpretation of an “act of God”. The judges considered such a thing to be ‘something in opposition to the act of man’. However, in order to limit litigation ‘going into circumstances impossible to be unravelled’, a carrier is considered to be liable for all loss except where it is shown to have been caused by the King’s enemies or ‘by such act as could not happen by the intervention of man, as storms, lightning, and tempests’. The court found that, in this case, the fire ‘certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident’.\(^6\)

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58 Ibid at 32-33. *Goff v Clinkard* was a decision referred to in argument by counsel for the plaintiff in *Dale v Hall*.

59 Ibid at 33, per Lord Mansfield. The judgment did not include specific reference to any previous judgment, despite the number of judgments referred to by counsel in argument.

60 Ibid at 33-34
This case was argued before the Court of King’s Bench. The case was an appeal for a rule in arrest of judgment. The plaintiffs had obtained a verdict in the original trial. The defendants then sought an arrest on the ground that the action was misconceived and should have been brought as trespass, rather than as an action on the case.

The original declaration stated that the plaintiffs possessed a ship and were on a voyage. The declaration also stated that the defendants possessed a ship, and ‘that they so… negligently, and inexpertly managed, steered and directed their ship, and took such bad care of the management, steering and direction thereof’ that the defendant’s ship ‘through the mere default, and by reason of the negligence… and unskillfulness of the defendants, with great violence and force, sailed against and ran foul of, and came upon and against the ship of the plaintiffs with great force, so that the plaintiff’s ship was greatly damaged’. The plaintiffs obtained the verdict on the basis of this declaration.

At the hearing for the arrest of judgment, counsel for the plaintiffs argued that ‘if the injury be occasioned by the immediate act complained of, an action of trespass must be brought; but if the injury be merely consequential upon that act, an action upon the case is the proper remedy’. According to counsel, a qualification that ‘there must be some act done by the defendant’ must be added for an action of
trespass to succeed. They argued that ‘it does not appear that any act whatever was
done by the defendants… it appears… that the injury complained of was
occasioned by their negligence’.63

Counsel for the defendants, in reply, stated that as ‘the injury done was occasioned
by the immediate act of the defendants, the plaintiffs should have brought an action
of trespass’. They also argued that ‘to constitute trespass, it is not necessary that the
will of the defendant should concur’. The distinction between wilful and negligent
acts, therefore, is not applicable in a case such as this. The case of Scott v Shepherd
was raised to support this claim. According to counsel, the defendant in Scott v
Shepherd was held liable in an action for trespass, despite the fact that the injury to
the plaintiff was not the result of a wilful act of the defendant, who ‘did not intend
to do the mischief that ensued’.64

THE DECISION

The decision of the court was unanimous in favour of the plaintiff. However, the
judges gave different reasons for reaching this conclusion. The first judge reported
began by noting that ‘it is clear that the mind need not concur in the act that
occasions an injury to another’. He then cited Reynolds v Clarke and Scott v
Shepherd where, for him, the legal distinction was clear. ‘[I]f the act occasion an
immediate injury to another, trespass is the proper remedy; but if the injury be not
immediate but only consequential upon the act done, there the party injured must

63 Ibid at 189. Counsel for the plaintiffs were Erskine, Gibbs and Alderson. A number of judgments
were referred to, by name only, including Reynolds v Clarke (1 Str 634), Savignac v Roome (6 TR
125) and Tripe v Potter (unreported, cited in Savignac v Roome).
64 8 TR 188 at 190. Counsel for the defendants were Law and Bayley. Counsel also referred to
Weaver v Ward (Hob 134).
bring an action on the case’. However, ‘it cannot be said, that in this case the defendants *vi et armis* did an injury to the plaintiffs, when it appears that they did not do any act at all’. The declaration stated that the defendants carelessly and negligently steered their vessel and, ‘by reason of such negligence, their vessel sailed against and ran foul of the plaintiff’s; and for that negligence they are liable in an action upon the case’.  

The second judge reported started with the observation that, as the court was being asked for an arrest of judgment, ‘every presumption is to be made in favour of the verdict; at least nothing is to be presumed against it’. Here, the original verdict was based on an allegation of negligence and not of wilfulness. In the judge’s opinion, if the damage in the present case had been the result of a wilful act, then ‘this case must have been governed by that of *Tripe v Potter*’ and trespass would have been the appropriate form of action. The decision in *Morley v Gaisford* was highlighted as further evidence of this statement. If, during the trial in the present case, the damage was proved to have been the result of such a wilful act, then the plaintiffs would have been non-suited. The record states that the injury ‘was occasioned by the negligence of the defendants’. As the jury found a verdict for the plaintiffs, the complaint set forth in the declaration must have been proved, ‘and for such an injury an action upon the case is the proper remedy’.  

The third judge reported repeated the distinction that wilful actions required a suit in trespass, while negligent actions required a suit of action on the case. The

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65 Ibid at 190-191, per Lord Kenyon, C.J.  
66 Ibid at 191, per Grose J.
decision in *Haward v Banks*\(^{67}\) was referred to with approval in this context. The judge stressed the importance of evidence in ascertaining the proper remedy. In this case, the ‘negligent and improvident management of the defendants’ ship does not imply that any act was done by them’. After the initial negligence, ‘they may have done every thing in their power to avoid the mischief, and then the running against the plaintiffs’ vessel may have been owing to the wind and tide’. There was no evidence of wilfulness on the part of the defendants. If the facts had indicated wilfulness, the plaintiffs could have been nonsuited and the defendants ‘should have taken this objection at the trial; but after verdict, we must understand that that was not the fact’. The judge ruled in favour of the plaintiff.\(^{68}\)

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\(^{67}\) 2 Burr 1113. This cases was another of the decisions cited by counsel for the plaintiffs in argument.

\(^{68}\) 8 TR 188 at 192, per Lawrence J.
ANALYSIS

During the eighteenth century, judges can be understood to have considered three questions when deciding whether the defendant had to compensate the plaintiff. The first was “was there any damage suffered by the plaintiff”. Second, “was the defendant in a category of people that could be liable to pay compensation?”, that is, was the defendant “visible” to the court, and last, “was the right writ pleaded by the plaintiff?”. In certain situations, the last two questions were conflated, however, in all cases, all the questions had to be answered in the affirmative for compensation to be payable.

This analysis will look at the two features of the law that are of interest to this application of an archaeological method. First, the practice of repetition of past legal statements will be highlighted. Key phrases will be indicated and their progress through the decisions will be noted. As the period covered in this chapter is one of relative continuity in terms of the articulation of liability there will be little evidence of particular legal statements either “dropping out” of, or coming into regular use by the judges. The second feature of the law that will be examined is the manner in which the defendants are “seen” by the judges. That is, the manner in which the members of the legal profession describe and categorise the defendants will be looked at more closely.69

The outcomes of the cases discussed in this chapter are of little interest to this archaeology. It does not matter whether or not the defendant was found liable, it

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69 This notion of discourse delimiting that which is “visible” to the members of the discourse is, as mentioned above, highlighted in Kendall & Wickham, Using Foucault’s Methods at 33.
does not matter who the defendants or plaintiffs are as individuals. In particular, it
does not matter whether or not there was a *just* outcome for the parties. These
issues are more the province of a traditional history of law, or at least of an
archaeology with a difference focus from this one. What is of interest to this project
is the language that is used by the judges. Specifically, the statements that the
judges use and re-use are the focus of this analysis.

**THE PRACTICE OF REPETITION**

There are two types of repetition that are evident in the decisions covered in this
chapter. The first type of repetition discussed here is the repetition of previous legal
statements that are not connected to specific judgments of past judges. The second
is the much-recognised use of precedents. The use of such precedents itself falls
into two types. The first is the quotation of specific phrases from the earlier
decision and the second is the reference, by name only, to the previous judgment.
In this discussion I am predominantly interested in the repetition of *statements* of
law (whether linked to specific cases or not); however, all forms references to
previous judgments and statements from previous judgments can be understood to
function in accordance with the legal discursive practice of repetition.

Within even this small selection of cases there are references to other decisions
examined in this chapter. In *Scott v Shepherd* two of the judges refer to the
judgment in *Slater v Baker*. In particular, the judges in the later case refer to the use
of “eagle’s eyes” by the court in the process of judgment. Further, in *Ogle v
Barnes*, reference is made to the decision in *Scott v Shepherd*. And, although not
part of the judges’ decision, counsel for the plaintiff in *Forward v Pittard* cited *Dale v Hall*.

In *Dale v Hall*, the first judge reported wrote: ‘this is no more than the law says; everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody’.\(^7^0\) This is a repeated statement of what the law is. This is the law that the judge considered was binding in this case and therefore he repeated it in creating his decision.

The statement in *Dale v Hall* was qualified by the exceptions relating to the “Acts of God, or the King’s enemies”. It was this qualification that was important to the judges in *Forward v Pittard*. Therefore, the judges in that case repeated the statement as being foundational for their judgment. Other statements were repeated describing the obligations of the common carrier. The judgment included the statement that it ‘appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract... It is laid down that he is liable for every accident, except by the Act of God, or the King’s enemies’.\(^7^1\) The judges added statements that discussed the common carrier being an “insurer” and describing the characteristics of “Acts of God”, however, their decision was built upon the repeated statements of law discussing the obligations of common carriers.

In *Slater v Baker*, the practices of repetition were used in ascertaining whether the defendants had acted appropriately. The judges held that ‘it was improper to disunite the callous without consent; this is the usage and law of surgeons... and

\(^7^0\) 1 Wils KB 281 at 282

\(^7^1\) 1 TR 27 at 33
indeed it is reasonable that a patient should be told what is about to be done to him’. The judges repeated the finding of the court of first instance and held that they did not have to ‘look with eagle’s eyes to see whether the evidence applies exactly’ to the writ pleaded.\textsuperscript{72}

This phrase was repeated by two of the judges in \textit{Scott v Shepherd} in relation to issue of whether the right writ was pleaded. It did not matter that the reference to “eagle’s eyes” was not the \textit{ratio} of the earlier case, it was important that past judges had written the phrase, therefore, the judges in \textit{Scott v Shepherd} could use it in writing their judgments. The first judge used the phrase after repeating other statements that related to the “unlawfulness” and the writ of trespass \textit{vi et armis}. The second judge used the phrase “eagle’s eyes” to find that the writ of trespass was not appropriate in this case.

These two judges also disagreed on the repetition of statements from the Lord Chief Justice in \textit{Reynolds v Clarke}. The first judge attributed the requirement of “unlawfulness” to him. This attribution allowed the judge to decide that the writ pleaded was the appropriate one. The second judge in \textit{Scott v Shepherd}, however, used statements from the Chief Justice in \textit{Reynolds v Clarke} to establish the difference between action on the case and trespass. The distinction found by the second judge allowed him to find that the wrong writ was pleaded. The other judges in \textit{Scott v Shepherd} repeated statements about the use of writs without specifically repeating statements from \textit{Reynolds v Clarke}.

\begin{footnotesize}
\textsuperscript{72} 2 Wils KB 359 at 361
\end{footnotesize}
Similar statements regarding the applicability of particular writs were repeated by the judges in *Ogle v Barnes*. These statements were attributed to specific precedents, with, for example, one of the judges referring to both *Reynolds and Clarke* and *Scott v Shepherd*. Other cases were referred to, and on the basis of these references and the statements of law connected to them, the judges wrote their judgements.

Another practice that can be seen as similar to the practice of repetition is evident in the judgment in *Ogle v Barnes*. In that decision one of the judges stated that ‘every presumption is to be made in favour of the verdict’. In other words, the lower court had made a legal statement to the effect that the defendant was liable and, more particularly, that the writ pleaded in the court of first instance was the appropriate writ. The judge in the court of review felt guided by the practice that, as the liability of the defendants had already been ascertained, it was incumbent upon the court of review to be very cautious about setting aside such a verdict.

What can also be seen from the decisions examined in this chapter is the role of counsel in process of the production of judgments. In some of the cases, *Ogle v Barnes* and *Scott v Shepherd*, a number of the judges made specific reference to judgments included in the argument of counsel. None of the judges in any of the cases examined in this chapter seemed to be limited to statements presented to them by counsel. In those judgments where specific reference was made to past cases, the judges engaged with the statements of law from judgments put forward by counsel.

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73 8 TR 188 at 191
This engagement by judges with the legal statements put forward by counsel indicates the important role that counsel play in the law. The law can be understood to change through the repetition of statements. The manner in which the law can be understood to change is through the contra-positioning of the statements put forward by counsel. Counsel for one party can be seen as putting forward statements that represent continuity in the law while counsel for the other party can be seen as putting forward statements to change the law. In other words, the role of counsel can be seen as either working for change or “resisting” change. However, both counsel are acting according to the discursive practices in which they have been trained. The contra-positioning of these practices can, then, be seen to be necessary for the continuity of law.

All the decisions examined in this chapter, then, relied on the repetition of past legal statements as the basis of the judges’ reasoning. The repetition did not dictate the verdicts, as the use of Reynolds v Clarke demonstrated. However, judgments were only possible if previous legal statements were repeated. Some of these statements related to the appropriateness of particular writs, while others related to the obligations of particular defendants. It is these obligations that will be examined more closely in the next section.

THE ‘VISIBILITY’ OF DEFENDANTS

Given the practices of the eighteenth century legal profession only certain categories of defendants would be “seen” by the judges as capable of being held

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74 This can be seen in Forward v Pittard where both counsel use statements from Dale v Hall. That is, counsel used this decision, irrespective of whether the statements were to be used as evidence for either change or resistance in the continuity of the law.
liable for what might be seen today as negligent actions. The writ system meant that only particular groups of legal subjects would be compelled to compensate the plaintiff for the damage they suffered. For example, in *Dale v Hall*, the judges held that a carrier is ‘answerable for goods the instant he receives them into his custody, and in all events…’.\(^7\) In this case, the court saw the defendant as being in the class of common carriers despite the fact that this was not pleaded.

Once a legal subject was legally perceived by a court as a member of such a category, a set of obligations and responsibilities were owed by that person in particular circumstances. That is, the defendant was endowed with all the responsibilities that came with that category. The defendant was not a person who acted as a common carrier. He was not “seen” as a free-thinking, free-willed individual. The law constructed its subjects as belonging to a set of categories. The law constructed the population in what might be understood as a pre-modern, feudal style.\(^7\) This was the way in which the eighteenth century legal discursive formation perceived and constituted English legal subjects.

This link to the notion of feudalism is not meant to suggest an argument that England in the late eighteenth century could still be categorised as a feudal society. As was discussed in Chapter One, the statements of the judges in these decisions

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\(^7\) 1 Wils KB 281 at 282

\(^7\) It has been suggested that in the Middle Ages, a time before the period covered in this project, but that can be considered to be “feudal”, “both sides of human consciousness – that which was turned within and that which was turned without – lay dreaming or half awake beneath a common veil. The veil was woven of faith, illusion, and childish prepossession, through which the world and history were seen clad in strange hues. Man [sic] was conscious of himself only as a member of a race, people, party, family, or corporation – only through some general category’ (Jacob Burckhardt, quoted in Fromm, E., *The Fear of Freedom*, Routledge, London, 1995 at 36). Again, this understanding does not show that feudal forms persisted in England until the nineteenth century, but that the articulations of the judges of the time bears some similarity to feudal understandings of society.
indicate that the defendants were still seen to owe a particular set of obligations that were dependent on their particular vocation, or station in life. They were not individuals who happened to be employed as common carriers. They were common carriers and only common carriers. In terms of the overall governance in England, this feudal remnant can be understood to suggest the extremely slow pace at which discursive change can occur.

As soon as a defendant was considered to be a member of the category of common carriers, it did not matter what his intentions or actions were. This was made explicit in *Ogle v Barnes* where one of the judges held that ‘it is clear that the mind need not concur in the act that occasions an injury to another’.\(^77\) In *Dale v Hall* the court was unconcerned as to whether the defendant did all that he could to protect the plaintiff’s goods. It was sufficient that there was damage suffered, the defendant was a common carrier, a class considered to be legally liable for damage suffered, and an appropriate writ was pleaded.

This lack of mentality extend in *Scott v Shepherd* to the two intervening actors between the plaintiff and the defendant, Willis and Ryall. They might as well have been considered to be mindless automatons, as they were seen to have even been ‘without the power of recollection’.\(^78\) They acted to protect their goods. There was no consideration as to whether their actions were reasonable. There was no assessment of their states of mind. All three were considered to have simply acted. It was only their physical effect in the world that was of interest to the court. In all

\(^77\) 8 TR 188 at 190
\(^78\) 3 Wils KB 403 at 411
the assessments of the obligations of the defendants, their mental state was not an issue.

Even in *Slater v Baker*, where the judges were interested in the character and abilities of the defendants, their mental state was not relevant. In that case, the judges did not question whether or not they acted reasonably. The defendants were considered to have acted ‘contrary to the known rule and usage of surgeons’.\(^79\) The reputations of the defendants were not an issue. It did not matter that they may have been the best in the land. They acted as surgeons (with the apothecary acting as an assistant) and damage was suffered by the plaintiff. This was sufficient for the payment of compensation, as long as the issue of the writs was appropriately satisfied.

In *Forward v Pittard* the defendant was considered to be a common carrier, therefore, a set of responsibilities and obligations were placed upon him, regardless of his intentions or actions. That is, the defendant was absolutely liable for any loss or damage suffered with respect to the goods that the defendant carried as soon as he accepted the task of carrying the goods. This is the case for all damage, save for damage which was caused by actions of the King’s enemies or by acts of God. In other words, the relationship between the defendant and the plaintiff was constructed by the “custom of the realm”. This construction included a characterisation of the role of the carrier as one of an “insurer”. This custom operated irrespective of the actual contract, whether written or oral. The law that considered the carrier had to cover the contracting party for all loss, except for those that resulted from acts of God or the King’s enemies. In this case, the plaintiff

\(^79\) 2 Wils KB 359 at 362
suffered loss, therefore the defendant was liable and had to compensate the plaintiff, despite the fact that the defendant had taken the utmost care with the goods.

The category of defendants that could be “seen” by the bench was not just limited to the “professional” categories such as common carrier or surgeon. Two decisions examined in chapter did not relate to such vocational relationships. Those cases were *Scott v Shepherd* and *Ogle v Barnes*. In these cases, the issue of whether or not the defendant was “seen” by the judges relied on the writ pleaded by the plaintiffs’ counsel. If the right writ was pleaded then the defendants could be “seen” by the court as being potentially liable for the damage suffered by the plaintiffs.
CONCLUSION

Members of the eighteenth century legal profession can be understood, from the perspective adopted here, to be constructed to see the law of liability in terms of specific obligations that bound particular categories of legal subjects. That is, only certain types of defendants were “seen” by the judges. These defendants were held to be liable, in part, due to their imputed position in society. A surgeon was constructed with a particular set of abilities and responsibilities, as was a common carrier. The liabilities these categories of people accrued were not applied to those outside such categories.

In all the cases, whether they concerned “professional” or voluntary relationships, the mental state of the defendants did not play a part in findings of liability. The defendants’ intentions and actions only affected the writ pleaded. It did not matter what the defendants meant to do, or how they perceived the plaintiffs. The defendants were not considered to have any “personality” outside their station in life or beyond the minimal character requirements of the writ in question. They were surgeons or common carriers, they were not people who were employed as surgeons or common carriers.

The members of the legal profession of the eighteenth century did not have another way to articulate liability for damages. The use of previous legal statements in legal argument demonstrates that the processes through which subjects of the legal discursive formation can be seen to be constructed were the same then as they were in the twentieth century. Counsel tried to get the courts to re-state the law in a way that would benefit their case. The law was articulated on a case by case basis. This
might have allowed for change, but, in the cases examined, the courts did not reconstitute the statements through which they constructed legal liability. Instead, the courts repeated the dominant legal statements. The courts were not even willing to extend “Acts of God” to include an out of control fire which did not appear to have been deliberately lit.

It can be seen, however, that even in the repetition of statements examined in this chapter there was a possibility for legal change. For example, another aspect of Slater v Baker of interest to this project is the use of the phrase “eagle’s eyes”. Not only is it important that the phrase itself was repeated, but the effect of the statement is also worth noting. The court in this decision was not as interested in the specifics of the requirements of the writ under which the defendants were sued. In Dale v Hall, liability was only recognised if the defendant was a member of the appropriate category and if the appropriate writ was pleaded. In the present decision, then, it seems unusual that the court was not going to use “eagle’s eyes”. The distinction here is that this was the court sitting as a court of review. In the previous court, the legal discursive formation had already recognised the legal liability, the “plaintiff [had] obtained a verdict”, therefore the court of review did not need to be tied to the specifics of the writs to “see” the relationship.

The use of the phrase “eagle’s eyes” can be seen as adding flexibility to the repetition of past legal statements as they relate to the use of writs. This potential for flexibility around the use of writs can be seen, but only in genealogical hindsight, as a condition of possibility for the later shifts to a wider “duty” ascribed to legal subjects. The decision in Slater v Baker still followed the feudal norms of categorising the defendants and bringing down the decision on the basis of that
categorisation. However, the inclusion of statements about the lack of a need for “eagle’s eyes” meant that these statements could be repeated later. It is the repetition of such statements that can, but does not necessarily, bring about change in the law. It may have been the repetition of that particular statement that contributed to the conditions of possibility for the shift to the more modern categorisations of liability that are evident, and discussed, in the later chapters of this thesis.  

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80 Again, it is necessary to highlight that the shifts from “feudal” to “modern” constructions of legal subjects are necessarily genealogical and therefore outside the strict bounds of an archaeological excavation. These observations are only included here for interest and a demonstration of part of my motivation for commencing this project.
CHAPTER FIVE – THE ARCHAEOLOGY: 1801-1900

INTRODUCTION

This Chapter includes the excavation of a number of decisions from the nineteenth century. Once again, the archaeology is presented as a close examination of a number of decisions of English courts. This period represents a time during which the construction of liability can be understood to have been in a state of flux. As in Chapter Four, the cases were selected from the web of decisions of which British Railways Board v Herrington is part. One of the cases is Govett v Radnidge, which is one of the first in the web decided in the nineteenth century and the first to involve a discussion of legal relationships of liability in terms of a duty. The other cases were chosen in order for there to be an even spread across the century. These cases will be described and analysed in the same manner as the cases were discussed in the Chapter Four.

The nineteenth century was a period of institutional reform within the English legal discursive formation. Heaven v Pender, for example, is the first case in this project that is a product of an appeal system that is substantially similar to that in place today. Changes were introduced with respect to the hierarchy of courts, the training of legal personnel, court procedures (for example, the shift from the use of declarations to statements of claim) and the practices involved in the reporting of

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1 This case as was highlighted as a point of inflection, albeit for another description of the changes in negligence law, in Fifoot, C. H. S., History and Sources of the Common Law: Tort and Contract, Stevens & Sons Ltd, London, 1949 at 165
2 Other cases that did fit the criteria but that were not examined in this thesis included Indermaur v Dames (1868) LR 1 CP 274, (1867) 2 CP 311; Rylands v Fletcher (1868) LR 3 HL 330; Smith v London Docks (1868) LR 3 CP 326; Winterbottom v Wright (1842) 10 M & W 109
3 This involved the abolition of most of the different forms of action, commonly referred to as the writ system (Baker, An Introduction to English Legal History at 80).
judgments. In spite of these reforms, the important point, at least for this project, is that the central discursive practices remained substantially unchanged. These changes did not affect the relationship between the law and the legal profession, which remained largely the same. Past statements of law were consistently used to argue cases and written decisions stated “the law” as it applied to the given circumstances.

Changes to the system of reporting judgments introduced in the nineteenth century are of particular importance for this thesis. The cases included in the last chapter, and the first three in this chapter, were reported in nominate reports. Those volumes of decisions were transcribed and published by individual reporters. This practice of recording changed in 1865 with the establishment of the Council of Law Reporting. This body was charged with the production of the Law Reports.\(^4\) After 1865, there were both official and unofficial reports. The official reports were privileged within the discursive formation, but that did not preclude the unofficial reports from being used as evidence of statements of law. In this chapter, in cases where there was an official report, discussion will focus on this report (with any variations evident in the other reports highlighted). For those decisions handed down before 1865, only the versions of the judgments included in the reports referred to in other decisions in the web of decisions associated with *British Railways Board v Herrington* will be examined.

This chapter covers, what can be understood only in retrospect as, a “moment” of change in the law for the purposes of this project. That is, from a genealogical perspective, the eighteenth century can be seen as highlighting “feudal”

\(^4\) Ibid at 211
conceptions of liability and the twentieth century includes “modern” conceptions of liability. However, any period can be seen as such a “moment” of change. This change demonstrates the processes of change that were discussed earlier in this thesis. The law changes through members of the legal discursive formation repeating, and privileging, particular legal statements. Some legal statements are repeated from a particular case, some legal statements are ignored and other legal statements are distinguished on any of a number of grounds. It is the manner in which the thread of repetition of particular statements are either “picked up” or “dropped” that is of particular importance for this chapter. It is the changes in the threads of repetition that can be understood to indicate change in the law.

This process of change in liability is evident in the treatment within the discursive formation of the case that does not seem to reflect the dominant ideas of the law. George v Skivington stands out, as it does not appear to be consistent with the other decisions of the time. This can be seen in its treatment in later cases. Some of the decisions discount it by distinguishing the facts of the case and others used stronger language to reject legal statements found in the decision. It is the discussion by various judges of varied treatments of legal statements that enables the members of the discursive formation to debate the effect of changes in the law. It is the varied treatment of previous legal statements that can be understood as an indicator of change in the law.
Govett v Radnidge, Pulman & Gimblett

STATEMENTS PRESENTED TO THE COURT

The case was argued before the Court of King’s Bench. The defendants sought a motion in arrest of judgment against the jury’s verdict in the original trial. The defendants argued that, as the original action was based on a joint contract, all parties to the contract should be jointly liable and, therefore, the jury decision, which acquitted two of the three defendants, could not be maintained.

The declaration placed before the court at the start of the action stated that the plaintiff had possession of a hogshead of treacle. The defendants agreed to load this cask onto a cart in return for a reward. There was an agreement to pay two of the defendants a ‘certain reasonable reward’ and the third defendant, a ‘certain other reasonable reward’. The declaration claimed that the defendants ‘so carelessly, negligently… conducted themselves in the loading of the said hogshead’ that the cask fell and broke and the treacle was lost. The jury found for the plaintiff against only one of the three defendants.

Counsel for the plaintiff argued that the defendants’ objection to the original verdict was based on the assumption that the original declaration was laid in assumpsit. If this was the case, then the contract was at the heart of the action. If that contract was a joint contract, then recovery would be against the defendants jointly, rather than severally. However, the action brought by the plaintiff was laid in tort, with the gist of it being ‘misfeasance [sic], which in its nature is several…

5 (1802) 3 East 62
6 3 East 62 at 62-63. There was no discussion in the report as to why only one of the defendants was found liable in the original court, beyond the minimal distinction in the rewards paid.
and therefore there is no repugnancy in the finding one guilty, and acquitting the others’. Counsel argued that the circumstances of the defendants’ possession of the treacle were immaterial. It was ‘sufficient if so much be proved as will sustain the action, and all that was necessary here to prove was, that the defendants were in possession of the plaintiff’s hogshead, and that the injury was done’.7

Counsel for the plaintiff then demonstrated the appropriateness of bringing the action in tort by referring to past judgments. Previous courts had decided, in similar circumstances, that action should be *ex delicto* not *ex contractu*, even though it arose out of a contract. Previous courts had also held that an action against a negligent carrier could be brought in either contract or tort. Decisions cited included *Dickon v Clifton*8 and *Coggs v Bernard*.9 Counsel, however, admitted that another decision, *Buddle v Wilson*,10 seemed to point in the opposite direction but argued that those discussions in which it was suggested that an action for joint liability was appropriate were *obiter*, as the plea by the defendant was too late.11

Counsel for the defendants argued that the present action arose in both contract and tort. It was not disputed by the plaintiff that the contract was a joint one and, as two of the defendants had been acquitted, ‘there can be no judgment on the verdict against the third’. Counsel reasoned that if the ‘contract were joint the negligence of one was the negligence of all; and therefore the only ground of the acquittal of the two must have been the negativing the joint contract’. *Boson v Sandford*12 was

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7 Ibid at 63-64. Counsel for the plaintiff were Serjeant Lens and Burrough.
8 2 Wils KB 319
9 2 Ld Raym 909
10 (1795) 6 TR 369
11 3 East 62 at 64-65
12 Salk 440
cited in support of this claim. Counsel then cited a previous decision, Buddle v Wilson, in which, in an *ex delicto* action, judgment was found for the defendants on the grounds that the defendants should have been sued jointly, *quasi ex contractu*, rather than severally.¹³

THE DECISION

The judgment of the court was contained in a single opinion in which the defendants’ application for a rule for an arrest of judgment was rejected. Given that the question before the court was one of legal practices, the bulk of the judgment dealt with the various forms of action available in this situation. The judges considered that the defendants’ argument that the action should be one of contract was based on a particular precedent, *Boson v Sandford*.¹⁴ Based on the judgment from that case the statement was made that the defendants ‘against whom it was charged that they, disregarding their duty, and fraudulently intending to injure the plaintiff, so negligently placed, carried, and kept the goods in the ship, that the goods were damnified by sea water’.¹⁵

The issue in the present case was repeated as being framed as an ‘alleged neglect of duty’. A further case was cited, specifically relating to the choice of action with respect to a claim against a common carrier. The earlier case, *Dickon v Clifton*,¹⁶ included the statement, made by the then Chief Justice, that previously it had been

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¹³ 3 East 62 at 66-67. Counsel for the defendants were Dallas and Dampier. Counsel also referred to *Dickon v Clifton*, but only to the extent of stating that it was not relevant because there was ‘no joint contract laid as the foundation of the duty’: id.

¹⁴ Salk 440

¹⁵ 3 East 62 at 68, per Lord Ellenborough CJ.

¹⁶ 2 Wils 319. The judgment in the present case noted specifically that *Dickon v Clifton* was ‘not directly contradicted by the judgment in Buddle v Wilson’ 3 East 62 at 71
held that ‘trover and a count against a common carrier cannot be joined, but common experience and practice is now to the contrary’. This statement of the law was then applied to the current case, ‘if the count against the common carrier is laid as this is, not in terms of contract, but upon the breach of duty, it is now the daily, and… the convenient and well warranted practice to join them’.18

The judgment then included the suggestion that considering the action to be either a ‘breach of duty as tortious negligence’ or a ‘breach of promise implied from the same consideration of hire… [avoids] a multiplicity of actions’. The judgment in the court of first instance was affirmed as the practice within the legal discursive formation; that is, to bring an *ex delicto* action in circumstances such as these was stated to be ‘established and recognised’. The court of review was of the opinion that the ‘acquittal of one defendant, in an action founded as this is on the neglect of duty, and not upon breach of promise, does not affect the right of the plaintiff to have his judgment as against the defendant, against whom the verdict has been obtained’.19

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17 Quoted on 3 East 62 at 70
18 Ibid
19 Ibid at 70-1
**Garnett v Willan**\(^{20}\)

STATEMENTS PRESENTED TO THE COURT

The defendant in this case, argued in King’s Bench, was a common carrier who had accepted a parcel from the plaintiff to be delivered to Worcester. The jury in the court of first instance had found for the plaintiff, subject to the opinion of this Court. In the facts presented to the court of first instance, the defendants did not use their own carriages to transport the goods but used a ‘heavy coach’ owned by another party. The plaintiff’s parcel was ‘afterwards lost out of the heavy coach, but it did not appear by what means’. Also of importance to this case was a public notice, of which the plaintiff was aware, that read:

> Take notice, that the proprietors of the public carriages, who transact their business at this office, will not be answerable for any package containing cash, bank notes, bills, jewels, plate, watches, lace, silks, or muslins, however small the value, nor for any other package which, with its contents, shall exceed 5l. in value, if lost or damaged, unless the value be specified, and an insurance paid over and above the common carriage, when delivered here, or to any of their offices or agents in the different parts of the kingdom.\(^{21}\)

Counsel for the plaintiff was not called to argue their case.\(^{22}\) Counsel for the defendant argued that the defendant could not be liable for the loss, given the ‘express terms of his notice’. Further, counsel argued that it was ‘not unreasonable, that, with respect to parcels of value, carriers should require an additional compensation in proportion to the risk they run’. Counsel cited an earlier case, *Nicholson v Willan*,\(^{23}\) in which it was held that a parcel was a “lost or damaged”

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\(^{20}\) (1821) 5 B & Ald 53
\(^{21}\) Ibid at 53-5
\(^{22}\) Counsel for the plaintiff was Chitty.
\(^{23}\) 5 East 507
parcel within the meaning of the notice after it had become lost. Some of the evidence in that case indicated that it was not known whether the parcel was lost in the ‘course of conveyance by the coach, or out of the warehouse’.

THE DECISION

The court found unanimously for the plaintiff. The three judges each provided their own judgments. The first judge reported began by discussing the meaning of the waiver notice. In particular, the issue was the meaning of the words “lost and damaged”. The ‘true construction’ for this judge was that ‘the carrier is not to be protected… if he divests himself wilfully of the charge of the parcel entrusted to his care’. Therefore, the words “lost and damaged” should be qualified with the words ‘the carrier himself doing nothing by his own voluntary act, or the acts of his servants, to divest himself of the charge of carrying the goods to the ultimate place of destination’.

The judge repeated the “principle” that ‘a carrier is responsible for the want of care and diligence of his servants’. His Honour then discussed the relevance of the notice, in the context of this statement of “vicarious liability”. A previous case, Smith v Horne, was mentioned in which, despite having a notice similar to that of the defendants in the present case, the carrier was held liable when the goods were stolen while the servant was away from the carriage. Other cases, including Bodenham v Bennett and Birkett v Willan were repeated to indicate the nature of

24 (1821) 5 B & Ald 53 at 55-6. Counsel for the defendant as F. Pollock.
25 Ibid at 56-7 per Bayley, J.
26 (1818) 2 B Moore 18
27 (1817) 4 Price 51
28 (1819) 2 B & Ald 356
a carrier’s liability with respect to the actions of servants. Statements such as ‘the carrier was not protected by the notice, upon the principle, that, at the time the loss accrued, the carrier… by a wrongful act of his own, had divested himself of the charge of it’ formed part of the judge’s discussion of the previous legal statements.29

His Honour noted that the court had been ‘strongly pressed in argument by the case of Nicholson v Willan’. The judge stated that the case is ‘plainly distinguishable from the present’ on the basis of a difference of fact.30 Therefore, that case ‘cannot govern the decision of the present’.31

A further legal statement was that in instances of ‘gross negligence’ any loss is ‘not protected by the terms “lost or damaged” in such a notice’. The judge argued that ‘the courts have put a sound construction upon those words lost or damaged, by which the carrier will receive all the protection which he ought to receive… but not from the consequences of his own misfeasance’. The judge then applied these legal statements to the case before him and held that ‘upon principle as well as authority… the plaintiffs are entitled to… judgment’.32

The second judge reported repeated the legal ‘principle… that a carrier, notwithstanding his notice, is responsible for any loss or damage arising in the course of the trust reposed in him, either from his own personal misconduct or that of his servants’. The legal importance of the notice was the first issue discussed.

29 (1821) 5 B & Ald 53 at 57-58
30 In Nicholson v Willan a parcel was lost in transit. However, unlike the present case, the carrier owned all the coaches involved in the transportation.
31 (1821) 5 B & Ald 53 at 59-60
32 Id
This judge held that the ‘words “if lost or damaged”… applied’ only to a loss or damage arising from any negligence or misconduct in the carriage of the goods. That is, the notice would not offer protection for any ‘wrongful act of the defendants’. Acts that would be ‘wholly inconsistent with the contract they had entered into to carry the parcel’. In the opinion of this judge, the ‘delivery of [the parcel] over to another coach, when they had undertaken to carry it by their own coach, was a wrongful act’.

Earlier cases were then cited, including *Beck v Evans*[^1] and *Ellis v Turner*,[^2] that affirmed the “principle” that ‘a carrier, notwithstanding these notices, is responsible for the negligence of his servant’. One of the quoted decisions, *Nicholson v Willan*, included a test based on the ‘renunciation’ of the character of the defendants as common carriers. The judge in the present case held that ‘there was a wrongful renunciation’ of the defendant’s character as a common carrier because of the use of another company’s carriage. This renunciation meant that they are responsible ‘for all the consequences’.

The words of another case relating to the use of notices, *Bodenham v Bennett*, were repeated as ‘these special conditions were introduced for the purpose of protecting carriers from extraordinary events; but they were not meant to protect them from due and ordinary care’. This statement was applied and it was held that ‘in this case the loss arose both from the want of due and ordinary care, and from doing an act in contravention of their duty and undertaking… upon these grounds… the

[^1]: Ibid at 60-1 per Holroyd J.
[^2]: 16 East 247
[^3]: 8 TR 531
[^4]: (1821) 5 B & Ald 53 at 61-2
defendants are responsible for the value of the property lost in consequence of the wrongful act of their servants’.37

The third judge reported based his judgment on the distinction between ‘negligence and misfeasance… because it appears… that this is a case of misfeasance’. Without recourse to a specific precedent, it was stated that ‘by common law a carrier is answerable for the negligence, as well as the misfeasance of his servants’. His Honour briefly engaged with the decision in Nicholson v Willan, however, only to the extent of stating that the ‘authority of the case is considerably shaken by the case of Birkett v Willan, where the decision of the court proceeded expressly on the ground that the carrier was liable for gross negligence’. The judgment was completed with the statement that by their ‘notices the carrier is only protected from that responsibility which belongs to him as insurer; that is a principle that all mankind can understand’. The judgment, therefore, was for the plaintiff.38

37 Ibid at 62-3
38 Ibid at 63-4, per Best J.
Vaughan v Menlove

STATEMENTS PRESENTED TO THE COURT

The case was argued before the Court of Common Pleas. The defendant was arguing for a new trial, after a jury had brought down a verdict for the plaintiff on the grounds that the original jury had been misdirected. The facts contained in the declaration were that the defendant was a farmer who maintained a rick of hay. This stack was situated close to the cottages and other wooden buildings of two of the plaintiff’s tenants. The defendant was alleged to have ‘wrongfully negligently, and improperly, kept and continued the said rick or stack of hay, so likely and liable to ignite and take fire, and in a state and condition dangerous to the said cottages’. The declaration further stated that, due to its improper maintenance, the rick did ‘break out into flame, and by fire and flame thence issuing and arising, the said buildings of the defendant… were set on fire… [and] were consumed, damaged, and wholly destroyed’. The value of the buildings was claimed to be 500l.

In the court of first instance, evidence had been adduced that the rick was built near the defendant’s own boundary and in such a manner ‘as to give rise to discussions on the probability of fire’. The defendant was warned of the potential danger of the hay on a number of occasions. On one occasion, in response to such a warning, the defendant said “he would chance it”. The rick did burst into flames, the fire then

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39 (1837) 3 Bing (NC) 468, 3 Hodges 51, 4 Scott 244, 1 Jur 215, 6 LJCP 92. The reports that were cited in the web of decisions that centred on British Railways Board v Herrington were those of Bing and Scott. These two reports will be the focus of this excavation. These two reports are also the reports privileged by their inclusion in current tort law textbooks eg. Salmond, J. W. Sir, Salmond and Heuston on the Law of Torts, 21st edition, Sweet & Maxwell, London, 1996

40 4 Scott 244 at 245-246, 3 Bing (NC) 468 at 469-470. The defendant’s occupation was only mentioned at 6 LJCP 92 at 92
jumped to the defendant’s barn and stables and, from there, to the plaintiff’s cottages. The question put to the jury was whether the ‘fire had been occasioned by gross negligence on the part of the defendant; adding that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances’.  

The jury gave a verdict for the plaintiff. The defendant obtained a rule nisi. This was granted on the ground that the jury should have been directed to ‘consider, not, whether the defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion; but whether he had acted bona fide to the best of his judgment’. ‘[T]his was not like the case of negligently keeping a fire’, for the defendant did not cause the fire and he ‘ought not to be responsible for the misfortune of not possessing the highest order of intelligence’.

Counsel for the plaintiff, in showing cause, said the judge’s summing up was ‘perfectly correct’. The issue of scienter was also raised, in that defendants have been held liable for the knowledge that they had of the likelihood of damage being done. The case of Thomas v Morgan was cited. The facts of that case were that a

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41 3 Bing (NC) 468 at 470-471
42 This meant that the plaintiff had to show sufficient cause for the rule to be discharged. If the plaintiff showed sufficient cause, the verdict stood. If the plaintiff failed to show sufficient cause, then the rule nisi became absolute and the case would have gone back to trial.
43 1 Jur 215 at 216
44 4 Scott 244 at 248
45 3 Bing (NC) 468 at 471
46 3 Hodges 51 at 53. Counsel for the plaintiff were Serjeant Talfourd and Whately.
47 2 C M & R 496
defendant was liable for dog attacks, not only because his ‘dogs were of a savage disposition, but also that the defendant knew them to be so’. 48

Counsel argued that the action, ‘though new in specie, is founded on a principle fully established, that a man must so use his own property as not to injure that of others’. It was noted that the defendant had previously been sued ‘for burning weeds so near the extremity of his own land as to set fire to and destroy his neighbours’ wood’. At that time, the defendant did not seek to set aside the verdict gained by the plaintiff and, in that instance, there were ‘no means of estimating the defendant’s negligence, except by taking as a standard, the conduct of a man of ordinary prudence’. Cases were cited, *Gill v Cubitt* 49 and *Crook v Jadis*, 50 to support the claim that in ‘taking bills of exchange… degrees of caution and prudence [are] necessary’. In the opinion of the plaintiff’s counsel, the standard of ordinary prudence ‘has been the rule always laid down, and there is no other that would not be open to much greater uncertainties’. 51

Counsel for the defendant, in support of the rule, argued that the previous action against the defendant was not relevant for the present case, as the earlier action was ‘clearly a case of negligence, and has no analogy to the present’. Addressing the current action, counsel stated that ‘[w]hat is or is not gross negligence, can only be properly estimated by reference to the individual skill and judgment of the party. The degrees of prudence are as various as are men’s tempers and dispositions’. 52

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48 4 Scott 244 at 249
49 3 Barn & Cress 466
50 5 Barn & Adol 509. These two cases were only referred to in the report of Hodges.
51 3 Bing (NC) 468 at 472
52 4 Scott 244 at 249. Counsel for the defendant was R V Richards.
A precedent, *Wyatt v Harrison*,\(^{53}\) was cited in defence of the claim that the ‘defendant had a right to place his stack as near to the extremity of his own land as he pleased… under that right, and subject to no contract, he can only be called on to act *bona fide* to the best of his judgment’. Further precedents, including *Crook v Jadis, Foster v Pearson*\(^{54}\) and *Gill v Cubitt* were adduced that compared the standard of prudence argued for in this case to previous cases involving negotiable instruments. Counsel argued that in these cases it was considered that *bona fide* action was an appropriate standard, rather than that of a prudent person.\(^{55}\)

Counsel for the defendant claimed that the address to the jury by the judge of first instance was ‘clearly erroneous’\(^{56}\) and that ‘the distinction between the degrees of negligence was not put to the jury with sufficient accuracy’.\(^{57}\) The judge’s direction, including the use of the phrase “gross negligence” and ‘associated with his observations respecting the degree of prudence to be exercised by the defendant, had misled the jury, and had infused into their minds the belief that the defendant had been guilty of the gross negligence’.\(^{58}\) According to the defendant’s counsel, this flawed summing up created a false impression which resulted in the jury finding for the plaintiff.

\(^{53}\) 3 Barn & Adol 871  
\(^{54}\) 1 C M & R 855  
\(^{55}\) 3 Bing (NC) 468 at 472-473  
\(^{56}\) 4 Scott 244 at 249  
\(^{57}\) 3 Hodges 51 at 54, this claim was not present in the other reports.  
\(^{58}\) 6 LJCP 92 at 93, this specific claim as to the judge misleading the jury was unique to this report.
THE DECISION

The court decided unanimously for the plaintiff, but the judges delivered their opinions separately. The first judge reported began with an acknowledgment that the case was one of *primae impressionis*, but argued that there was ‘no difficulty in applying to it the principles of law laid down in other cases of a similar kind’. The judge recognised that the circumstances did not fall into the category of contract or bailment, but repeated the legal statement that there was a ‘rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequence of his own neglect’. Despite the fact that the defendant did not start the fire, he was liable for the damage caused, as ‘it is well known that hay will ferment and take fire if it be not carefully stacked’. This statement was supported by reference to an earlier decision, *Tubervill v Stamp*,\(^5\) which involved the burning of weeds near the boundary of the defendant’s land.\(^6\)

The judge then responded to the claim that the jury had been misdirected, due to the trial judge’s linking of the question of negligence with the standard of the prudent man, rather than posing the question as to whether the defendant had acted *bona fide* and to the best of his judgment. This was rejected outright with the statement that the ‘care taken by the prudent man has always been the rule laid down’\(^6\) in the case of bailment and contract. This “rule” was supported by reference to *Coggs v Bernard*.\(^6\) That is, the first judge stated that ‘to hold the

\(^5\) (1697) 1 Salk 13  
\(^6\) 3 Bing (NC) 468 at 474, per Tindal C.J.
\(^6\) Ibid at 474-475
\(^6\) (1703) 2 Ld Raym 909
degree of care to be sufficient if co-extensive with the judgment of the individual would introduce a rule as uncertain as it is possible to conceive’.63

The judge then repeated a modified statement more often used in the context of judgments in the courts of Equity. The judge held that instead of liability for negligence being ‘co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe’. The opinion ended with a final assessment of the negligence of the defendant and the judge discharged the rule.64

The second judge reported agreed with the first. He accepted that the case, whilst one of first impression, still fell ‘within a principle long established, that a man must so use his own property as not to injure that of others’. This was repeated as ‘every man must use his own so as not to hurt another’. This judge also referred to the decision of Tubervill v Stamp. In his opinion, the trial judge’s direction was ‘perfectly correct’. The judge added a qualification to the jury’s finding to the effect that ‘[a]fter he [the defendant] had been warned repeatedly during five weeks as to the consequences likely to happen, there is no colour for altering the verdict, unless it were to increase the damages’.65

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63 4 Scott 244 at 253
64 3 Bing (NC) 468 at 475-6
65 Ibid at 476-477, per Park J. The latter qualification was also included in the Law Journal report (6 LJCP 92 at 95), while the other three reports only agreed with the verdict of the jury (4 Scott 244 at 253, Jur 215 at 216, 3 Hodges 51 at 55).
The third judge reported agreed with the first two.\textsuperscript{66} The fourth, and last, judge reported acknowledged that the ‘principle upon which we hold this action to be maintainable is by no means new. It is at least as old as \textit{Tubervill v Stamp}.\textsuperscript{67} That “principle” was ‘every one takes upon himself the duty of so dealing with his own property as not to injure the property of others’. As for the standard of conduct against which the defendant’s actions should be measured, the judge raised the example of insurance cases. In such cases ‘the question has always been, whether [the defendant] has pursued the course which a prudent man would have pursued under the same circumstances’. Given this assessment of the law, and the fact that ‘there was not a single witness whose testimony did not go to establish gross negligence in the defendant’,\textsuperscript{68} the judge discharged the rule.

\textsuperscript{66} 4 Scott 244 at 254, per Gaselee, J.  
\textsuperscript{67} 4 Scott 244 at 254, per Vaughan J.  
\textsuperscript{68} 3 Bing (NC) 468 at 477
The case was argued before the Court of Exchequer. The declaration stated that the defendant manufactured and sold a certain type of lamp called “The Holliday Lamp”. The first plaintiff bought such a lamp from the defendant for his own use. Included in the declaration was the allegation that the defendant ‘deceitfully warranted to the plaintiff… that the lamp then was reasonably fit and proper to be used’. It was also alleged that the lamp, was not, either at the time of sale, or afterwards, ‘reasonably fit and proper to be used… but was then made of weak and insufficient materials, and then was cracked and leaky, dangerous, unsafe, and wholly unfit and improper for use by the plaintiffs’. The second plaintiff, the first plaintiff’s wife, tried to use the lamp in their shop. While she was holding the lamp it ‘burst, exploded and flew to pieces; and the spirit and naphtha then contained therein… ignited and ran upon and over [her and she] was greatly burned scorched and wounded’.70

At the trial, the ‘jury found all the facts for the plaintiffs, except the allegation of fraud, they being not satisfied that the defendant knew of the defects’. Counsel for the defendants obtained a rule nisi on the grounds that if the fraud was not proved then the action would not lie. That is, if there was no fraud then the plaintiffs could not recover as there was no contract between the defendant and the person who suffered the injury.71

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69 (1851) 6 Exch 761, 20 LJ Ex 430, 17 LTOS 243. The reports cited by the later cases were the Law Journal and the Exchequer reports. These, therefore, will provide the material for the excavation.
70 6 Exch 761 at 761-2
71 Ibid at 763
Counsel for the plaintiffs, before the court of review, argued that the action was not ‘for a breach of duty arising solely from contract, but for an injury resulting from conduct amounting to fraud’. It was argued that the ‘lamp was purchased expressly to be used in the plaintiff’s shop; and there was, therefore, an implied warranty by the defendant’. The decisions in *Jones v Bright* and *Morley v Attenborough*, among others, were cited in defence of the statement. Counsel further asserted that if a ‘person sells an article for a specific purpose, he undertakes that it is adapted for the purpose for which it is designed’. Other cases referred to in argument were *Langridge v Levy*, *Pippin v Shepherd* and *Gladwell v Steggall*.

Counsel for the defendants ‘conceded, on the authority of *Langridge v Levy*, that where a person knowingly sells to another a dangerous article under a false representation of its safety, being well aware that the article is to be used by a third person, the latter may maintain an action for the injury sustained by him in consequence of its defective construction’. They argued that this was not the situation in this case. The jury ‘negatived fraud, so that the action is not founded on a breach of duty, but depends simply on contract; and the contract was with the husband alone’. Other cases cited by counsel included *Winterbottom v Wright*, *Ormerod v Ruth* and *Chanter v Hopkins*.

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72 Ibid at 765. Counsel for the plaintiffs were Serjeant Miller and R. B. Miller.
73 5 Bing 533
74 3 Exch 500
75 20 LJ Ex 430 at 431
76 2 M & W 519
77 11 Price 400
78 5 Bing NC 733
79 6 Exch 761 at 765. Counsel for the defendants were Watson and Webster.
80 10 M & W 109
81 14 M & W 651
82 4 M & W 399
THE DECISION

The court, in a unanimous decision, found for the defendant. The judges started by repeating the “principle”, repeated from the decision in *Langridge v Levy*, that ‘if any one knowingly tells a falsehood, with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit’. However, fraud was ‘negatived’ in this case, so the ‘action cannot be maintained’. 83

The judges recognised that there were cases, ‘besides those of fraud’, where a ‘third person, though not a party to the contract, may sue for the damage sustained, if it be broken. These cases occur where there has been a wrong done to that person, for which he would have had a right of action, though no such contract had been made’. Examples were given from decisions including *Pippin v Shepherd* and *Gladwell v Steggall*. These included situations involving apothecaries and surgeons where a patient suffered harm due to treatment but where someone else paid for the treatment. Other examples included that of a mason and a stage-coach proprietor. The final example was put in the following terms: ‘it may be the same when any one delivers to another without notice an instrument in its nature dangerous, or… a loaded gun… and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person’ who is then injured. *Dixon v Bell*84 was cited as a ‘very strong case to that effect’. 85

The extremes of the position in law was stated as

83 6 Exch 761 at 766. The records of the judgment in the two Reports are virtually identical. The only differences being in punctuation.
84 5 M & Selw 198
85 6 Exch 761 at 766-8
it would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous, but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it.

This “principle” was applied to the facts in the case. If the lamp had been lent or given to the plaintiff’s wife there would have been no action maintainable against the defendant. Had it been a case of a ‘breach of contract with the plaintiffs, the husband might have sued for it; but there being no misfeasance towards the wife independently of the contract, she cannot sue and join herself with her husband. Therefore a nonsuit must be entered’. 86

86 Ibid at 768
George and Wife v Skivington

STATEMENTS PRESENTED TO THE COURT

The case was argued before the Court of Exchequer. The argument centred on a demurrer plea brought by the defendant. That is, the court was asked to decide whether there was legal sufficiency in the declaration. In such a pleading the court assumes that the facts contained in the declaration are true and must decide whether these facts require a defendant to respond to a plaintiff’s claim.

The declaration stated that the defendant carried on the ‘business of a chemist, and in the course of such business professed to sell a chemical compound made of ingredients known only to the defendant’. The defendant ‘represented and professed’ that the product was ‘fit and proper to be used for washing the hair, which could and might be so used without personal injury’ and had ‘been carefully and skilfully and properly compounded by him’. The first named plaintiff purchased a bottle of this compound for his wife. Of this, the plaintiffs would argue, the defendant was aware. The declaration alleged that the defendant had ‘so unskilfully, negligently and improperly conducted himself in and about making and selling’ the compound that is was not ‘fit or proper to be used for washing the hair, nor could it be used without personal injury to the person using the same’. The second named plaintiff had ‘used the compound for washing her hair, pursuant to the terms upon which the same was sold by the defendant, [and] was by using the same injured in health’. 88

87 (1869) LR 5 Ex 1, 39 LJ Ex 8, 21 LT Rep 495, 18 WR 118. The reports cited by later cases were those in the Law Journal and the Exchequer Law Reports, therefore, these will be the focus of this excavation.

88 Law Rep 5 Ex 1 at 1-2
Counsel for the defendant claimed that the declaration ‘discloses no facts on which a legal duty on the defendant’s part towards her can be raised’. Counsel argued that the plaintiffs were not claiming that the defendant ‘knew the compound he manufactured and sold was unsuitable for the purpose it was bought for’. Therefore, this case is distinguished from *Langridge v Levy* and the defendant ‘cannot be held responsible for injuries sustained by a third person with who he has no contract’. Further, there was ‘no implied warranty that an article sold by a tradesman to a customer shall be for the purpose for which it is sold’.

Counsel argued further that, even if there was an implied warranty, there was ‘no duty cast upon the tradesman towards a stranger to the contract of sale, and he cannot be made liable at the suit of a stranger who has been injured by using the article sold, unless he knew that the article was deleterious’. Unless fraud was alleged, counsel argued, there was no legal practice in which a person who was not party to the original contract of sale was allowed to bring an action against the manufacturer. ‘Negligence, in these cases, must be either with regard to contract or with regard to public duty’. The decisions in *Longmeid v Holliday* and *McFarlane v Taylor* were cited as providing statements that supported these claims. Counsel also contended that the plaintiff who suffered the injury did not fit into either of these categories and, therefore, could not claim for the damage she suffered as a result of her using the product.

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89 Law Rep 5 Ex 1 at 2. Counsel for the defendant was Lord. Counsel for the plaintiffs, Ingham, was not called upon.

90 18 WR 118 at 118

91 Law Rep 5 Ex 1 at 2

92 Ibid at 2-3

93 21 LT Rep 495 at 496

94 Law Rep 1 HL, Sc 245
THE DECISION

The court decided unanimously for the plaintiffs. The decision was delivered in separate judgments which will be examined in turn. The first judge reported, after repeating the facts of the declaration, stated that the question before the court was ‘whether an action at the suit of the plaintiff, Emma George, her husband being joined for conformity, will lie’. The first issue he addressed concerned the rejection of any express or implied warranty. The judge said it was ‘not necessary to enter into that question, because the contract of sale is only alleged by way of inducement’. The ‘charge is that the defendant so negligently and unskilfully compounded the article, that… the article turned out unfit for the purpose, and effected a personal injury to the female plaintiff’.

As he considered it unnecessary to enter into the question of warranties, this judge stated that ‘there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair’. The judge held there existed ‘such a duty towards the purchaser, and it extends… to the person for whose use the vendor knew the compound was purchased’. This position was justified by reference to a previous decision, Langridge v Levy, in which it was held that, while there was no contract between the plaintiff and the vendor of the gun, ‘a duty arose towards the plaintiff that the gun should be safe’. The first opinion in the present case ended with the statement that ‘[u]nder these circumstances, there being in the declaration a direct allegation of negligence and unskilfulness, our judgment ought to be for the plaintiffs’. The decision in Longmeid v Holliday was explicitly distinguished on the

95 Law Rep 5 Ex 1 at 3, per Kelly, C.B.
96 Id
97 39 LJ Ex 8 at 9
grounds that the jury in the earlier case ‘found bona fides and no negligence on the part of the vendor’.

The second judge agreed with the first. The third judge argued from the position that the ‘action is, in effect, against a tradesman for negligence and unskilfulness in his business’ and that if ‘the article been bought by the husband for his own use, and the action been brought by him alone, it cannot be doubted that it would have been maintainable’. The judge stated that there was ‘no reason’ why the ‘defendant’s duty’ should not extend to the plaintiff’s wife. However, he continued, there was no doubt the case would ‘have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended’. The opinion distinguished this set of circumstances from a situation where a chemist sold a compound that is suitable for a grown-up man to a customer who then gives it to a young child, who suffers injury from using it. In such a case ‘it could not be contended that the chemist was liable’. However, ‘it is only reasonable common sense that a duty should extend to a case like the present, and that the wife should be allowed to recover for the injury she has sustained’.

The fourth, and last, judge agreed that the ‘declaration shews a good cause of action in the female plaintiff’. The judge stated that, while ‘[n]o person can sue on a contract but the person with whom the contract is made’, in a previous case, Langridge v Levy, the legal “principle” was held to be that a ‘vendor who has been

98 Law Rep 5 Ex 1 at 3-4
99 39 LJ Ex 8 at 10, per Channell, B.
100 Law Rep 5 Ex 1 at 4, per Pigott, B.
101 21 LT Rep 495 at 497
102 Law Rep 5 Ex 1 at 4
103 39 LJ Ex 8 at 10-11. The third judge made no reference to specific decisions.
guilty of fraud or deceit is liable to whomsoever has been injured by that fraud, although not one of the parties to the original contract, provided at least that his use of the article was contemplated by the vendor’. For the present case, if the ‘word “negligence”’ was substituted ‘for “fraud”’, then ‘the analogy’ between the two cases ‘is complete’. 104

According to this judge, the ‘real question is whether the allegations in the declaration are sufficient to raise a duty towards the female plaintiff’. Given that the declaration stated that ‘the defendant himself manufactured this wash of ingredients known only to him, and that he held it out and professed it to be of a certain quality, and it was not of that quality’, and given that ‘he knew it was purchased for the purpose of being used by the female plaintiff’, then ‘there was a duty imposed upon him to use due and ordinary care’. 105 The defendant’s knowledge that the compound was for the use of the female plaintiff, and not the purchaser, meant that there was no issue of remoteness of damage to be considered. In summation, ‘two things concur here; negligence and injury flowing therefrom. There was, therefore, a good cause of action in the person injured’. 106

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104 Law Rep 5 Ex 1 at 4-5, per Cleasby, B
105 Id
106 Law Rep 5 Ex 1 at 5
Heaven v Pender\textsuperscript{107}

STATEMENTS PRESENTED TO THE COURT

This case was argued in the Court of Appeal of the Queen’s Bench Division. This was an appeal of a decision of the Queen’s Bench Division\textsuperscript{108} in which the court had held that the plaintiff could not maintain an action against the defendant. The plaintiff had been given judgment at the original trial and had been awarded damages of 20\textpounds.

The defendant was the owner of a dry dock where vessels were painted and repaired. The plaintiff was a ship painter who had been contracted to paint a vessel in the defendant’s dry dock. The defendant had supplied and set up the scaffolding and staging necessary for the job. The owner of the vessel had hired a master painter, William Gray, to do the job. Mr Gray had subsequently employed the plaintiff. The scaffolding and staging no longer remained in the control of the defendant after it had been handed over to the ship owner. On the day the defendant had erected the scaffolding and staging, the plaintiff commenced work using the staging. While they were in the process of painting, one of the ropes gave way. The plaintiff fell to the dock and was badly injured. The ropes had been supplied by the defendant as ‘part of the machinery of the staging, and there was evidence that they had been scorched and were unfit for use with safety’ and that ‘reasonable care had not been taken by the defendant as to their state and condition’\textsuperscript{109}.

\textsuperscript{107} (1883) 11 QBD 503, 49 LT 357, 52 LJQB 702, 47 JP 709, 27 Sol Jo 667. The Queen’s Bench Division report is the official report and therefore that is the version that will form the basis of this excavation.

\textsuperscript{108} (1882) 9 QBD 302

\textsuperscript{109} 11 QBD 503 at 504
Counsel for the plaintiff stated that, as the plaintiff was on the dock on the ship owner’s business and as the defendant had supplied and erected the staging for that purpose, then the defendant owed a duty towards the plaintiff that ‘the staging should be in a state of reasonable safety and fitness for the work’. Counsel argued that, as the plaintiff had been invited onto the defendant’s property and as the staging was dangerous, the defendant was liable for the injury suffered by the plaintiff.\textsuperscript{110} Counsel stated that the cases of \textit{Indermaur v Dames} and \textit{Smith v London and St. Katherine Docks} were similar.

The defendant, counsel argued, must have realised the importance of the staging in the nature of the work requested by the ship’s owner. Counsel for the plaintiff argued further that \textit{George v Skivington} was applicable, as the defendant in this case knew of the nature of the work and the need for good staging in that work. If \textit{George v Skivington} (a decision that according to counsel was an ‘extension of \textit{Langridge v Levy}'), applied counsel argued, then the defendant was liable for any damage suffered from the use of the staging.\textsuperscript{111}

According to counsel for the plaintiff, both \textit{Winterbottom v Wright} and \textit{Longmeid v Holliday} are distinguishable from the present case. The former is distinguishable because the duty in that case arose from contract and there is no contract binding the parties in the present case. Further, \textit{Longmeid v Holliday} is ‘also distinguishable, as there was no negligence’.\textsuperscript{112}

\textsuperscript{110} Ibid at 504. Counsel for the plaintiff were A. Charles QC and C. C. Scott.
\textsuperscript{111} 11 QBD 503 at 505
\textsuperscript{112} Id. Counsel also referred to \textit{Collis v Selden} (Law Rep 3 CP 495), \textit{Corby v Hill} (4 C. B. NS 556), \textit{Blackmore v Bristol & Exeter Roy Co} (8 E & B 1035) and \textit{Francis v Cockrell} (Law Rep 5 QB 184) among others.
Counsel for the defendant argued that as ‘soon as the staging had been put up against the sides of the vessel it became… part of the vessel, and the defendant’s liability… ceased, for he had no longer any control over it’. Any liability that might arise could only come out of the contract under which he supplied the staging, counsel argued, and no-one who was not a party to that contract could sue the defendant. In a review of past cases, counsel argued that unless the defendant was aware of the ‘dangerous condition of the staging there was no duty he owed the plaintiff’. Counsel argued that *Winterbottom v Wright* ‘governs the present case’ and that *Langridge v Levy* was distinguishable because it was ‘decided entirely on the ground that there was fraud’. Counsel also distinguished *George v Skivington* from the current case on the grounds that it ‘stands alone, and is not to be reconciled with a long series of cases, all of which tell in favour of the defendant’.114

**THE DECISION**

The court found for the plaintiff. This judgment was delivered in two opinions. In the first, the issue was framed as ‘in form and substance an action for negligence’. The defendant did not deny that the staging was ‘supplied in a state unsafe for use’. However, the judge added, a mere ‘want of ordinary care is not a good cause of action’, even if injury arises from such a want. ‘Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the

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113 11 QBD 503 at 505-6. Counsel for the defendants were Bompas QC and H. Dickens. The reviewed cases included *Alton v Midland Ry Co* (19 C. B. (NS) 213 and *Dickson v Reuter’s Telegraph Co* (2 C. P. D. 62).

114 52 LJQB 702 at 703
defendant owes the duty of observing ordinary care and skill’. The focus in this case was ‘whether the defendant owed such a duty to the plaintiff’.¹¹⁵

The judge considered the notion of “duty” in abstract terms. First, in a contractual situation where a person agrees to use ordinary care as part of the contract; in this case, that care is an obligation of a contract and not to be seen in terms of a duty. However, for this judge, there are situations where there is no contract, such as two drivers sharing the same road, in which one person may owe a duty to another. A railway company which has contracted with one person to carry another person also owes a duty to the passenger. An owner or occupier of a building, who allows others to come onto the land, also owes a duty, despite the lack of contract. Further, the ‘existence of a contract between two persons does not prevent the existence of the suggested duty between them also raised by law independently of the contract’.¹¹⁶

The judge then moved to justify a duty which accrues independent of circumstances of contract or fraud. In the circumstances of the drivers, when they are ‘approaching each other, such a relation arises between them… that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them’. In the case of the railway company, even if there is not a contract between the company and the passenger, ‘the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered’. For the property owner or occupier, ‘if you permit

¹¹⁵ 11 QBD 503 at 506-7, per Brett, M.R.
¹¹⁶ Ibid at 507
a person to enter [the premises] you impose on yourself a duty not to lay a trap for him’.

Underlying these duties is the claim that ‘every one ought by the universally recognised rules of right and wrong, to think so much with regard to the safety of others who may be jeopardised by his conduct’. If a person ‘does not think… or if he neglects to use ordinary care or skill, and injury ensue, the law, which takes cognisance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury’. In a summation of the circumstances where the members of the legal discursive formation did recognise a duty between two people, the judge provided a general statement:

Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

The judge then tested the proposition in hypothetical circumstances involving suppliers of goods or machinery. In such a case, where a supplier, ‘if he thought’, would ‘recognise at once that unless he use ordinary care and skill with regard to the condition of the thing supplied… there will be a danger of injury to the person’ who is to use the goods, then ‘a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing’. The proposition was then applied to past judgments, including George v Skivington, where the judge considered that ‘the proposition laid down in this judgment is clearly adopted’. The judge

117 Ibid at 508-509
118 Ibid at 508
119 Ibid at 509
120 The other decisions that were addressed included Langridge v Levy, Corby v Hill, Winterbottom v Wright, Smith v London & St. Katherine Docks and Collis v Selden.
considered that there was no circumstances where, if the facts were proved to fit the proposition, the law would not find liability. As the present case fits the proposition, then the ‘appeal must… be allowed, and judgment entered for the plaintiff’.121

In the second opinion the judges also repeated the relevant facts of the case. They concluded that all who came to the ships for ‘the purpose of painting and otherwise repairing them were there for business in which the dock owner was interested, and… must be considered as invited by the dock owner to use the dock and all appliances provided’ that are necessary to carry out the painting and repairs. Given this invitation, ‘the dock owner was under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by him they were in a fit state to be used’. Past decisions had held this to be the case where the appliances provided remained under the control of the dock owner, the judges considered that the ‘same duty must exist as to things supplied by the dock owner for immediate use in the dock, of which the control is not retained by the dock owner’.122

This consideration of the ‘reasonable care’ owed by the dock owner to those invited on to the dock to conduct work in which the dock owner had an interest was sufficient to decide this appeal in favour of the plaintiff. This second opinion specifically expressed an unwillingness to ‘concur’ with the first opinion in the ‘laying down unnecessarily’ of the ‘larger principle’. This position was based on

121 11 QBD 503 at 510-514
122 Ibid at 514-515 per Cotton, L.J. with whom Bowen L.J. agreed.
different interpretations of the past decisions.\textsuperscript{123} For example, the decisions of George v Skivington and Longmeid v Holliday were considered not to have ‘support[ed] the existence of a general principle’ of liability.\textsuperscript{124} The judges posited another “principle”, however, that

\begin{quote}
anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.\textsuperscript{125}
\end{quote}

This “principle” was not given any further discussion as to its effect, its connection with past decisions or in terms of any hypothetical situations in which it might apply.

\textsuperscript{123} The decisions considered included Langridge v Levy, Indermaur v Dames, Smith v London & St. Katherine Docks and Blackmore v Bristol & Exeter Roy Co.
\textsuperscript{124} 11 QBD 503 at 515-517
\textsuperscript{125} Ibid at 517
This decision was by the Court of Appeal in Queen’s Bench after an appeal by the plaintiffs against the refusal of a lower court to set aside a judgment for the defendants. The plaintiffs had interests in mortgages over a piece of land and the defendant was an architect and surveyor. The plaintiffs had alleged that the defendant had issued some certificates which ‘were in fact untrue’ and as a result of these certificates they had suffered loss. In their declaration the plaintiffs alleged that the ‘certificates when given were untrue in fact to the knowledge of Gould, and that, even if there were no fraud on his part, the defendant did not use due care, skill, and diligence to ascertain whether the facts to which he certified were true’. It was further alleged that the defendant ‘acted with gross negligence, and in breach of the duty which he owed to the plaintiffs’. The official referee in the lower court held that there was no contract between the plaintiff and the defendant, that there had been no fraud on the part of the defendant and that the defendant did not owe the plaintiffs a duty. Judgment, therefore, was for the defendant.127

Before the Court of Appeal, counsel for the plaintiffs argued that ‘independently of contract, the defendant owed a duty to the plaintiffs to exercise due care in giving his certificates. He knew, or ought to have known, that the certificates would or might be acted upon for the purpose of obtaining’ money, therefore he ‘was grossly negligent… and he is liable to the plaintiffs for his breach of duty’. *Heaven v*

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126 [1893] 1 QB 491; 62 LJQB 353; 68 LT 626; 57 JP 484; 41 WR 468; 37 Sol Jo 267; 4 R 274; 9 TLR 243 (*sub nom Dennes v Gould*)

127 [1893] 1 QB 491 at 491-5
Pender and Cann v Willson\textsuperscript{128} was referred to in support. Counsel commented that the decision of the official referee in the lower court only meant that the defendant ‘had no corrupt motive’. However, the evidence shows that ‘he recklessly made a representation which was untrue in fact, not caring whether it was true or false, and taking no trouble to ascertain the facts’\textsuperscript{129} Counsel for the defendants was not ‘heard’\textsuperscript{130}.

THE DECISION

The Court found unanimously for the defendant. Three judgments were brought down separately and will be examined in turn. The first judge reported started by suggesting that if there was indeed a contract between the plaintiff and the defendant then there was no doubt that ‘one of the implied terms of that contract [would be] that the defendant in giving the certificates should use reasonable care to ascertain the truth of the facts to which he certified’. However, there was no such contract.\textsuperscript{131}

The judge then discussed the proposition that the defendant, despite the lack of contract, ‘owed a duty to the plaintiffs to exercise care in giving the certificates, because he knew that the plaintiffs would or might act upon them’. The judge accepted that the ‘defendant did give untrue certificates; it was negligent on his part to do so, and it may even be called gross negligence’. The law was stated, however, as the ‘question of liability for negligence cannot arise at all until it is established

\textsuperscript{128} Ch D 39
\textsuperscript{129} Ibid at 495-6. Other decisions referred to included Derry v Peek (14 App Cas 337) and Scholes v Brook (63 LT 837). Counsel for the plaintiffs were Jelf QC and Montague Lush.
\textsuperscript{130} Counsel for the defendant was Upjohn.
\textsuperscript{131} Ibid at 496, per Lord Esher, M.R.
that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence’.132

Another legal statement was repeated: ‘A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them’. The decision in Heaven v Pender was distinguished, without reason beyond the claims that the decision ‘has no bearing upon the present question’ and ‘it has no application to the present case’. The ‘effect’ of the decision of Heaven v Pender was discussed in detail nonetheless. The judge considered that the decision ‘established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them’. And, further, that ‘if one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property’. The example of a motorist was used. ‘If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases’. However, as soon as ‘he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage’.133

The judge discussed four other decisions, Scholes v Brook, Cann v Willson, Derry v Peek and Peek v Derry.134 The judge considered that the decision in Derry v Peek ‘restated the old law that, in the absence of contract, an action for negligence cannot be maintained when there is no fraud’. In order to establish fraud, it must be shown that the defendant ‘had a wicked mind’. A person who ‘tells a wilful falsehood, with the intention that it shall be acted upon by the person to whom he

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132 Ibid at 496-7
133 Ibid at 497
134 (1887) 37 Ch D 541
tells it’ has a “wicked mind”. As does a person who ‘recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false’. However, negligence, no matter how ‘great, does not of itself constitute fraud’. On the facts as they were present to the official referee in this case, any ‘negligence, in the absence of contract with the plaintiffs, can give no right of action at law or in equity… the appeal must be dismissed’. 135

The second judge reported agreed with the first. The judge stated that there ‘was no contractual relation between the plaintiffs and the defendant, and upon that point, therefore, we must decide against the plaintiffs’. He went, however, to discuss the issue of fraud. The official referee ‘found that the there was no fraud, that is, that there was no fraud in the sense that the law understands it… the conduct of the defendant was not dishonest’. Based on that finding, ‘it is impossible… [to] allow the case to be tried again on the question of fraud’.136

The judge considered the question whether the defendant owed the plaintiffs a duty outside of contract. Reference was made to the decisions in Cann v Willson and Derry v Peek. The former as a support for the claim of a duty outside contract and the latter, a later decision, was held to over-rule the former. Derry v Peek ‘decided two things. It decided, first, that a plaintiff cannot succeed in an action of deceit or fraud without proving that the defendant was fraudulent’. The judge went on to consider the history of the courts of Equity in order to determine whether such a proposition could be doubted. This history tied together decisions based on gross negligence and fraud to the extent that ‘at last a notion came to be entertained that it

135 [1893] 1 QB 491 at 498
136 Ibid at 499, per Bowen, LJ
was sufficient to prove gross negligence in order to establish fraud’. For this judge, this was an error and was recognised to be so in *Derry v Peek*, which he represented as holding that ‘an action of deceit must be based upon fraud, and that negligence is not of itself fraud, although negligence in some cases may be of such a kind as to make it highly probable that there has been fraud’.

The second legal statement that this judge repeated as coming from *Derry v Peek* was that ‘there is no duty enforceable in law to be careful. Negligent misrepresentation does not amount to deceit, and negligent misrepresentation can give rise to a cause of action only if a duty lies upon the defendant not to be negligent’. The judge then considered whether there was such a duty in the present situation. *Heaven v Pender* was cited as suggesting that the defendant did have a duty. That case, for this judge, meant that where an owner of a chattel, such as a gun, which is ‘of such a character that, if it be used carelessly, it may injure some third person who is near it; then it is as plain as daylight that the owner of that chattel, who is responsible for its management, is bound to be careful how he uses it’. Applying this reading of *Heaven v Pender* to the present case, the second judge reported held that the ‘law of England… does not consider that what a man writes on paper is like a gun… and, unless he intends to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly’.

Further case law was highlighted which held that there were two situations where a duty existed outside of contract. One is where ‘one person invites another to come upon his premises, in which case the person giving the invitation must use

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137 Ibid at 499-501  
138 Ibid at 501-2
reasonable care to ensure that the condition of the premises does not subject the person invited to danger’. The other situation is where a ‘person becomes liable for using or leaving about in such a way as to cause danger, an instrument which is dangerous in itself’. According to this judge, this case does not fit either of these situations, therefore, as there was no contract established, the action must fail.139

The third judge reported stated that the ‘defendant was right in saying… that he owed no duty to the plaintiffs, unless they could shew, which they cannot, that he entered into a contract with them to give the certificates’. The judge also raised the case of *Heaven v Pender*. That decision, the judge stated, ‘was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done’. However, ‘that case is a totally different one from the present, and its principle cannot be applied to it’.140

The law, as it applied to the present case, was stated as being that there was ‘no duty… arising from the defendant to the plaintiffs, unless by contract, and no contract between the plaintiffs and the defendant has been proved, and, consequently, no breach of duty on the part of the defendant has been established’. The judge also raised the decisions in *Cann v Willson*, *Peek v Derry* and *Derry v Peek*. The latter case was the governing House of Lords precedent for the judge in the present case, therefore, the decision of the official referee was upheld.141

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139 Ibid at 502-3
140 Ibid at 504, per A. L. Smith, LJ
141 Id
ANALYSIS

One of the first changes that can be noticed from the cases discussed in this chapter is that the legal discussion undertaken by the judges became longer as the period progressed. The practices of the judges, however, remained the same. They discussed the facts as they were presented in the court of first instance in terms of repeated statements of law. That is, the judges in these cases were being asked to rule on points of law and on the application of “the law” to the particular fact situations in each case.

The outcome of the applications of the past statements of law to the facts was that the notion of liability was undergoing change. The significance of the first case, 

Govett v Radnidge, was the use, by the court, of the term “duty”. The introduction of this term was a condition of possibility for the wider form of liability evident in the twentieth century. However, the extent of liability did not seem to change to any great extent during this period.

The shift in liability that was evident in the nineteenth century was not a complete shift. The change involved a discussion of liability that used a different repeated statement. This form of liability was that related to the vendor or owner of a “thing dangerous in itself”. The repetition of this phrase was based on the liability that was owed by a contracting party to another contracting party. This phrase was applied in circumstances involving other potential plaintiffs if, and only if, the contract between the parties involved an article “dangerous in itself”.

The way in which defendants were “seen” by the judges was also undergoing change. By the end of the nineteenth century, the judges no longer “talked of” some of the defendants in terms of them belonging to discrete categories. These defendants were no longer held to be liable according to their station in life. That is, some defendants began to be judged against “standards of behaviour” rather than being merely categorised by the legal profession as belonging to particular vocations.

THE PRACTICE OF REPETITION

As was the case with the decisions in Chapter Four, there are two types of repetition evident in these judgments. The first is the repetition of past cases and the “law” for which they were taken to stand. The second type of repetition is the repeating of a statement of law as “law”, often described as a “legal principle”, in itself. The statements in this second category are repeated without the need for them to be justified by recourse to a particular precedent. That is, for the judges who repeat them these statements are self-evident, they did not need to be sourced to a specific case or justified.

The specific use of repetition that is of interest to this project as a whole is the introduction and later use of the term “duty”. This word was first used inGovett v Radnidge and repeated in all bar one of the other cases in this chapter (Longmeid v Holliday) and it will also be found in all of the cases in Chapter Six. The repetition of this word by the nineteenth century judges will be discussed separately below.
The other repeated statements of law in *Govett v Radnidge* were very similar to the repeated statements of law that were evident in the previous chapter. That is, there were statements relating to the liability of “common carriers” and there were statements relating to the ways in which the courts deal with particular types of actions. The same type of statements were also repeated in *Garnett v Willan* as the defendant in that case was also a common carrier.

Another type of statement repeated in *Garnett v Willan*, relating to the profession of the defendant, discussed the meaning of “lost and damaged” in the context of goods for which a common carrier had assumed responsibility. Statements were taken from earlier cases and applied to the facts in the present case. A “principle”, a repeated legal statement unattached to a specific decision, was also used to support the claim that carriers are only protected by disclaimers from “responsibility which belongs to them as insurer”.

The decision in *Vaughan v Menlove* is interesting because, despite the fact it was described as a “case of first impression”, the judges could still repeat earlier statements of law to arrive at a conclusion. The issue before the court was whether the defendant should have done something that he had not done. To do this, the judges had to assess the standard of behaviour of the defendant. This was done by “importing” statements from other areas of law. These statements were that the “care taken by the prudent man has always been the rule laid down”. This “principle” did not need explanation or justification, it was just a repeated “statement of law”.142 After *Vaughan v Menlove*, the courts could, and did, look at

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142 Another “principle” that was “imported” in this decision was the reference, as an aside, to one of the statements that used to refer, pejoratively, to the Courts in Equity. This “principle” related to the “practice” of basing statements of justice on flexible standards. In this case liability could not be
the care taken by a defendant and took into account the specifics of the circumstances of the event that caused the damage. In *Vaughan v Menlove*, as the defendant failed this standard, the defendant was legally liable for the damage.

The court in *Vaughan v Menlove* also applied a legal statement that usually formed part of the discursive practices relating to bailment or contract, that is that “you must so enjoy your own property as not to injure that of another”. The result of the repetition of this statement was that the defendant could be held liable for the damage suffered by the plaintiff. The introduction of this statement into a case of personal liability law mean that it was open to later judges in the same area of law to repeat the same statement. In other words, it could be said that the law of liability in negligence was changed as a result of the repetition of these single legal statements from other areas of law.

In *Longmeid v Holliday*, the judges repeated three categories of statements from previous decisions. These categories related to the “law” of deceit, the “law” that related to liability being found for damage sustained by a plaintiff that was not a party to a contract binding the defendant and the “law” that limited liability for injuries suffered from “instruments dangerous in themselves”. Interestingly, the judges in this decision referred to the previous decision of *Langridge v Levy*, a case involving a gun, as an example of things dangerous in themselves. This example and decision was repeated again in *George v Skivington* and *Heaven v Pender*.

seen as “co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual”.
The different judges in *George v Skivington* repeated different types of legal statements in establishing their decisions. The first judge reported, with whom the second agreed, stated, as legal “principle”, that the there was a “duty on the defendant to use ordinary care” in the manufacture of the product. This position was reinforced with reference to previous legal statements relating to things dangerous in themselves. This judge also distinguished the decision in *Longmeid v Holliday*, as the jury in that case found no negligence on the part of the defendant.

The third judge reported based his decision on repeated generalities. The judge repeated the law as being that if the purchaser has suffered from the use of the product then the defendant would have been liable. The judge further argued that if the defendant did not know the end user then there would be no reason to extend the law to make the defendant liable for any damage suffered. However, in this case, it is “only reasonable common sense that a duty should extend” to cover the wife of the purchaser.

The fourth judge reported argued that statements relating to the law of fraud were appropriate in these circumstances. The statements of “law” in that area were taken to mean that if a third party suffers damage due to the fraud of one of the contracting parties then the defendant would be liable if the defendant had that third party in mind. The fourth judge considered that it was appropriate to repeat this “principle” in the area of negligence law and therefore found the vendor of the hair wash liable.

The judgments in *Heaven v Pender* also repeated certain legal statements to explain their reasons. The minority judge began by repeating the “principles” that a mere
“want of ordinary care is not a good cause of action” and “actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill”. These “principles” were not supported by the use of precedent. It was in the context of the judge’s discussion of “duty” that earlier decisions were discussed.

The “use” of the term “duty”

One of the more common legal concepts, in terms of this project, that is introduced in the cases covered in this chapter is “duty”. This word was not used in the cases that were described in Chapter Four. The word was first used, in this area of “the law” (as far as I have been able to establish), in the decision of *Govett v Radnidge*. The judges in that case cited a previous decision, *Boson v Sandford*, and they repeated a statement of law that *Boson v Sandford* was said to “mean”. This statement included the word “duty”. The use of the word “duty” was by the nineteenth, rather than seventeenth, century judge.143

The term “duty” was repeated without qualification. There did not appear to be a need on the part of the judge to explain how this term related to other statements of “the law” in this area, despite the fact that it had not been applied in the past. There was no discussion of the extent of such a duty and there was no discussion of how a liability based on a failure of a “duty” differed from other forms of liability. As far

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143 There are two problems that arise in assessing whether the judges in *Boson v Sandford* used the word duty. The first is that the reports tended to only include the reporters analysis of the decisions (Baker considers that the ‘reports of the period 1650-1750 were mostly of an inferior nature, An Introduction to English Legal History at 210), and secondly, as was discussed in Chapter Two, after the end of the Commonwealth, the language of the court returned to be Latin and Law French, therefore, issues exist with respect to the translation of the original judgment into English.
as the legal discursive practices existed at the time, there was nothing “revolutionary” about the use of the word. It did not affect other statements with respect to the liability of the defendant, or the compensation owed to the plaintiff.

The word “duty” was then used in all the other cases in this chapter, with the exception of Longmeid v Holliday. None of these later cases cited Govett v Radnidge, or any other case, as the basis for the introduction of the term “duty” into the law of personal liability. It just seemed to be accepted that this word was to be used in discussions of liability, despite the fact that the word had not been used in this manner before. “Liability” in Longmeid v Holliday was used in a way more like the way that it was used in discussions of liability in the eighteenth century. That is, the defendant “should be answerable to the [plaintiff] for subsequent damage” if the facts fitted the legal requirements.

An important aspect of the decision in Vaughan v Menlove was the fact that one of the judges, the minority, “spoke” of the liability in terms of a general duty imposed on the defendant. This fourth judge reported averred that “every one takes upon himself the duty of so dealing with his own property as not to injure the property of others” (emphasis added), or in the words of one of the other reports, “it clearly was the defendant’s duty, whilst enjoying his own premises, to take care that his neighbour was not injured by any act or neglect of his”.

This judge was not speaking of a strict set of responsibilities that arose from a defendant’s station in life. The judge’s statements seem open to use in statements that established a general duty, that is, in statements to the effect that all legal subjects, regardless of their occupation, could potentially be liable in certain
circumstances. As these were only the words of a minority judgment, discursive practices of the law meant that it carried less weight than if it was from the majority. The fact that it was recorded, however, meant that it was open to repetition by other members of the legal discursive formation according to the discursive practices associated with the repetition of statements.

Earlier statements associated with the projection of a “duty” seem to have been supplemented in *George v Skivington*. The word “duty” was repeated without question in the three written judgments. One of the judges repeated “duty” in terms of fraud, another in terms of “things dangerous in themselves” and in the other written judgment it was stated to be a “principle” that a manufacturer “owes a duty” when they manufacture their goods. All four judges agreed that the duty present was not to be limited by the contract of sale between the vendor and the purchaser. All four judges made statements in which a wider duty was central to their finding of liability.

The minority judgment in *Heaven v Pender* repeated statements about the notion in terms of parties to a contract, in terms of fraud and in circumstances where there was no contract or fraud. The example the judge gave involved two drivers approaching each other, with their physical closeness giving rise to a relationship in which they owe each other a duty. These descriptions of duties were not taken from specific, named, decisions but are from previous categories of cases where liability for an injury had been found. These earlier classes of liability, in particular the cases involving two “strangers”, had not always been discussed in terms of a “duty” owed by the parties involved. The judge’s discussion of duty was then reinforced with reference to *George v Skivington*. The “principle” in that case
accorded with the judge’s conception of a generalised duty, therefore the judge found for the plaintiff.

The reasoning of the majority in *Heaven v Pender*, despite also finding for the plaintiff, was inconsistent with that of the minority judge. Their disagreement, however, seems only a matter of degree. The majority judges repeated statements in which it was suggested that a dock owner was under an obligation, a “duty”, to take care with respect to appliances that were under their control and which were to be used by others.

The repetition, by the majority, of the “principle” from *George v Skivington* was however, different from that of the minority judge. The majority judges were unwilling to “concur” with the statement that *George v Skivington* had laid down the wide “principle” that the minority judge suggested that it did. The majority repeated the “principle” from *George v Skivington* as turning on the more widely repeated legal statements relating to “things dangerous in themselves”. The majority did not state that those people with control of a dangerous item had a “duty” to ensure that others were not harmed, rather the majority stated the law as being that anyone who leaves a dangerous item “in such a way as to cause danger… is liable for injury caused to others by reason of his negligent act”.

In *Le Lievre v Gould* the judges were all of the opinion that the defendant did not owe the plaintiff a duty. The two relevant “principles” were repeated by the first judge as being “liability for negligence can not arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make
him liable for his negligence” and “a man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them”.

The decision in *Heaven v Pender* was discussed, by the judges separately, but it was distinguished as having “no bearing” on the case. The “meaning” of that decision, in relation to a duty owed to a person not party to a contract, was still discussed. The first reported judge repeated one of the fact situations used in the minority judgment of *Heaven v Pender*. According to the judge in *Le Lievre v Gould* motorists can drive as they like when there is no one else around, but as soon as there is another carriage near them, then the drivers owe each other a duty “not to drive in such a way as is likely to cause an injury” to the other driver.

The judge reported second repeated the relevant statement from *Heaven v Pender* in terms of it applying in relation to “things dangerous in themselves”. But as what a person writes on paper is not like a gun, that “principle”, in the eyes of the second judge, was not applicable here. The third judge reported considered statements from *Heaven v Pender* in terms of the decision providing a “principle” that a “duty to take care arises when the person or property of one is in such proximity to the person or property of another that, if due care was not taken, damage might be done”. As, however, “that case is totally different from the present its principle cannot be applied to it”.

The other source of legal statements that were repeated in *Le Lievre v Gould* related to cases concerning fraud. A precedent was cited as “restating the old law that, in the absence of contract, an action for negligence cannot be maintained when there is no fraud”. A further “principle” was repeated that indicated that “negligence, no
matter how great, does not of itself constitute fraud”. One earlier case, *Cann v Wilson*, was highlighted by the second judge reported who restated the case to suggest that gross negligence could be sufficient to establish fraud. However, a more recent decision was cited that repeated the “principle” that “an action of deceit must be based upon fraud, and that negligence is not of itself fraud, although negligence in some cases may be of such kind as to make it highly probable that there has been fraud”.

These precedents, and others, produced the statements of law that were evident in the judgments in this chapter. Many of these precedents are also used as the basis of the judgments in the next chapter. The law both changes and maintains its authority through this, almost contradictory, use of past legal statements. The value of the archaeological method, as it is understood in this thesis, is that it helps to show the manner in which the legal practices “produce” the law and the manner in which statements are repeated by the judges in such a way as to allow for both continuity and discontinuity in the law. However, before the method is applied to the cases decided in the twentieth century, it appears useful to engage in a discussion of the way in which the nineteenth century judges “saw” the defendants who came before them. This is because statements of the law can be understood to be part of the processes through which defendants become visible to the court.

**THE ‘VISIBILITY’ OF DEFENDANTS**

One of the changes evident in the cases discussed in this project is in the way in which the judges in the different times “saw” defendants. The eighteenth century judges did not “see” the defendants as “rational” “individuals” who happened to
occupy certain positions. These judges simply “saw” people as, for example, common carriers. When the judges “saw” a common carrier, they knew that common carriers had certain legal obligations because they were common carriers. In the nineteenth century, the way in which judges “saw” defendants began to change. This section will describe how the judges can be understood to have “seen” the defendants in the cases discussed in this chapter.

In Govett v Radnidge the defendant was seen in much the same way in which common carriers were seen by the courts in the eighteenth century. On the facts as they were presented, the defendant was a common carrier who had taken responsibility for goods and these goods were damaged. That is, there was damage sustained, the defendant was in a category that could be seen as liable, and the appropriate writ was pleaded. The defendant was liable because he was a common carrier. This was also the outcome in Garnett v Willan. In that case the defendant was also a common carrier. Here again, the court considered the defendant liable because he was a common carrier. Liability was contingent on the “station in life” of the defendant.

The “visibility” of the defendant began to change, in terms of the cases described in this thesis in the next case. In Vaughan v Menlove, the judges were not simply interested in seeing the defendant as a member of a particular class of legal subjects. The judges were interested in measuring the standard of behaviour of the defendant. One of the issues before the court related to whether the defendant should be measured against the standard of the “prudent man”. The judges accepted this as the appropriate standard and held that the defendant was liable because of his failure to meet this standard.
In finding for the plaintiff the court in *Vaughan v Menlove* was introducing the concept of individuality on the part of the defendant into the area of negligence law. As can be seen in the cases up to this point, the defendants were considered to be part of a particular category, and it was the membership of the category that was important in an assessment of liability. The introduction of a separable standard against which the behaviour of defendants could be judged meant that the defendants were no longer held liable just because they belonged to a specific class of subjects. They could be held liable if they did not live up to a required standard of behaviour.

The four judges in *Vaughan v Menlove* can be considered to have formed a majority/ minority split on one particular point. The majority, that is three of the judges, considered the liability in terms of the absolute obligation to “enjoy your own property as not to injure that of another”. The fourth judge described liability in terms of the general duty that was highlighted above. The choice of one of the judges to describe and use statements of obligations of defendants in terms of a general duty is important in this archaeology of statements of legal liability. Statements concerning defendants were no longer with respect to their “station in life”. The statements of this one judge can be understood to have allowed the possibility for statements in which a specific standard of behaviour was applied in specific circumstances and those in which a general standard could be applied to all subjects in any situation.

The decision in *Longmeid v Holliday* “saw” the defendant as a contracting party. A contracting party was not just seen as being responsible for damage suffered by other parties to the contract (this responsibility was not described in terms of a
“duty”). Contracting parties were “seen” to be responsible for other injured people outside the contract in certain circumstances (for example, in cases concerning fraud). In the eyes of the court, the facts in *Longmeid v Holliday* did not fit any of those circumstances, so the defendant was not found to be liable.

In *George v Skivington* the defendant was “seen” as a manufacturer. Manufacturers were seen as people who owed a duty to the end-user of their products only where they knew who the end-user of their products was to be. In other words, the defendant was “seen” as someone who was liable only when he had specific knowledge and was supposed to act bearing that knowledge in mind. The court held that legal liability rested on the defendant’s knowledge that the end-user was to be the purchaser’s wife. The defendant had the consumer in mind and, therefore, should have considered her at the time of sale. The judges were not constituting a manufacturer as a just a manufacturer. This manufacturer was held to possess certain traits and owed responsibilities that arose from his specific knowledge. For all the legal statements and argument that are evident in this case, the dominant discursive practices of the nineteenth century discursive formation were such that statements from *George v Skivington* were not repeated in a majority judgment with approval.

In *Heaven v Pender* the minority judge and majority judges “saw” the defendant differently. The minority judge saw him in terms of the statement that “everyone ought by the universally recognised rules of right and wrong, to think so much with regard to the safety of others who may be jeopardised by his conduct”. This judge characterised the defendant as a person who *should* take others into account when
he acted. This “ought” was not limited to the defendant’s life as a member of his profession, this was a general duty to take care which “everyone” should exhibit.

In other words, the minority judge saw the defendant as a legal subject who was capable of foresight and who was obliged to act according to that foresight. The law was stated, in this opinion, to suggest the possibility of statements in which liability in negligence was no longer limited to specific categories of legal subjects. Each and every legal subject was to be measured against the norm of a person who uses ordinary care and skill in her or his conduct.

The difference between the two judgements can be understood to lie in, what may be called, the mental element of the duty. In the minority opinion, normal human beings were seen to think in general terms about their actions. Thus a person could be seen as liable “whenever [that] person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care… he would cause danger of injury…” Here the mental element was constructed in terms of an abstract person who could “think” and could “recognise” the consequences of her or his actions.

In the majority opinion, the “principle” was confined to the defendant and “an instrument or thing which to his knowledge” was “is in such a condition as to cause danger”. That is, the mental element was limited to the actual knowledge of the defendant. The defendant was constructed by the judges to be closer in kind to the earlier categories of defendants who could be liable to pay compensation. The defendant was liable because he was the defendant in the position of, and with the
knowledge of, the defendant. There were statements in which the defendant’s behaviour was understood in terms of a general norm of behaviour and there was no wider consideration of potential defendants. There was no consideration of what another person, including an ordinary person, may do in the same circumstances.

The majority used the words of “duty” and “obligation to take reasonable care” to characterise the manner in which dock owners were expected to control their docks and the appliances used in relation to their docks. Statements in which these duties and obligations were made, however, were specific to dock owners. The majority could not be understood to have been suggesting that there was a general duty of care that all legal subjects should observe, the majority considered that dock owners were limited by obligations specific to dock owners. In the same manner that eighteenth century common carriers had obligations specific to common carriers, late nineteenth century dock owners had duties that were specific to dock owners. The difference between these two conceptions of obligation was that the common carrier was liable for all injury, save for acts of God, while dock owners only had to take reasonable care. This can be understood to be an important difference, as it introduces statements as to “reasonable care” that could be severed from specific applications.

In Le Lievre v Gould the defendant was not held to owe a duty to the plaintiff. The law was stated by the second judge as “there is no duty enforceable in law to be careful”. It did not matter to the court whether or not the defendant knew of the plaintiff or knew that the information the defendant was supplying was to be relied upon by a third party. That is, the judges did not “see” the defendant as a person who should have exhibited that level of foresight. The defendant was “seen” as a
contracting party and, therefore, governed by statements that created obligations to other parties to the contract. The judges considered that the defendant might have been seen to have a “wicked mind”. If seen in this way, the defendant would have been understood in terms of statements associated with fraud and the defendant would have been liable to third parties who had suffered injury due to the fraud (according to statements that formed part of contracts law). This is not to say the judges would “see” a fraudulent party as owing a duty to third parties, only that the defendant would have been liable if there had been fraud.

There seem to have been a couple of different ways in which judges “saw” defendants in the nineteenth century. There is no evidence that there was an “evolutionary” shift involved in the different manners of “seeing” defendants. Within individual cases there can be seen to be different ways of “seeing” the defendant. However, as will be evident in the next chapter, there appears to have been greater consistency in the “visibility” of defendants in the twentieth century.
CONCLUSION

The dual “nature” of law is perhaps more obvious in this chapter than in the other two periods considered in this thesis. When a number of cases are examined in detail, the importance of the repetition of statements in the writing of judgments emerges more clearly. When a series of judgments dealing with a particular area of law are examined, it is easier to see how the law can change without losing its legitimacy.

The nineteenth century can be understood to reflect a moment of change in the articulation of liability. Prior to the decision in *Govett v Radnidge*, there were no legal statements that delimited relationships of liability outside those that existed within certain specific relationships. That is, the repeatable legal statements constructed particular relationships between plaintiffs and defendants that depended on the circumstances of the action and the writs pleaded. There was no general duty that governed an understanding of all legal subjects. From the cases discussed in this chapter, it can be seen that there was much judicial discussion as to the possible extent of general duties of liability.

Previous statements of liability were not explicitly discarded. However, within the discursive formation much broader statements of liability began to be articulated.\(^{144}\) It is this change in the law, in particular in the language of the law, that is important in this chapter. That is, the processes of legal change and the mechanisms for the continued legitimacy of the law were intended to be made evident in the cases

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\(^{144}\) As was stated above, it is possible to see this change in terms of judges repeating earlier statements without including the references to the specific relationships.
examined. The statements changed, in particular, from being about specific applications of writs, to being about a consideration of generalised normative claims, where claims with respect to proper conduct were made. This category of “others” toward whom one owed a “duty” widened over the course of this moment of change. These others were no longer limited to those with whom one formed specific relationships, such as that owed to a patient by a surgeon.

The changes in the nineteenth century can be understood to have been brought about through the repetition of particular statements reported in judicial decisions. Govett v Radnidge was the first, from the web of decisions associated with British Railways Board v Herrington, in which the word “duty” was used in the context of a discussion of liability. This word was taken up in the judgments handed down by later courts. Another discursive practice evident here is that legal terms and statements from one area of law could be supplemented with legal statements from other areas of law. For example, Vaughan v Menlove, a case of first impression, repeated a “principle” from another area of law (bailment) and brought it into negligence law. George v Skivington repeated precedents and, in the process, produced a statement of a duty which was almost as broad as that in Donoghue v Stevenson, a significant decision in negligence law decided in 1932. The judges of the nineteenth century were still constrained to repeat only a limited number of legal statements, however. Their training still required them to repeat the dominant legal statements in any particular area of law and few of those whose decisions came after it could repeat statements from George v Skivington with approval.

145 One of the majority judgments in Donoghue v Stevenson interpreted George v Skivington as being ‘based on an ordinary duty to take care’ [1932] AC 562 at 584 per Lord Atkin
For the purposes of the application of the archaeological method as understood in this thesis, and only in retrospect, the use of the word “duty” in *Govett v Radnidge* represents an important discursive event. Prior to this point, a common carrier had to act as a common carrier, because that was what they were. The introduction of the notion of “duty” can be understood to have contributed to an opening up of the discursive possibility of a separation between the subject and the profession. In 1802, there was no way of knowing what would become of the word “duty” as a statement of law. However, viewed from the present day, the use of the word contributed to the possibility of the legal changes that were to follow.

*George v Skivington* was problematic for the courts, as it contained statements that implied a recognition of a much wider scope of liability than was implied in previous statements. Even within a single decision, such as *Heaven v Pender*, there were two separate interpretations of *George v Skivington*. Both readings of the “problem” decision were still valid statements within the legal discursive formation. The members of the formation recognised the statements in *George v Skivington* as legal statements and such statements had to be spoken of, but, in the nineteenth century, they were difficult to repeat with approval. This point was emphasised by one of the dissenting judges in *Donoghue v Stevenson*, who, when referring to *George v Skivington*, stated that ‘few cases can have lived so dangerously and lived so long’.146

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146 [1932] AC 562 at 570 per Lord Buckmaster. His lordship went further and stated that “[s]o far… as the case of *George v Skivington* and the dicta in *Heaven v Pender* are concerned, it is in my opinion better that they should be buried so securely that their perturbed spirits shall no longer vex the law”, at 576
The changes associated with statements of liability can be understood to reflect a shift in the way the courts “saw” defendants. In the eighteenth and early nineteenth centuries, the judges “saw” those who came before them as members of their profession. They did not have any other characteristics that were relevant to any finding of liability. However, during the nineteenth century, statements began to emerge with respect to the tests to be applied in viewing the standard of care and the knowledge required of those who caused injury. That is, over this time, the courts began to “see” the defendants as having other characteristics beyond their job description.

These other characteristics gained in importance as the members of the legal discursive formation began to repeat statements that reflected a generalised norm of conduct, such as the standard of “ordinary prudence”, as the basis of the legal recognition of relationships of liability. In the eighteenth century, a surgeon was assumed to have a pre-determined standard of appropriate behaviour as a surgeon, rather than as a person who happened to work as a surgeon. It may be considered that statements with respect to the required standard became more general as they came closer to being universally applicable. Alternatively, it may be considered that only specific aspects of particular statements were replaced. That is, statements reflecting the requirement that a surgeon use due care began to be repeated as statements requiring a person use due care. The law, and the legal profession, changed and legal practices began to include the production of statements as to a possible general duty of care. In other words, the judges and lawyers could be understood to have “seen” defendants as having characteristics that could be measured against a normalised standard of behaviour.
All the judgments discussed in this chapter can be understood as having contributed to the conditions of possibility for the legal statements produced in the twentieth century. It is arguable that the term “duty” itself is an important condition for the broader obligation known in the twentieth century as the “duty of care”. Without a word that can be used more generally, away from the specifics of the surgeon/patient or the common carrier/customer relationships, the introduction of new statements into the law of liability may have not occurred in the same way, or at the same time. This is not to say that the introduction of the word “duty” into the legal vocabulary “caused” the changes, merely that without the term, statements with respect to any general obligation toward liability of care would be different.

As will be seen in the next chapter, in the twentieth century, statements like those in *George v Skivington* were much more widely repeated within the legal discursive formation. This chapter can be understood as having covered a period of change in the legal articulation of liability. The decisions excavated in the next chapter will also be presented in terms of processes of change. However, the cases examined in both this chapter and the next can also be understood to illustrate the manner in which “the law” stays the same. The demonstration of this dual nature of the law is one of the more important effects of the application of the archaeological method, as understood in this project, to the law.
CHAPTER SIX – THE ARCHAEOLOGY: 1901-1972

INTRODUCTION

This chapter covers the third, and final period, of the archaeological excavation developed in this thesis. The period covered in this chapter ends with the nominal inclusion of the English legal system under the jurisdiction of the European Court of Justice. The legislation enacted in 1972 did not represent an immediate and drastic shift in the practices of the English legal discursive formation, but it did displace the House of Lords as the highest appellate court in England. This has sufficiently opened the legal discursive formation of the English common law to new discursive practices to provide a limit point for this thesis.

The selection, and discussion, of cases in this chapter was governed by similar principles to those used in the previous chapters. The main difference was that the final case was instrumental in the choice of the eighteen other excavated cases. Given that the period covered by this archaeology ended in 1972, the most recent decision to be selected was to be one reported in 1972. British Railways Board v Herrington was chosen, and the web of decisions of which that decision is part was used to select the other cases dealt with in this thesis.

The decisions discussed in this chapter are McDowall v Great Western Railways, Blacker v Lake & Elliott, Hodge v Anglo-American Oil Company, Farr v Butters

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1 European Communities Act (1972) s. 3 (1)
2 Two decisions that could have taken the place of British Railways Board v Herrington are Dutton v Bognor Regis Urban District Council [1972] 1 QB 373 and Home Office v Dorset Yacht [1970] AC 1004
3 [1903] 2 KB 331
4 (1912) 106 LT 533
5 (1922) 12 LlL Rep 183
Brothers,\textsuperscript{6} Bolton v Stone\textsuperscript{7} and Videan v British Transport Commission.\textsuperscript{8} Many other cases could have been included in this chapter.\textsuperscript{9} Those included in this chapter were chosen, in part, to be relatively evenly spread across the period, in the same manner as was done in Chapters Four and Five.

The discursive formation, as examined in this chapter, is likely to be much more familiar to the modern reader than the profession as examined in Chapters Four and Five. However, the similarities in discursive practices suggest that it is still the same legal discourse as governed the judges who decided Dale v Hall in 1750. There are, nonetheless, sufficient differences in the articulations of liability contained in the judgments to suggest that twentieth century judges “saw” the defendants that came before them differently from the manner in which eighteenth century judges “saw” the defendants that came before them. That is, dominant members of the twentieth century legal discursive formation constructed and “saw” legal subjects as self-reflexive members of the community who were reasonable and who were aware of, and took into account, those other members of the community who may be affected by their actions or omissions.

\textsuperscript{6} [1932] 2 KB 606
\textsuperscript{7} [1951] AC 850
\textsuperscript{8} [1963] 2 QB 650
\textsuperscript{9} Other cases that would have been eminently suitable for an archaeological excavation in this period were Earl v Lubbock [1905] 1 KB 253; Latham v Johnson [1913] 1 KB 413; Adams v Naylor [1944] KB 750 and Hedley Byrne v Heller [1964] AC 465
This decision was an appeal in the Court of King’s Bench. The defendants were a railway company, the servants of which left some rail trucks coupled to a brake van on an inclined siding. The servants left the trucks below a catch point in the tracks designed to prevent trucks rolling down the incline onto a highway. The servants left the trucks in a safe condition with their brakes screwed down. Trespassers then came onto the siding and caused the trucks to roll down the incline and to strike the plaintiff, who was lawfully passing along the highway. Judgment was given for the plaintiff in the court of first instance.11

In the court of appeal, counsel for the defendant argued that the judge in the court below used the wrong precedent.12 The precedent that the judge was considered to have relied on, Clark v Chambers,13 and all the cases relied on in that judgment, according to counsel in the present case, involved ‘some wrongful, negligent, or careless act on the part of the defendant’. Counsel stated that there is ‘no case in which a man using his own land in the way he has a right to do is liable for an accident arising from such lawful use’.14

In this case, the defendants left the ‘train standing on their own land, as they had a perfect right to do, and they had no reason to anticipate that this would result in doing an injury to anybody’. The jury had found that the van was left in a ‘safe

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10 [1903] 2 KB 331; 72 LJKB 652; 88 LT 825; 19 TLR 552; 47 Sol Jo 603
11 [1903] 2 KB 331 at 331
12 Counsel for the defendants were Francis Williams KC and Denman Benson.
13 (1878) 3 QBD 327
14 [1903] 2 KB 331 at 332
position, and that it only became dangerous upon the intervention of the trespassers’. Various precedents were discussed, including *Vaughan v Menlove*, *Blyth v Birmingham Waterworks*,\(^{15}\) *Lynch v Nurdin*\(^{16}\) and *Engelhart v Farrant*,\(^{17}\) and the law was argued to be that, on a ‘question of alleged negligence as being the cause of an accident on a man’s own land, the rule is that it must appear whether all care was taken by him as should be taken by a prudent man’. Counsel asserted that the defendants lived up to that standard in the present case. It was acknowledged that the trucks and van were not left on the safe side of the catch point, however ‘it is settled that you are not under any obligation to use a particular contrivance or thing merely because it happens to be on your property’\(^{18}\).

Counsel for the plaintiff suggested that the issue was whether there was any ‘initial negligence on the part of the defendants’.\(^{19}\) It was argued that the defendants left the trucks and the van in an unsafe place and that they ‘had had actual knowledge for years of the mischievous acts committed by boys on this part of their line, and therefore should have taken precautions’. Precedents were raised, including *Dixon v Bell*\(^{20}\) and *Lynch v Nurdin* and the law stated as being that ‘if this was an accident which, in the circumstances, the defendants might have foreseen’ then the plaintiff was entitled to relief.\(^{21}\)

\(^{15}\) (1856) 11 Ex 781
\(^{16}\) (1841) 1 QB 29
\(^{17}\) [1897] 1 QB 240
\(^{18}\) [1903] 2 KB 331 at 332-3
\(^{19}\) Counsel for the plaintiff were Arthur Lewis and E. M. Samson.
\(^{20}\) 5 M & Selw 198
\(^{21}\) [1903] 2 KB 331 at 333-4
THE DECISION

The court allowed the appeal and found for the defendant. The decision was given in three judgments, which will be examined in turn. The first judge reported suggested that ‘at the conclusion of the plaintiff’s case there was really no case to go to the jury at all – no evidence of the neglect on the part of the defendant railway company of any duty the neglect of which would have led to this accident’. The judge, however, still examined the case on the basis of the findings of the jury. For him, the central issue is whether ‘there really [was] any reasonable evidence to go to the jury, in respect of those findings of the jury, so far as they are findings, which are against the defendants’.22

The answers to the first three questions put to the jury were that the van was left in a safe position with regard to persons using the highway; that the accident would not have happened if the van had not been interfered with; and that it was the negligent act of the trespassers that had caused the van to roll down the incline. That means that, with respect to the first three questions, there ‘is nothing to shew any negligence whatsoever by the railway company’. The judge argued that not only was the van placed in a safe position, ‘but also that it was placed there under conditions to make it safe. It was locked up, it was braked, and it was coupled by a screw coupling to the train. Under those circumstances, for this interference… these boys… had to go through a very considerable operation’. That “operation” meant that the boys first had to break ‘into the van, or get into it with keys, which it

22 Ibid at 334-5, per Vaughan Williams LJ
is suggested they did; and when they got there they had a great deal to do before this van could be loosed and allowed to run down the incline’.23

The fourth question to go to the jury concerned whether ‘the danger of such interference causing injury to persons using the highway [was] known to the defendants at the time when the van was left… and might it have been sufficiently guarded against by the exercise of reasonable care and skill on the part of the defendants?’ The jury answered yes. The first judge reported considered the question in two parts. The first part concerned whether ‘the danger of such interference causing injury to persons using the highway [was] known to the defendants at the time when the van was left?’ As a response to this, the judge noted that there was a history of boys breaking into the vans or trucks but there was ‘no evidence that they ever loosed a van or vehicle before during all that time’, therefore, ‘there is nothing… to lead one to anticipate that they would go and uncouple a vehicle and let it down the incline’.24

The judge considered this to mean that there was ‘no evidence to go to the jury upon which they could properly find that the danger of such interference causing injury to persons using the highway was known to the defendants… and might have been sufficiently guarded against by the exercise of reasonable care on the part of the defendants’. The argument of counsel for the plaintiff was that the van and trucks could have been left the other side of the catch point, however, ‘it is not true to say absolutely that if the defendants had done so it could not have gone down the incline, and it is not true to say that upon the other side of the catch point it would

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23 Ibid at 335
24 Ibid at 335-6
have been safe’. That is, ‘all these boys would have had to do was to open or close, as the case may be, this catch point and let the van go by… a very much simpler operation than that they went through when they got into the van, of uncoupling and unbraking the van’.25

The final question put to the jury concerned whether ‘the occurrence of injury to the plaintiff [was] materially and effectively caused by want of reasonable care and skill on the part of the defendant’s servants?’ The jury responded that the ‘company was negligent in not placing the van to the east of the catch point’. The judge repeated his conclusion that ‘there is nothing to justify the finding that the not placing the van to the east of the catch point was an effective cause of the accident’.26

After these conclusions as to the facts, the judge turned to the applicable law. That law was stated as being that ‘in those cases in which part of the cause of the accident was the interference of a stranger or third person, the defendants are not held responsible unless it is found that that which they do or omit to do… is itself the effective cause of the accident’. This was qualified by the addition that where the ‘circumstances are such that anyone of common sense having the custody or control over a particular thing would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury’.27

25 Ibid at 336-7
26 Ibid at 337
27 Id
The judge continued that if this was the law then ‘there was nothing in the circumstances of this case which would induce an ordinary person of common sense and care to do anything more than the railway company did in respect of this van’. He then considered a hypothetical situation where ‘there was evidence to go to the jury of neglect by the defendants of that care which a reasonable man would have taken to avoid… “obvious dangers”.’ The law that applied in such a situation was repeated as ‘if a stranger interferes it does not follow that the defendant is liable, but equally it does not follow that because a stranger interferes the defendant is not liable if the negligence of a servant of his is the effective cause of the accident’. This statement of law was a direct quotation from a judgment in *Engelhart v Farrant*, one of the cases cited by counsel for the defendants in argument. The judge in the present case then considered that even if the defendant had been negligent, ‘such neglect was not the effective cause of this accident, and… if it was not, that means that the defendants are not liable’.²⁸

The second judge reported agreed with the first. The fact that the jury found that the train was left in a ‘perfectly safe’ condition was noted. The judge argued that as the trucks were ‘not left in any condition in which it could be said that there was any negligence on the part of the railway company… unless it is plain that the evidence relating to the mischievous boys turned the that act which was otherwise a proper act… into a negligent one’. In this judge’s view, the jury could not reasonably have found that the defendant ‘ought under the circumstances in which they left this train, reasonably to have anticipated that the boys would do or might have done what they in fact did’. Further the jury could not reasonably have found that there was ‘at the time, known to the company, any such risk of the particular acts of the

²⁸ Ibid at 337-8
boys which caused the accident as called upon the railway company to take further precautions against those particular acts’. Given these facts, ‘the findings upon which the learned judge below acted cannot be relied upon on behalf of the plaintiff, and… the appeal ought to succeed’.

The third judge reported was ‘of the same opinion’. For this judge the question became, after the findings of the jury, ‘was there any evidence to shew that the company ought reasonably to anticipated’ the interference by the trespassers?’ The judge in the court below had stated that ‘for years the defendants had been troubled by boys trespassing on this part of the line and playing in and about the vehicles standing upon it, and… to the knowledge of the defendants, used to get into the trucks and vans and unlock the doors of the vans’. As this had been going on for years ‘and no accident of any kind had occurred’, the contention that ‘the company ought to have reasonably anticipated any such act as was actually done by the boys… or the result which came from it’ does not ‘seem… fair’. On that basis, the judge allowed the appeal.

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29 Ibid at 338-9, per Romer LJ. The judge made no specific reference to previous decisions.
30 Ibid at 339, per Stirling LJ. The judge made no specific reference to previous decisions.
The first judge reported started by repeating the facts of the case. The plaintiff sustained ‘severe injuries’ as a result of using a brazing lamp in the course of his employment as a bicycle maker and repairer. In the ‘ordinary course of user [sic] it burst at a joint in the top of the container which forms one part of the instrument’. The paraffin oil that fuels the lamp was ‘driven forcibly out in the direction of another part of the instrument called the vaporiser, became ignited and fell upon the plaintiff’. He had bought the lamp ‘from a firm who sells various articles required in the bicycle-making trade’. This firm had bought the lamp from the manufacturers, the defendants. The judge described the brazing lamp in detail and considered that a ‘person who bought such an instrument for use, and the person who made it to be used and sold it, must have realised that in the course of its use it might be a source of some danger’. In other words, ‘there was a capability of danger about this instrument, but the nature of that danger was one which might easily be apprehended without any explanation’.

The judge then addressed the history of the legal proceedings in the case. The judge in the court of first instance had ‘ruled that there was a case to go to the jury upon the ground that the lamp was a thing dangerous in itself’. The lower court judge put the following questions to the jury: Was the lamp defective? Were the plaintiff’s

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31 (1912) 106 LT 533
32 There was no separate background, beyond the headnote, for the case provided in this report, only a report of the decision. Therefore, the discussion of this case will be presented differently. All the facts and the arguments of counsel are contained in the words of the judges. Therefore, only the judgments themselves will be examined. Counsel for the plaintiff was named as Mallinson and counsel for defendants was H. Jacobs.
33 (1912) 106 LT 533 at 534 per Hamilton J, sitting in the court of King’s Bench.
injuries by any defect in the lamp? Was the lamp when made, and for the purposes for which it was intended by the defendants to be used, a dangerous thing? If the lamp was dangerous, did the defendants know that it was so? The judge in the court of review suggested that the result of the lower court judge’s address and of the questions put to the jury was that the jury were told that the plaintiff could be successful ‘if the defendants have put upon the market a lamp really not fit for use in the sense that, although worked with reasonable care and not damaged in any way, the person working it still incurred a risk which a properly constructed lamp would not impose upon him’. The jury were also considered to have been told that ‘they might find that the plaintiff had a cause of action if the impropriety consisted in defects in design, workmanship or material’. After the judge’s address and questions, the jury ‘found that the plaintiff had a cause of action’ and that the lamp was ‘improperly designed, although the materials and workmanship were not defective, and that the lamp was a dangerous thing for the purpose it was intended to be used’. The jury also found that ‘although the defendants were not aware that the lamp was dangerous… as reasonable men they ought to have known about it’.34

The judge held that the ‘direction of the learned judge was incorrect’. The judge repeated several examples where a plaintiff could recover in tort for an injury suffered and held that it is a ‘question of law and not fact whether a given case comes within one category or another, and whether one rule of law is to be applied or another’. In terms of the facts of this case, the judge held that it was ‘for the learned judge to decide whether this lamp was a thing dangerous in itself as that

34 Ibid at 534-5
term has been used in decided cases’. The trial judge, however, left this decision to the jury.35

The facts, according to the judge, were that the ‘lamp was an instrument of a common kind and was not sold by the plaintiff to the defendant. It was absolutely innocuous until used with paraffin, and when it had been charged with paraffin it worked with perfect safety and without defect whatever’ for almost a year. In the opinion of the witnesses ‘more care in its manufacture might have produced a more durable article’. Therefore, according to the judge, the lamp was not ‘brought within the category, so far as it has been defined, of a dangerous object, the dealing with which per se imposes any special liability’. The judge recognised that it may have been made more durable, but, there is ‘authority for the proposition that a man is entitled to let a tumbledown house, and I think there is no law which says that a man may not sell a cheap lamp’. Therefore, in the opinion of the judge, the judge at the trial ‘ought to have said that this was not a dangerous instrument in itself, and that it was not dangerous in the way it was constructed so as to bring it within the category of chattels which a person incurs a special risk in dealing in’.36

The judge then turned to the ‘authorities’ that provided the law in this case.37 The area of law into which this case fell was that of ‘chattels bought and sold, where there is no privity of contract between the parties to the action… [where] the plaintiff and his injuries are not too remote… because he was within the class of persons into whose hands the thing sold might from the first be contemplated as

35 Ibid at 535
36 Id
37 These authorities included Winterbottom v Wright (10 M & W 109), Earl v Lubbock ([1905] 1 KB 253) and Cavalier v Pope ([1906] AC 429).
likely to come’. This characterisation meant that a number of precedents were not relevant. Further, this was not a case ‘of the sale of any commodity which is… dangerous per se’.38

Three specific precedents, Collis v Selden,39 Parry v Smith40 and Dominion v Natural Gas Company,41 were cited that gave rise to the law being that the ‘breach of the defendant’s contract with A to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B when he is injured, by reason of the article proving to be defective in breach of that contract’. The judge was ‘unable to see how a person could be under a greater obligation when he makes a thing without having personally having contracted to do so than when he makes it under a contract’.42

The judge re-phrased the statements of law presented by the plaintiff’s counsel as: ‘when a person deals with a dangerous thing, whether he is ignorant of its danger or not, he is bound at his peril, with regard to anyone into whose hands it may come in ordinary course, to see that it shall be safe so far as the then existing knowledge’ of humanity can make it. The judge offered another statement of the law: ‘if the article is a dangerous thing, either by reason of its general character or by reason of the specific condition in which it is sent out, then the maker owes a duty of care and skill’. This “duty of care and skill” is owed ‘to the same class of persons which extends not only to the employment of skill in the manufacture and the avoidance

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38 (1912) 106 LT 533 at 535-6
39 (1868) Law Rep 3 CP 495
40 (1879) 4 CP Div 325
41 [1909] AC 640
42 (1912) 106 LT 533 at 536
of a possible case of misfeasance, but even to an obligation upon the manufacturers
to provide themselves with the best knowledge in existence at the time’.43

The judge ‘put aside’ three cases as being irrelevant to this case. These decisions
dealt with “things dangerous in themselves”. The judge considered the plaintiff’s
case to rest on the decision of Langridge v Levy.44 The judge repeated the following
statement of a judge in Langridge v Levy:

We should pause before we made a precedent by our decision which
would be an authority for an action against the vendors, even of such
instruments and articles as are dangerous in themselves, at the suit
of any person whomsoever into whose hands they might happen to
pass, and who should be injured thereby. We do not feel it necessary
to go to that length, and our judgment proceeds upon another
ground.

The judge then raised the case of Longmeid v Holliday in which the ‘cause of
action, which was in respect of the explosion of a lamp, failed because there was no
misfeasance by the defendant independently of the contract to which the plaintiff
was not a party’.45

Other cases46 relating to the ‘question of dealing with dangerous articles’ were
raised and the conclusion was that the ‘point is that a knowledge of the danger is
the foundation of the obligation to warn’. An extensive quotation from Longmeid v
Holliday was repeated which stated that ‘it would be going much too far to say…
that if a machine not in its nature dangerous but one which might become so by a
latent defect discoverable by the exercise of ordinary care… [the manufacture]

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43 Id
44 (1837) 2 M & W 519
45 (1912) 106 LT 533 at 536-7
46 Including Brass v Maitland (6 E & B 471), Farrant v Barnes (11 CB (NS) 553) and Acatos v
Burns (3 Ex Div 282).
should be answerable… for a subsequent damage accruing by the use of it’. The judge in the present case considered that ‘all that can be said is that the defendants did not know that their lamp was not perfectly safe and had no reason to believe it was not so’.47

George v Skivington was the next precedent discussed. The judge stated that he had examined all reports of that case to see ‘whether the difficulty which the case presents can be explained by any discrepancy in the reports’. The judge then provided a detailed discussion of the arguments of the judges in George v Skivington and used extensive quotations from the various reports. The judge then dealt with how later courts had received the decision. It was suggested that the ‘case has not been expressly affirmed, but I do find that it has been expressly doubted’. Several decisions were referred to which discussed, but did not follow, George v Skivington. Heaven v Pender was one of these cases. The judge considered that he ‘was unable to see in these judgments any dissent from the discredit cast on the decision in George v Skivington by the Divisional Court in Heaven v Pender’. Further cases, including Le Lievre v Gould and Cavalier v Pope (a decision from which an extensive quotation was repeated) were then raised to counter the statement of law contained in George v Skivington.48

The judge concluded with the ‘consideration’ that ‘without presuming to say that the decision in George v Skivington was wrong, it is not a case which I can follow here’. Therefore, Skivington is ‘no authority in the present case’. According to this judge, as the trial judge had misdirected the jury because he had led the jury ‘to

47 (1912) 106 LT 533 at 537
48 Ibid at 537-9
suppose that if this lamp was… likely to do harm or expose the user to risk when a
properly made lamp would not do so, they were entitled to say that it was a
dangerous instrument’ and therefore entitled to ‘justify a judgment against the
defendants’. It was up to the judge ‘to decide whether it was a dangerous
instrument with a view to seeing a whether any special rule of law was applicable
to it’. The verdict of the jury was based on the ‘evidence of [a] want of care against
the makers [which] amounted to no more than that they had omitted to inform their
minds as to the best method of constructing such an instrument’. As such, the first
judge reported was ‘of the opinion that there was no evidence upon which the
defendants could be held liable… the appeal must be allowed and judgment entered
for the defendants with costs’.49

The second judge reported agreed that the judge in the court of first instance had
misdirected the jury. He stated that ‘there was no evidence which warranted them
in coming to the conclusion of fact at which they arrived’. The judge considered
that that was sufficient to allow the appeal but decided to discuss the law as ‘so
many questions of great importance have been raised in the course of the
arguments’.50

The judge began by discussing the law from the hypothetical position that the
‘brazier was a thing which falls within the class of chattels which are dangerous in
themselves…and that there was some want of care in the manufacture of the article
by the defendants’. The issue then became whether liability would arise in this
hypothetical situation. Before there could be liability there had to be a duty. As

49 Ibid at 539-40
50 Ibid at 540, per Lush J
there was no contract of sale between the defendant and the plaintiff, there could be no implied or express term in contract for liability, which meant that the plaintiff had to show a duty outside of contract. That ‘duty must be one created or brought about by the relation subsisting between the defendant and himself, a duty created by the supply of the chattel and not by the contract under which it is supplied’. A ‘long line of authorities’ shows that ‘whatever may be the want of care’ in the making or repairing of a chattel, that ‘want of care can be taken advantage of only by the person towards whom the care should have been exercised’.

The judge then dealt with some of the same precedents as the first judge reported. The cases established the ‘proposition that dealing with a chattel of an ordinary kind, not a chattel which comes within the special class of articles in themselves dangerous, if there is any negligence in the manufacture of… the chattel, that negligence cannot be made the foundation of an action’ if there is no contract. George v Skivington was expressly highlighted. The judge acknowledged that it ‘has never been in terms overruled, but it is inconsistent’ with other authorities and therefore is would be ‘quite impossible to follow the decision… and it cannot be… regarded as good law’.

The judge considered that ‘in order that a stranger to a contract may maintain an action in regard to a defective chattel by which he has been injured, he must… bring his case within one of the following three classes of cases’. The first class was where ‘the vendor knows that the particular person is going to use the article… and if he allows the chattel to be so used, fraudulently representing that it is safe, he

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51 Ibid. The “long line of authorities” included Earl v Lubbock, Cavalier v Pope and Malone v Laskey ([1907] 2 KB 141).
52 Id
will be liable’. The second class includes those cases where the article was a ‘thing… noxious or dangerous’ in itself. In such an instance, if the ‘vendor sells the chattel to one person contemplating or knowing that it will be used by another, he is under a duty towards the person who he knows will use it not to misrepresent its real nature’. The third class is that ‘class of cases in which the thing supplied is in itself a public nuisance. In such a case the person who is responsible for the nuisance is liable to any person who is specially damaged’.53

A fourth class of cases that related to defective chattels was suggested by counsel for the plaintiff. This class was founded on a previous decision, Elliott v Hall,54 which if ‘merely glance[d]’ suggests that ‘a person who supplies a defective waggon [sic] to another knowing that a third person will use it is liable to that third person if he is injured’. The judge in the present case, however, considered that if ‘the case is more closely looked at… it belongs to that totally different class of cases where the control of premises or the management of a dangerous thing creates a duty’. In other words, a ‘person who is in control of a thing, such as a waggon, to which he knows other people will resort, owes a duty to those persons to take reasonable care that it shall be safe’. This duty ‘arises, not from contract, but from the fact that the person has dominion or control over the… waggon’. Another case, Mulholland v Caledonian Railway,55 counters Elliott v Hall and is a ‘direct authority for saying that the supply of a defective waggon gives no cause of action to a person who, to the knowledge of him who supplied the waggon, was going to use it and who was injured in the course of using it’.56

53 Ibid at 540-1
54 (1885) 15 QBD 315
55 [1898] AC 216
56 (1912) 106 LT 533 at 541
In terms of the ‘vendor of a chattel which does belong to the “dangerous” class’ as soon as ‘he discloses the nature of the chattel he has done all that the law requires him to do’. In circumstances where a chattel that is ‘obviously dangerous, or is known to be dangerous, occasions injuries to a third person, because of its imperfect manufacture, the manufacturer is under no more obligation towards the person injured than the manufacturer of a cart with a defective wheel’ where the wheel comes off the cart causing injury to a third person. The law was stated as being that there is a duty ‘to warn, and, if that duty has been discharged, no duty to take care in the manufacture of the article is owing except to the person with whom the manufacturer contracts’. In other words, the ‘manufacturer is no more bound, as between himself and a stranger, to take reasonable care in the manufacture of the article than if the chattel were not dangerous, because the only duty… when a chattel belongs to the dangerous class is to disclose its true character’.57

Central to this judge’s review of precedents was a discussion of the relevance of George v Skivington. ‘If the decision in George v Skivington had proceeded on [these] grounds… it would not have been in conflict with any of the [other] authorities’. However, George v Skivington, ‘upon which the plaintiff principally relies in the present case, is not an authority which we can follow… and for the reasons that I have give, I think the judgment entered in favour of the plaintiff must be set aside and judgment entered for the defendants’.58

57 Id
58 Ibid at 541-2
The court found for the defendants in both cases, unanimously in *Hodge & Sons v Anglo-American Oil Company*, but by a majority of 2 to 1 in *Willmott & Others v Anglo-American Oil Company*. The opinions of the court were given separately.

The opinion of the first judge reported began with a recitation of the circumstances of the two actions. Both arose from the explosion of an oil tank barge that was moored at the wharf of Hodge and Sons. The judge held that such a barge, whether laden, empty or after being efficiently cleaned, ‘is a dangerous thing’. Due to the dangers associated with the transportation and storage of petrol, specific practices for the cleaning of barges were in place at the time of the explosion. These included the extraction ‘as far as possible’ of the remaining petrol, the mopping out of the tank by hand, and the use of ‘steam at high pressure’ to vaporise any petrol left and to vent the vapour through apertures in the tank designed for that purpose.  

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59 (1922) 12 LlL Rep 183

60 There was no separate background, beyond the headnote, for the case provided in this report, only a report of the decision. As with the previous decision, the discussion of this case will only include an examination of the judgments. By way of background, however, this decision of the Court of Appeal was from an appeal brought by the plaintiffs. This case was heard simultaneously with that of *Willmott & Others v Anglo-American Oil Company and D. T. Miller & Co*. Both actions were a result of an explosion on the defendant company’s oil tank barge, the *Warwick*, in which several lives were lost. Hodge & Sons, the named plaintiff, were ship-repairers and wharf owners who suffered damage from the explosion. The case brought by Willmott was a test action on behalf of workers who were injured by the blast. The other salient facts of the case were included in the judgment of the court and will be addressed in the following section. Counsel for Hodge were R. A. Wright KC and J. Dickinson, counsel for Willmott were Harold Morris KC and Tristram Beresford, counsel for Anglo-American were Patrick Hastings KC and H. Claughton Scott and counsel for Miller were A. Neilson KC and W. A. Jowitt KC.

61 12 LlL Rep 183 at 183-184 per Bankes L.J.
The defendant owned several barges and employed D. T. Miller & Co to do the repair work on them. Mr Miller gave evidence at the trials of first instance that he used his own sense of smell in order to ascertain whether it was safe for workers to commence repairs on the tanks. If he smelt petrol vapour, no work commenced until the smell disappeared. Over a period of years this method appeared to work, as there had been no accident at Mr Miller’s premises. However, these premises did not have the facilities to lift the storage tanks out of the barges. This, when the defendant asked Miller to modify the interior of the *Warwick*’s tank, Miller arranged for Hodge to carry out the work, as the latter company had the facilities to carry out the repair. All communications between Hodge and Miller ‘appear to have been verbal’, but Miller had sent barges for repair to Hodge twice before without incident. Within half an hour of the *Warwick* arriving at wharf of Hodge and Sons, however, the explosion occurred.\(^\text{62}\)

As to the question of liability, the first judge held that the defendant, the oil company, was under a ‘double duty, (a) the duty of using reasonable means for securing the efficient cleaning out of the tank, and (b) the duty of giving any necessary warning of the dangerous character of the tank even after a proper and sufficient cleaning’. The former was owed to all those ‘who necessarily came into contact with the tank in the course of carrying out the repairs’. The plaintiff Willmott would be included in this category. The warning included in the second duty would not be required ‘where the person who would otherwise be entitled to warning was already aware of the danger, or who might reasonably be assumed to be aware of it’. The defendant Miller ‘obviously required no warning’.\(^\text{63}\)

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\(^{62}\) Id
\(^{63}\) Id
The relationship between the plaintiff, Hodge and Sons, with the first defendant, Anglo-American, was different from the one between the plaintiff and second defendant, Miller. If the first defendant was aware that the barge was being sent to Hodge’s wharf, then Hodge ‘would be entitled to a warning’ unless, like Miller, it could be assumed that they were aware of the danger. Given ‘what must be the state of knowledge among ship and barge repairers on the Thames as to the danger of dealing with cleaned petrol tanks’, the judge considered that the defendants could assume that Hodge needed no warning. From the evidence, it ‘appeared’ that the manager of Hodge’s wharf was ‘sufficiently aware of the danger’, and ‘it would appear also that if a warning was needed it was sufficiently given by the notice painted on the barge itself’. The judge went further and held that neither defendant was under an obligation to warn all of Hodge’s employees individually. Therefore, the defendants were not ‘under any duty to give any warning to the plaintiff Willmott or to the other employees of Messrs. Hodges’.64

When the barge arrived at the wharf of Hodge and Sons, it was in the charge of a ‘lighterman in the employ’ of the first defendant. ‘The covers on the openings to the tank were… closed, as they were bound to be, while the barge was being navigated on the Thames’. There was no evidence to suggest that the workers on the wharf made any attempt to ‘ascertain whether petrol vapour was present in the tank’ before they started ‘work on the tank with an oxy-acetylene burner, with the result that the disastrous explosion occurred’. Apart from the fact that the Hodges’ representatives should have realised that the barge had been carrying petrol, the

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64 Ibid at 184-185
lighterman, when he saw the work commenced with the burner, told the ‘foreman that it was not right to use the burner until the barge was opened out’.\textsuperscript{65}

The court of first instance held that the representatives of Hodges and Sons ‘were guilty of negligence in allowing the oxy-acetylene burner to be used in the tank in the way and at the time at which it was used; and that their negligence caused or contributed to the explosion’. This first judge ‘entirely’ concurred with those decisions. Therefore, Hodge and Sons ‘must fail in their action, and their appeal must be dismissed with costs’.\textsuperscript{66}

With respect to Willmott’s action, the court of first instance had held that no negligence had been established, despite the fact that similar evidence had been presented to both lower courts. As to the finding in Wilmott’s action, the present judge held that it ‘is impossible to say that there is no evidence of negligence’. The defendants, however, were ‘entitled to the benefit of the rule accepted in this Court that the decision of a learned Judge upon a question of fact is not to be reversed unless the Court is satisfied that it is wrong’. As the court of first instance had the opportunity to assess the witnesses, ‘it would not be right for this Court to disturb the finding of the learned Judge upon this all-important issue in the action’. This ‘conclusion disposes of the appeal’.\textsuperscript{67}

On a more general point, it ‘was said that even if the [defendants] were guilty of negligence the immediate cause of the explosion was the negligence of Messrs Hodges’ foreman… rendering Messrs. Hodges, and Messrs Hodges alone,\textsuperscript{66}

\begin{footnotes}
\item[65] Ibid at 185
\item[66] Id
\item[67] Id
\end{footnotes}
responsible for the explosion’. The judge cited a precedent, *Ruoff v Long*, 68 in which *Scott v Shepherd* was cited, and considered that if the ‘test in reference to things dangerous in themselves is… that the person guilty of the original negligence is liable for the act of an intervener in all cases where the act of an intervener could reasonably have been foreseen’ then the defendant in the present case ‘are freed from liability’. Even ‘if they failed to cause the tank to be sufficiently cleaned… no one could possibly have anticipated the reckless act of a person employed to repair the tank of using a naked light… before it has been opened out and some means taken to ascertain the presence of petrol vapour’. Therefore, the appeal of Willmott ‘fails and must be dismissed with costs’. 69

The second judge reported dealt with Willmott’s appeal first. ‘The first matter is to ascertain what is the legal liability of the owners towards workmen who may work on the tank, but with whom or their employers the owners have no contract’. It was suggested that ‘the state of the authorities in England is not very satisfactory’ in terms of providing the limits of liability of a person who negligently puts a dangerous item into ‘circulation’, particularly when there is no contract. A past decision of the House of Lords, *Earl v Lubbock*, suggested that ‘the repairer or constructor is under no liability to a person whom he might reasonably expect to use it, but with whom he has no contract’. Other cases, including *Blacker v Lake*, *Cavalier v Pope*, *Winterbottom v Wright* and *Caledonian Railway Co v Mulholland* were highlighted, featuring an extensive quotation from *Longmeid v Holliday*, limiting the liability of those dealing with dangerous items. 70

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68 [1913] 1 KB 148. The decision of *Latham v Johnson* was also referred to in the present case.
69 12 LlL Rep 183 at 185-186
70 Ibid at 186-187, per Scrutton L.J.
A line of cases was also adduced that suggested that a wider liability was recognized in English law, one of the decisions mentioned was the ‘much-doubted case of *George v Skivington*’. Other decisions included in the list were *Langridge v Levy*, *Elliott v Hall* and *Parry v Smith*. The judge in the present case considered himself bound by precedent ‘to hold [that] the defendant is not liable to persons with whom he has no contract for damage caused by the dangerous article’. This position was qualified by the proposition that it ‘may be otherwise where he himself invites the plaintiff and his class to use the article without examination, which is probably the explanation of the majority judgment in *Heaven v Pender*’.71

The judge then discussed the distinction between a ‘thing in its nature dangerous’72 and something that was dangerous due to negligent construction. The judge did ‘not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter… seems the more dangerous… a wolf in sheep’s clothing instead of an obvious wolf’. In the former circumstances, the ‘duty is to warn of dangers not obvious to a reasonably careful person’. However, if the ‘damage was occasioned by the act of a third party in connection with the dangerous thing’, then the defendant is not ‘liable to third parties for action of the receiver [of the dangerous thing]’.73

Applying this understanding of the statements available in the law to the present case, the judge considered three legal statements that were applicable in this case.

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71 Ibid at 187
72 Cases referred to in this context included *Dominion v Natural Gas Company*, *Dixon v Bell* and *Indermaur v Dames*.
73 12 LIL Rep 183 at 187-188
The first was that, ‘if the barge which has carried petrol is an article dangerous in itself, it is the duty of the owners to take proper and reasonable precautions to prevent its doing damage to people likely to come into contact with it’. The second was that, if the same barge ‘is not dangerous in itself, but becomes dangerous because it has been insufficiently cleaned, and the owner is ignorant of the danger, the owner is not liable for damage caused by it to persons with whom he has no contract’. And, finally, that ‘where the danger is obvious or the owner has given proper warning to the person entrusted with it, not being his servant, the owner is not liable for negligence of such person causing injury to a third party’.74

In the present case, the judge posed the question: ‘was the barge which had carried petrol a thing dangerous in itself?’ The answer, in his opinion was “yes”, ‘in view of the extreme difficulty of freeing it from vapour’. Therefore, on this basis, ‘the owners came under a duty to persons likely to come into contact with it, to take reasonable precautions to prevent damage from it, which might be satisfied by adequate warning of its danger if not obvious’. In terms of the practices involved in the cleaning of oil tank barges, there ‘was no evidence of any explosion on a barge before this one; and according to the evidence the methods pursued in cleaning this barge were those ordinarily used with success on previous barges’. Although the ‘presence of a considerable amount of vapour after cleaning may be some evidence of negligence’ and given the ‘view of the evidence of experts that no ordinary cleaning can be relied on to extract all petrol vapour’, this was not sufficient ‘to outweigh the actual evidence of the ordinary method followed’. Therefore, the

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74 Ibid at 188
The judge considered that Miller, the Hodges and the Hodges’ foreman had ‘ample knowledge and warning that the barge was dangerous’. If the owners ‘hand a dangerous barge to competent people who had full knowledge of the probability of danger, even if they did not know the exact amount of it, [then, it] appears… to involve no further liability on the owners’. The actions of such competent people could amount to a ‘new intervening cause, which may impose liability on the interveners, but breaks the chain of liability on the owner’. On this ground, Willmott’s appeal ‘must be dismissed’.  

With respect to Hodge and Sons’ appeal, the second judge considered that there was no need to repeat the legal analysis from the decision on Willmott’s appeal, as it was considered sufficient. Given the facts, ‘it is not necessary in this case to express an opinion about the negligence of the oil company’. As to the foreman’s actions, it was held that ‘it was great negligence to set an oxy-acetylene flare to work on the hold, without any precautions either by smell or ventilation, to ascertain that the hold was safe or get it clear of petrol’. Due to this intervening cause, the appeal of Hodge and Sons also ‘must be dismissed’.  

The third judge reported looked at Hodge and Sons’ appeal first. He stated that he was ‘not prepared to reverse the Judge’s finding of contributory negligence’. It was

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75 Ibid at 188-189  
76 Ibid at 189  
77 Id
not ‘necessary’ to add to the reasons given in the other two opinions, therefore, the appeal ‘must be dismissed’.\textsuperscript{78}

With regard to Willmott’s appeal, the third judge re-visited the findings of the court of first instance. There the court ‘negatived any negligence on the part of the defendants; [but] was not prepared to decide whether, if there was any negligence in the defendants, the negligence of the foreman was a novus actus interveniens forming the sole cause of the damage’. Given that ‘in respect of the same accident there have been two conflicting findings of fact on the issue of the defendants’ negligence’, this judge questioned whether, in the case of Willmott, the judge ‘ought to have found negligence established’.\textsuperscript{79}

This judge stated that

\begin{quote}
if a person for his own purpose manufactures a dangerous article, or puts any chattel into a dangerous condition such that it is likely to cause injury to third persons who in the ordinary course of affairs come into its vicinity, it is his duty to such third persons before so disposing of it as that they may be affected by it, to take reasonable precautions to make it as little dangerous as possible.
\end{quote}

Applying this duty to the present case, ‘the defendants, having loaded the tank barge with petrol which when discharged left an explosive spirit in the tank, owed a duty to third persons whom the barge might affect to take reasonable precautions to see that the explosive vapour was removed’. After reviewing past cases, including the majority judgment from \textit{Heaven v Pender} and the decisions of \textit{Dixon v Bell}, \textit{Dominion v Natural Gas Company} and \textit{Parry v Smith}, in order to defend this statement of the law, the judge then considered whether there was a breach of this

\textsuperscript{78} Ibid at 189-190 per Atkin L.J.
\textsuperscript{79} Ibid at 190
duty. The ‘fact remains that the danger is from explosion, that the obligation to cleanse is to avoid that danger; that a very violent explosion took place some 15 hours after the cleansing operation had ceased’. When details of the cleaning were considered, the steaming was for ‘one hour in the tank, and then only in two compartments, how the steaming of the outside was again only on one side, and above all how the all-important ventilation ceased at 9.30pm in order that the servants concerned might catch their trains’, the judge held that ‘there was negligence in cleansing’.80

This understanding of the situation removed the need for the judge to discuss the issue of whether the defendant was under a duty to warn third parties of the possible danger, as the duty is to take “reasonable precautions to make it as little dangerous as possible”. The judge did suggest, however, that if there was a ‘duty to warn, it appears… not to be sufficiently performed by a mere statement that the chattel may be in a dangerous condition that may follow careful cleansing, if… it is in the far more dangerous condition that follows careless cleansing’. The judge ruled that in the specific circumstances of this case the ‘appeal should be allowed’.81

80 Ibid at 190-191
81 Ibid at 191-192
Statements Presented to the Court

This case was heard in the Court of Appeal of the King’s Bench Division. At the hearing in the lower court it was held that, after the evidence had been presented for the plaintiff, there was no case to go to the jury. The original hearing was held prior to the handing down of the decision in Donoghue v Stevenson, but this appeal was heard after the decision in that landmark case was brought down.

The plaintiff was the widow of an ‘experienced crane erector’ who died when the jib of a crane fell on him. The deceased worked for builders who had purchased an unassembled crane from the defendants, who were manufacturers of cranes. During the construction of the crane the deceased had made chalk marks on those cog-wheels that ‘worked with unusual stiffness’ and that ‘fitted inaccurately’. This was done with the intention of notifying his principals. The deceased, however, began ‘working the crane before the defects had been remedied, and while it was working and he was standing under the jib it fell and killed him’.

82 [1932] 2 KB 606, 101 LJ(KB) 768, 147 LT 427
83 Donoghue v Stevenson was not included in this archaeology for two reasons. (The decision involved the an alleged snail in an opaque ginger beer bottle. A woman, who did not purchase the drink brought an action and won, despite not being the purchaser of the drink). First, it is arguable as to whether the decision is strictly part of the English common law. It has certainly been accepted into the English common law, but the decision itself was an appeal from the Scottish courts and, therefore, was, in part, produced by discursive practices that were different to the discursive practices of English common lawyers. There has been some discussion amongst legal academics of the relationship between the two jurisdictions and, in particular, on the degree of persuasiveness of any precedents. See, for example, Heuston, R. F. V., ‘Donoghue v Stevenson in Retrospect’ (1957) 20 Modern Law Review 1. The second reason for its lack of inclusion is its notoriety. One of the purposes of this application of the archaeological method is to attempt a shift away from an understanding of law based on “marker cases”. The emphasis placed upon Lord Atkins’ “neighbour principle” in Donoghue v Stevenson in understandings of negligence law suggests that the case may be a more significant “marker case” than any other case in the English common law.
84 [1932] 2 KB 606 at 607
In the statement of claim, the plaintiff alleged that the crane was new and that it was made and supplied by the defendants ‘who were responsible for its safe and efficient working’ and that the accident was ‘the result of the negligence of the defendants, their servants or agents’. The particulars alleged were, firstly, that the ‘crane was defective in construction and assembled without proper care in that the gear wheels had not been trimmed to mesh properly’. This caused them to jam and break, causing the jib to fall. The second particular allegation was that the defendant failed to ‘test the crane before delivery and/or after erection’.  

The court of first instance considered that there was evidence that the crane was defective when it was delivered, but that ‘there was no evidence that the defendants knew that the crane was dangerous or defective, nor could it be said that there was any concealed defect in the crane’. If there was negligence on the part of the defendant in the assembly of the gear wheels, the judge held, then there must also have been ‘negligence on the part of the deceased man, who knew the exact state of affairs, who allowed the crane to be worked with that knowledge, and who was the first to be responsible for its use when the accident occurred’. On this basis, the judge held that the defendants had no case to answer and the jury was not asked to come to a decision on the evidence.

In the appeal, counsel for the plaintiff stated that the ‘action, which is based on negligence apart from contract, is brought by its facts within the principle of the decision of the House of Lords’ in *Donoghue v Stevenson*. That is, a ‘duty was owed by the defendants to those in the purchaser’s employment who were to use

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85 Id
86 Ibid at 607-608
the crane’. Counsel noted that, in *Donoghue v Stevenson*, ‘emphasis was no doubt laid on the fact that the bottle was intended to reach the ultimate consumer… exactly in the state in which it was sent out by the manufacturers and with no possibility of intermediate examination’. Applying this “principle” to the present case, counsel argued that ‘the crane was sent out by the [defendants] as being in a fit state to be assembled out of the identical parts they supplied, and without the idea that any intermediate examination was necessary’. Counsel then cited cases, including *George v Skivington*, *Dominion v Natural Gas Company* and a decision from the United States, *MacPherson v Buick Motor Company*,87 where it had been held that a manufacturer who supplied an object that featured some form of ‘latent danger’ was responsible for injuries suffered by consumers as a result of the use of that object.88

Counsel also responded to the lower court’s finding that, even if there was negligence on the part of the defendant, the deceased person was also negligent. Counsel argued that, although the ‘deceased man saw that the meshing of the cog-wheels was irregular, there is strong evidence on the facts that he was unaware that such a defect would cause anything but a stiffness in working’. It was contended that the deceased man would not have ‘gone on working the crane if he knew that danger was involved in doing so. Stiffness in working is quite common in a new crane’. Counsel further argued that the decisions that were relied upon by the lower court, *Earl v Lubbock* and *Winterbottom v Wright*, were no longer ‘good law’ after the decision in *Donoghue v Stevenson*. Further, counsel asserted that even if there

87 (1916) 217 NY 382
88 [1932] 2 KB 606 at 608. Counsel for plaintiff were Somervell KC and Edgar Dale
was a ‘question of contributory negligence, that ought to have been left to the jury’.  

THE DECISION

The court found unanimously for the defendants, with the decision being given in three separate judgments. The reasoning in the judgments will be examined in turn. The first judge reported started by noting that the present case was ‘of considerable interest’ because of the, then recent, decision in *Donoghue v Stevenson*. There was not going to be, however, a ‘complete judgment on the effect of that decision’. The Scots case is relevant but ‘the question is, is there any liability on the part of the manufacturers to the employee of the purchaser?’

After a review of the evidence, the judge held that ‘after the manufacturers had supplied the parts of the crane to their purchasers there was an opportunity for examination in that the purchasers were going to assemble the parts’. And further, that the crane was assembled by the purchaser’s ‘skilled erector, who examined the wheels and found their condition and did not rectify it’. The courts ‘have repeatedly held that when a plaintiff gives evidence which is only consistent with the accident being caused by his own negligence the judge ought to withdraw the case from the jury’. As that was the action of the trial judge, this appeal judge endorsed that action.

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89 Ibid at 608-609. Counsel for the defendants, Hilbery KC and Vos, was not called upon to present their argument.
90 Ibid at 609-610 per Scrutton, L.J.
91 Ibid at 610-611
The judge then considered the effect that the decision in *Donoghue v Stevenson* could have in this case. The “principle” extracted from the House of Lords case was that:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.  

Reference was also made to *Le Lievre v Gould*. The statement of law, by one of the judges in that case was repeated as ‘if one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property’. The judge in the present case, however, considered that statement of the law to be ‘inaccurate’.  

The judge returned to the quotation from *Donoghue v Stevenson* and stated that he considered that this ‘general proposition… is wider than is necessary’. He held that the House of Lords did not rule that the above proposition was part of the English law but only that ‘liability exists on the part of the manufacturer to a person who ultimately uses the goods which the manufacturer has sold’. That is, on the facts of *Donoghue v Stevenson*, ‘the consumer was in such a proximate relation to the manufacturer that legal relations resulted’. This proximity ‘rested on the fact that the manufacturer sent out his goods in such a container that no one could discover the defect until the consumer had begun to consume the ginger beer’. In other

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92 Ibid at 613. Prior to this discussion of *Donoghue v Stevenson* the judge considered some of the decisions referred to by the judge in the court of first instance. These decisions included the US cases of *MacPherson v Buick* and *Thomas v Winchester* (6 NY 397) and the English decision *Heaven v Pender*.  
93 Id
words, liability existed because ‘there was no opportunity of independent examination between the manufacturer and the consumer’.94

This analysis of *Donoghue v Stevenson* was reinforced by three lengthy quotations from that case. The second of the three is the most descriptive of the duty owed by manufacturers to the users of their products:95

> It may be a good general rule to regard responsibility as ceasing when control ceases. So also where as between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer’s product before he reissues it to the actual user. But where, as in the present case, the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer and the manufacturer takes steps to ensure this by sealing or otherwise closing the container, so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded, and was in fact in the present case excluded.96

The statements of law from *Donoghue v Stevenson* were again summarised as being that ‘liability is rested upon no reasonable possibility of examination between the manufacturer and consumer’. Therefore, the first judge in the present case held that as ‘there was ample opportunity for intermediate examination before the deceased man met with his accident… the appeal must be dismissed in spite of the new view involved in the recent decision of the House of Lords’.97

The second judge reported agreed with the first. He distinguished the circumstances of the present case from those in *Donoghue v Stevenson*, holding that the

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94 Ibid at 614-615
95 The last of the three is quoted below in the discussion of the third judgment of this case.
96 Cited in [1932] 2 KB 606 at 615. The judge in the present case highlighted the fact that this judgment from *Donoghue v Stevenson* referred to the case of *Caledonian v Mulholland*.
97 Ibid at 617
“principle” from the earlier case ‘was not intended to apply to a case like the present where the article (a crane) was supplied by the manufacturers in parts to be assembled by the purchasers before use’. The defect was ‘patent and discoverable, and was in fact discovered by the deceased’. The ‘fact that the cog-wheels did not fit must have brought home to the deceased… that there was something wrong with the crane, yet he took his chance of operating it without remedying the defect or testing the crane’. The judge agreed that this meant that the ‘appeal fails’.98

The third judge reported came ‘to the same conclusion’. He stated that the essence of the plaintiff’s claim was that ‘her husband had been killed by reason of a breach of duty by the defendants’. The judge accepted that the witnesses for the plaintiff ‘gave evidence showing that the cog-wheels had not been trimmed to mesh properly, and that if the wheels had been trimmed to mesh properly when the crane was delivered to the purchasers this accident would not have happened’. The judgment then stated that the ‘question is whether that in law would justify a finding for the plaintiff’.99

The governing legal statement for this judge was that it is ‘common knowledge among lawyers that mere negligence in itself is not a cause of action. To give a cause there must be negligence which amounts to a breach of duty towards the person claiming’. The judge considered that the ‘decision of the majority of the House [in Donoghue v Stevenson] must be regarded as a reasonable interpretation of the law, but it was a very different case from that which we are concerned’. If the present case had involved a ‘machine defective in construction in a way that no

98 Ibid at 617-618 per Lawrence, L.J.
99 Ibid at 618 per Greer, L.J.
reasonable examination can be expected to discover’, then the judge conceded that
*Donoghue v Stevenson* ‘may carry a decision in favour of a workman’. However, in
the ‘present case the particular defect complained of was not only capable of
discovery by reasonable inspection, but was in fact discovered at the hands of the
unfortunate deceased man’. The judge repeated the following statement from
*Donoghue v Stevenson*:\(^{100}\)

[A] manufacturer of products which he sells in such a form as to
show that he intends them to reach the ultimate consumer in the
form in which he left him, with no reasonable possibility of
intermediate examination, and with the knowledge that the absence
of reasonable care in the preparation or putting up of the products is
likely to result in injury to the consumer’s life or property, owes a
duty to the consumer to take that reasonable care.

This judge interpreted this to mean that ‘if the manufacturer had left a reasonable
possibility of examination, either through an intermediate person or by its use, there
would be no liability, because there would be no duty’. The judge saw as decisive
the ‘point that there was no evidence that the accident was caused through any
breach of duty towards the deceased by the manufacturers’.\(^{101}\)

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\(^{100}\) The judge in the present case also highlighted the reliance in this judgment from *Donoghue v Stevenson* on the previous decision of *Heaven v Pender*.

\(^{101}\) [1932] 2 KB 606 at 618-620
This case was decided in the House of Lords after an appeal from the Court of Appeal in King’s Bench. The plaintiff was a pedestrian who was hit by a cricket ball when she was standing on a highway adjacent to a cricket ground. The ball was hit by a batsman during a match on the ground. The defendants were the committee and the members of the club. The club had existed since 1864, with the ground having been constructed in 1910. The pitch was not centrally located on the ground, with the boundary over which the shot in question was hit being ‘a few yards nearer the batsman’ than at the opposite end. At the point at which the ball left the field, the fence was ‘seven feet high but the upward slope of the ground was such that the top of the fence was some seventeen feet above the cricket pitch’. The fence was about seventy-eight yards from the striker and the spot where the plaintiff was hit was ‘just under 100 yards’ from the batsman.

Evidence was given by a person living near the ground that ‘five or six times during the last few years he had known balls hit his house or come into the yard’. His evidence was considered ‘vague’, however. Club members ‘of twenty years standing or more agreed… that the hit was altogether exceptional in comparison with anything previously seen on that ground’. The trial court accepted their evidence that it was ‘only very rarely indeed that a ball was hit over the fence during a match’. One member could recall ‘no complaints of balls being hit into the road’ and another ‘estimated that balls had been hit into the road about six times in

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102 [1951] AC 850, [1951] 1 All ER 1078, 1 TLR 977, 50 LGR 32, 95 Sol Jo 33
103 [1951] AC 850 at 851
twenty-eight years, but said that there had been no previous accident, so far as he knew’. 104

The plaintiff ‘claimed damages in respect of injuries said to be caused by the defendants’ negligence’. This claim was founded on allegations that the defendants placed the cricket pitch too near to the road; failed to erect a fence of sufficient height and otherwise failed to ensure that cricket balls would not be hit onto the road. The trial court ‘acquitted the defendants of negligence’. On appeal, the Court of Appeal reversed the decision, holding ‘that the defendants were guilty of negligence and were liable in damages’. 105

In the House of Lords appeal, counsel for the defendants argued that the issue was ‘whether what the defendants should have foreseen and guarded against was not a bare possibility, but a reasonable probability’. They admitted that the ‘chance of a ball hitting a person on the highway was not a fantastically remote possibility but it was improbable’. 106

Counsel for the defendants contended that the questions relating to the issue of negligence were ‘What standard of duty is owed by the occupiers of a ground on which a lawful game is played to persons using an adjacent highway? Were the defendants in breach of that duty? If so, was the injury caused by that breach?’ Counsel argued that, in terms of ‘the duty owed, the degree of care demanded varies with the risk involved’. The decision in Glasgow Corporation v Muir 107 was

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104 Ibid at 852
105 Id
106 Id. Counsel for the defendants were Sir Walter Monckton KC and Sime.
107 [1943] AC 448
put forward as evidence of this assertion. Counsel argued that in terms of risk, ‘every person using the highway must, as a social animal, accept some risk from the lawful occupations of others’. Further, the ‘standard of care required in each case must be infinitely variable to meet all cases, and it should not be put too high’. In the circumstances of this case, counsel argued that it should be a ‘duty to guard against the ball being constantly hit out of the ground or against it being hit out of the ground by an ordinary stroke, but it is not necessary to provide against an extraordinary or exceptional stroke’. This statement was put forward to distinguish another sporting ground case, Castle v St Augustine’s Links, in which the plaintiff’s claim succeeded.

Counsel for the plaintiff argued that when the ‘boundary was altered in 1910 it was the duty of the committee of the club to consider whether in all the circumstances their arrangements provided reasonable safety for persons on the highway’. In the game of cricket ‘[b]alls are not hit out of the ground accidentally. Players are encouraged to do so by being awarded six runs’. Counsel argued that the ‘defendants were negligent in failing to take sufficient precautions to prevent the escape of cricket balls from the ground and the consequent injury of the plaintiff’. The few previous incidents involving balls being hit out of the ground, counsel contended, were sufficient to give the committee ‘warning that one might land in the road and that it was likely to cause injury to anyone standing there. Longer hits than the one in question have been known in cricket’.

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108 [1951] AC 850 at 852-853
109 (1922) 38 TLR 615
110 [1951] AC 850 at 853-854. Counsel for the plaintiffs were Nelson KC, Burton and Clark.
Counsel also argued that the court of first instance ‘made no express finding that this was an exceptional hit. If even one ball went over there arose a duty of care to insure that no one was injured in the future’. It was admitted that the ‘cost of precautions is a relevant factor’ in considerations of safety, however, in this case, the ‘accident was very easy to avoid. If the wickets had been placed at the centre of the field… [t]he ball would not then have been hit onto the highway and the accident would not have occurred’.  

Counsel for the defendants were given the opportunity to reply to this assertion. They argued that it ‘was suggested that when one ball had crossed the fence there arose in the defendants a duty of care to insure. But one is in the realm of practical life and common sense’. The hit in question was said to be a ‘terrific’ one and the ‘standard of care applicable is affected by the fact that it was wholly exceptional’. In terms of the game, counsel suggested, ‘the defendants were anxious to prevent the opposing team from hitting boundaries, and the hit was made by a visiting batsman’. The defendants ‘did not cause the ball to leave the ground’. As for the standard of care, the ‘matter is one of degree and fact and the standard must vary in relation to the place where the occurrence happened’.  

THE DECISION

The House of Lords unanimously found for the defendants. The decision was delivered in five separate judgments. For the first judge reported, the central question was: ‘Is it enough to make an action negligent to say that its performance

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111 Ibid at 855  
112 Ibid at 856
may possibly cause injury, or must some greater probability exist of that result ensuing in order to make those responsible for its occurrence guilty of negligence?"

It was important to this judge that, in this case, the defendants did not carry out the act, but were ‘trustees of a field where cricket is played, are in control of it, and invite visiting teams to play there’. In this case, the question was: ‘What degree of care must they exercise to escape liability for anything which may occur as a result of this intended use of the field?’ 113

‘Undoubtedly’, according to the first judge, the defendants knew that a cricket ball being hit ‘out of the ground was an event which might occur and, therefore, that there was a conceivable possibility that someone would be hit by it. But so extreme an obligation of care cannot be imposed in all cases’. The judge then repeated statements concerning the legal conception of duty from preceding judgments. From the decision in Bourhill v Young, 114 the judge stated that the ‘duty is to exercise “such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care”.’ And he repeated the statement from Donoghue v Stevenson, that “you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour”. However, the judge qualified this duty with the statement that ‘it is not enough that the event should be such as can be reasonably foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate’. The ‘remote possibility of injury’ is not enough, ‘there must be sufficient probability to lead a reasonable man to

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113 Ibid at 857-858 per Lord Porter
114 [1943] AC 92
anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken’.\textsuperscript{115}

The judge accepted the finding of the court of first instance ‘that a reasonable man would not anticipate that injury would be likely to result to any person as a result of cricket being played in the field in question’. In a finding of negligence the ‘quantum of danger must always be a question of degree. It is not enough that there is a remote possibility that injury may occur: the question is, would a reasonable man anticipate it?’ As the ‘tribunal upon whom lies the duty of the finding of facts is the proper judge of whether he would or not’, the ‘appeal should be allowed’.\textsuperscript{116}

The second judge reported stated that ‘it is not questioned that the occupier of the cricket ground owes a duty of care to persons on an adjacent highway or on neighbouring property… But it is necessary to consider the measure of the duty owed’. After discussing the finding of the lower courts, the judge stated that it ‘is not the law that precautions must be taken against every peril that can be foreseen by the timorous’. Past judgments, including \textit{Glasgow Corporation v Muir} and \textit{Donoghue v Stevenson}, were then discussed with the judge holding that it is ‘not enough… to say that the [defendants] could have foreseen the possibility that a ball might be hit out of the ground… [but] that they ought, as reasonable men, to have foreseen the probability of such an occurrence’.\textsuperscript{117}

The judge then revisited, and accepted, the findings of fact of the court of first instance. He arrived at the conclusion that ‘the number of balls driven straight of

\footnotesize{\textsuperscript{115} [1951] AC 850 at 858
\textsuperscript{116} Ibid at 859-860
\textsuperscript{117} Ibid at 860-861 per Lord Normand}
The ground… is so small as to be almost negligible, and the probability of a ball so struck hitting anyone in Beckenham Road is very slight’. The judge stated that the ‘only practical way in which the possibility of danger could have been avoided would have been to stop playing cricket on this ground’ and held that the ‘appeal should be allowed’. 118

The third judge reported agreed that the decision by the court of first instance should be restored. ‘The standard of care in the law of negligence is the standard of an ordinarily careful man, but… an ordinarily careful man does not take precautions against every foreseeable risk’. An ordinarily careful man, 119 in this judge’s view, can ‘foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are reasonably likely to happen’. Applying this to the present case, it was possible that ‘after this accident the ordinarily prudent committee man of a similar cricket ground would take some further precaution, but that is not to say that he would have taken a similar precaution before the accident’. After highlighting a case involving golf links, Castle v St Augustine’s Links, the judge held that the ‘owners and the committees’ of ‘cricket and golf courses and… the pedestrians who use the adjacent footpaths and highways’ treat the risks associated with balls driven out of such grounds as ‘negligible’, therefore, ‘it is not… actionable negligence not to take precautions to avoid such risks’. 120

118 Ibid at 861-863
119 The gendered nature of the articulation can also be seen as another manner in which the members of the legal profession, and in particular the judges, “see” those who appear before them. As highlighted in Chapter Two, critiques of the gender bias in the law are well-known. Conaghan & Mansell, however, make particular reference to the decision in Bolton v Stone in their discussion of the characteristics of the “reasonable man” (The Wrongs of Tort at 37-39).
120 [1951] AC 850 at 863 per Lord Oaksey
The fourth judge reported stated that ‘it was readily foreseeable that an accident such as befell the [plaintiff] might possibly occur during one of the [defendants’] cricket matches’. In this situation, however, ‘the chance of a person ever being struck even in a long period of years was very small’. Therefore, he wrote, the question becomes ‘what is the duty and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway’.121

The judge first repeated a statement from Blyth v Birmingham Water Works in which negligence was presented as ‘the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do’.122 The judge then repeated the statement of Donoghue v Stevenson “You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour”.123

Statements from further judgments were quoted, including Bourhill v Young and Fardon v Harcourt-Rivington,124 in part to show that the ‘law of Scotland does not differ in this matter from the law of England’. The statements repeated by this judge did not support the contention of the plaintiff that ‘as soon as one ball had been driven into the road in the ordinary course of a match, the [defendants] could and should have realised that that might happen again and that, if it did, someone might be injured’. Such a claim could only succeed if ‘the true test is foreseeability

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121 Ibid at 864 per Lord Reid
122 (1856) 11 Ex 781 at 784
123 [1951] AC 850 at 865
124 (1932) 146 LT 391. This decision was also referred to by counsel for the defendants in argument.
alone’. As the ‘crowded conditions of modern life’ present many risks, the judge wrote, ‘the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the [defendants]… would have thought it right to refrain from taking steps to prevent the danger’.125

The judge stated that the court of first instance had decided that the ground ‘was large enough to be safe’. Based on this finding, which was a ‘question not of law but of fact and degree’, and after ‘much repeated and anxious consideration’, the judge found for the defendants, but added that ‘this case is not far from the borderline’. The decision would have gone the other way if the ‘risk here had been other than extremely small’. That the risk was extremely small meant that the ‘appeal should be allowed’.126

The final judge reported agreed ‘with regret’ that the ‘appeal must be allowed’. He considered that it would not be ‘unfair’ for the defendants ‘to compensate the [plaintiff] for the serious injury that she has received as a result of the sport they have organised… But the law of negligence is concerned less with what is fair than with what is culpable’.127

If the duty owed by the defendants, the judge argued, was ‘to depend merely on the answer to the question whether this accident was a reasonably foreseeable risk… [then] there would have been a breach of duty’. But in this case, ‘there was only a remote… chance of the accident taking place at any particular time’. Given that fact, ‘a breach of duty has taken place if they show the [defendants] guilty of a

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125 [1951] AC 850 at 866-867
126 Ibid at 867-868
127 Ibid at 868 per Lord Radcliffe
failure to take reasonable care to prevent the accident’. Reasonable care, according to this judge, means that ‘unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breach of legal duty’. In the circumstances of this case, ‘a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences’. 128

128 Ibid at 868-869
This case was decided in the Court of Appeal of the Queen’s Bench Division. The appeal was based on the claim that the judge in the lower court ‘misdirected himself’ and misunderstood the duty owed to the plaintiffs by the defendants.

There were two plaintiffs. The first was an infant who had been hit by a ‘power-driven trolley’ that was passing through a train station. The second was his mother. She was acting as administratrix of the estate of her husband’s, the infant’s father, who had died trying to rescue his child. The plaintiffs were suing the British Transport Commission for negligence. The infant, then two, had ‘strayed from the station platform on to the track’. His father, the stationmaster at the station where the accident happened, was not on duty at the time of the accident. The defendants ‘denied liability and claimed that, as the infant was a trespasser on the line, they owed him no duty of care’. The driver, the defendant’s employee, was not joined as a party to the action.

The court of first instance dismissed the claims of the plaintiffs. The judge found that if the driver had been ‘keeping a proper look-out he would have seen the boy before he saw the [stationmaster and porter]’. The regulation applicable to the conduct of the driver in the circumstances of the accident ‘provides that: “A power-worked trolley… must not be allowed to exceed a speed of 30 miles per hour… Stations, signal-boxes and catch points must be approached with care…”’. The

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130 [1963] 2 QB 650 at 653
131 Ibid at 652
judge found that, if the driver had been ‘driving at a reasonable speed’ for the conditions, he ‘would have slowed down quicker after seeing the men and perhaps would have been driving more slowly before seeing them’. And if the driver ‘should have applied his brake hard before he did and so would probably have avoided running down the boy and his father’.\textsuperscript{132}

The conclusion of the court of first instance was that the driver ‘failed to approach this station with the reasonable care that an experienced trolley-driver should have taken and that if he had taken reasonable care, the injury to the infant plaintiff and the death of his father would probably have been prevented’. The court, however, failed to find ‘any negligence on the part of any other servant of the defendants’, but did find that ‘the infant plaintiff was a trespasser upon the line when he was struck’. The ‘submission that carelessness of the… [driver] is a breach of duty to this trespasser’ was rejected, as was ‘the submission that the defendants and their servant owed the dead man a duty of reasonable care distinct from and more stringent than the duty they owed his son…’\textsuperscript{133}

Counsel for the plaintiffs in the Court of Appeal began by arguing against the assumption that the infant was a trespasser.\textsuperscript{134} It was contended that ‘the duty owed to him by the [defendants] was that of occupiers of land on which current operations were being carried on, and that is the duty to take reasonable care not to injure their “neighbour”’. Counsel highlighted one of the judgments from \textit{Donoghue v Stevenson} in this context. This is the same duty as is owed to a

\textsuperscript{132} Id
\textsuperscript{133} Ibid at 653
\textsuperscript{134} Counsel for the plaintiffs were Croom-Johnson QC and Hoare.
‘licensee or invitee, though the facts which would amount to a breach of the duty might be different and a question of degree’.135

The judge in the court of first instance considered that ‘there must be some element of wilful or reckless disregard in order to constitute a breach of duty’. On appeal, counsel for the plaintiffs stated that this was a ‘statement’ relating to the duty of the occupier in relation to the static condition of the land’. Counsel argued that the defendants owed ‘the duty of a contractor, not being the occupier’. A previous decision, Excelsior Wire v Callan,136 was argued to be one in which the ‘House of Lords held that there was a duty owed by contractors who carried on activities on the land to trespassing children whose presence ought to have been foreseen’.137

Counsel then argued that ‘whatever may be the duty of the commission as occupiers, the duty of the trolley-driver, in relation to people whom he might reasonably expect to be around the station, was to take reasonable care, having regard to all the circumstances’. Counsel acknowledged that the judge in the court of first instance had ‘found that the driver did not take reasonable care but that he was not liable because his carelessness fell short of wilful or reckless disregard of the possible presence of a trespasser’. If the driver had been sued alone, however, he could not have pleaded that the infant was a trespasser as the driver was not the occupier of the land. Counsel argued that the ‘driver was guilty of reckless disregard of the boy’s possible presence… he was therefore in breach of the duty owed to the trespasser, so that the commission are vicariously liable’.138

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135 Counsel also highlighted the possibility, with a reference to Indermaur v Dames, that a person may owe more than one duty.
136 [1930] AC 404 HL
137 [1963] 2 QB 650 at 654-655
138 Ibid at 656
Counsel then discussed the issue of whether the infant was a trespasser. The boy ‘had not come from outside on to the commission’s land but started there lawfully and only strayed a very short distance beyond his licence’. The defendants had provided a house in the station precincts for the stationmaster and his family. ‘It would be going too far to say that a small child who had wandered only a few feet beyond the point to which he had a right to go would be converted automatically into a trespasser’.139

As to the ‘claim of the widow and the duty owed to the father’, the court ‘misdirected’ itself, ‘for the defendants owed him a duty of reasonable care distinct from that owed to the child’. Referring to precedents, including Bourhill v Young, counsel argued that the ‘right of the rescuer is not dependent on a breach by the defendant of a legal duty to someone else’. Applying this to the present circumstances, ‘the trolley driver did not have to foresee the precise form which the emergency caused by his bad driving might take’.140

Counsel for the defendants argued that, despite the initial conduct of the driver, ‘once he became aware of the child’s presence on the line, [he did] everything in his power to prevent the tragedy’.141 Therefore, this ‘eliminates any question of reckless disregard of the presence of someone whom he knew or ought reasonably to have anticipated being there’. As the infant was a trespasser, counsel claimed,

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139 Id
140 Ibid at 657
141 Counsel for the defendants were N. R. Fox-Andrews QC and C. Ross-Munro.
with reference to Addie v Dumbreck,\textsuperscript{142} that there ‘was no negligence of the quality required to constitute a breach of duty to this trespassing child’.\textsuperscript{143}

Counsel for the defendants also rejected two submissions by the opposing counsel relating to the duty owed by the driver. Counsel for the defendants first addressed the issue of vicarious liability. The ‘driver was not in breach of any duty owed to the child whose presence could not have been foreseen’. That is, the child was not the “neighbour” of the driver and, therefore, the defendants are ‘not vicariously liable’. Counsel then discussed the driver’s relationship with the father. Counsel contended that, as the driver had no reason to foresee the presence of a trespasser, ‘then a fortiori he had no reason to anticipate the presence of a rescuer, and the rescuer was therefore not his “neighbour” in the Donoghue v Stevenson sense’.\textsuperscript{144}

THE DECISION

The Court found for the defendants in respect of the appeal on behalf of the child, but found for the plaintiff in respect of the appeal on behalf of the father. The decision was given in three separate judgments. The first legal question addressed in the first judgment reported was as to whether the infant was a trespasser at the time of the accident, ‘as much of the law depends on it’. That is, if ‘he was lawfully present, the occupier owes him the common duty of care’. The argument that the child’s straying of a few yards was insufficient to render him a trespasser was

\textsuperscript{142} [1929] AC 358. This decision will be discussed more in the next case in this application of the archaeological method.

\textsuperscript{143} [1963] 2 QB 650 at 657-658

\textsuperscript{144} Ibid at 659
rejected on the basis of a number of precedents. As ‘he went beyond the bounds of any licence that he had’, the judge held, he was a trespasser.\textsuperscript{145}

The judge then addressed, as a matter of “settled” law, the duty of care owed to a trespasser by an occupier of land. ‘It has commonly been supposed that the occupier of land owes no duty towards a trespasser to care for his protection’. The judge repeated a statement from \textit{Addie v Dumbreck} to justify this position. However, he continued, as many trespassers are ‘innocent of any wicked intent’, the courts ‘have time and again turned a trespasser into a licensee so as to give him a remedy for negligence when otherwise he would have none’. More recently, a ‘new way has been found to mitigate the harshness of the old rule about trespassers’. It has been considered that the old rule ‘only applies when it is sought to make the occupier liable, as occupier, for the condition of his premises’. However, the occupier’s ‘duty towards his neighbour to conduct his activities with reasonable care’ remains ‘untouched’. Therefore, ‘he may be liable as neighbour for negligence when he would not be liable as occupier’.\textsuperscript{146}

The judge then considered various precedents, including \textit{Donoghue v Stevenson}, \textit{Bourhill v Young}, \textit{Excelsior Wire v Callan}, \textit{Addie v Dumbreck} and \textit{Lynch v Nurdin}, and stated that the ‘true principle’ that applies in this situation is that ‘the duty to use reasonable care extends to all persons lawfully on the land, but does not extend to trespassers, for the simple reason that he cannot ordinarily be expected to foresee the presence of a trespasser’. In certain situations, however, the occupier of the land ‘ought to foresee even the presence of a trespasser… Once he foresees their

\textsuperscript{145} Ibid at 660-663 per Lord Denning MR
\textsuperscript{146} Ibid at 663-664
presence, he owes them the common duty of care, no more and no less’. There were several criteria, in this judge’s view, that have to be considered in the application of this ‘simple test’. These include ‘the gravity and likelihood of the probable injury… the character of the intrusion by the trespasser… the nature of the place where the trespass occurs… [and] the knowledge which the defendant has, or ought to have, of the likelihood of trespassers being present’. In addition, that judge stated that this test ‘applies only where an occupier or a contractor or anyone else conducts activities on land’.147

The judge then applied these legal statements to the present case. In terms of the actions of the defendants, ‘they were carrying on the simple operation of driving a trolley along a railway line. The railway line was not open to the public. It was prohibited to everyone except such person as a porter or platelayer on his lawful occasions’. On this basis, the judge held that it ‘could not reasonably be foreseen that a trespasser would be there. Not even a child trespasser could be foreseen, for there is no evidence that children were in the habit of trespassing there at all’. In particular, the driver ‘could not reasonably be expected to foresee that a child was there… therefore… the child’s claim fails’.148

The judge then turned ‘to the widow’s claim in respect of the death of her husband’. For it to succeed, she must demonstrate that the driver ‘owed a duty of care to the stationmaster, that he broke that duty, and that, in consequence of the breach, the stationmaster was killed’. After considering two cases that discussed liability toward rescuers, Haynes v Harwood149 and Baker v Hopkins,150 the judge

147 Ibid at 665-667
148 Ibid at 668
149 [1935] 1 KB 146

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stated that the ‘right of the rescuer is an independent right and is not derived from
that of the victim’. Foreseeability was still a ‘necessary’ factor, ‘but not [the]
foreseeability of the particular emergency that arose’. 151

In this case, the driver ‘ought reasonably to foresee that, if he did not take care,
some emergency or other might arise, and that someone or other might be impelled
to expose himself to danger in order to effect a rescue’. This judge stated that ‘if a
person by his fault creates a situation of peril, he must answer for it to any person
who attempts to rescue the person who is in danger…’ That is, ‘so long as it is not
wanton interference… the rescuer… can recover damages from the one whose fault
has been the cause of it’. Therefore, the first judge ‘would allow the appeal of the
widow and dismiss the claim of the child’.152

The second judge reported stated that ‘so far as the facts of this case are known,
there does not seem… to be any relevant dispute about them’. Therefore, the ‘first
question to be answered is whether the boy on the line was a trespasser’. In this
developer’s view, ‘the boy undoubtedly was a trespasser… [as there is] no trace of any
invitation or permission to him to cross the line’. After discussing precedents
relating to the issue of children and licences, including Jenkins v Great Western
Railway,153 Cooke v Midland Great Western Railway154 and Latham v Johnson, and
repeating extensive statements of law from them, the judge held that the

150 [1959] 1 WLR 966. These two cases were referred to in argument by counsel for the plaintiffs.
151 [1963] 2 QB 650 at 668-669
152 Ibid at 669
153 [1912] 1 KB 525
154 [1909] AC 229
investigation, therefore, must start from the premise that the child was not lawfully upon the line, but a trespasser’. 155

Precedents, ‘however, do show that there may be a duty even to trespassing children in some circumstances’. This is important as ‘negligence in law involves a duty’. Duties to trespassers have been found where the presence of a trespasser is known, or where their ‘presence… may be probable or suspected’. This statement was emphasised through the use of statements from earlier cases, including Excelsior Wire v Callan, Addie v Dumbreck and Bourhill v Young. Therefore, for this judge, this case ‘seems to turn on whether it was reasonably foreseeable by the driver that the child would be on the line’. On the facts of the case, the driver ‘had no reason to suppose the child would be there. If that be so, he owed the child no duty because his presence there was not reasonably foreseeable: if so, his carelessness does not amount to negligence in law’. 156

The judge then considered the claim relating to the father’s death. The argument that the ‘father could not be in a better position than his son’ was not accepted. As power-driven trolleys did not run to a strict schedule, ‘with no stated times and no warning of their approach’, their drivers ‘must approach stations with care’. That is, ‘they must take care that there are no persons on the line, more especially railway servants engaged in maintenance and like duties. One of these servants was the dead stationmaster’. A child on the line could have been that of a passenger and it ‘would clearly be within the scope of the stationmaster’s employment to take all steps to rescue such a child’. In terms of foreseeability, it is ‘not necessary that the

155 [1963] 2 QB 650 at 670-672 per Harman L.J.
156 Ibid at 672-675
exact event should be foreseeable. The presence of the stationmaster… on the track was within the sphere of contemplation’. As a result, ‘though the child’s action fails, the father’s succeeds, and the appeal should be allowed to that extent’.157

The third judge reported first laid out the findings of fact from the court of first instance that ‘were fully justified by the evidence and should be accepted’. These included the finding, that the trolley driver was ‘negligent in three respects… he was driving too fast… he was not keeping a sufficiently careful look-out… he did not respond sufficiently to the attempts of the stationmaster and the porter to communicate with him by hand signals’. The last fact that the third judge accepted was that neither the driver ‘nor anybody else acted in reckless disregard of the presence of the infant plaintiff’. Therefore, ‘prima facie on those facts the [defendants] had no liability to the infant plaintiff… did not owe him any ordinary duty of care, and… did not act with reckless disregard of his safety’. This statement was supported with reference to Addie v Dumbreck.158

The judge then engaged with the arguments of counsel and considered statements of the law as it related to the duty owed to trespassers, including those from Bourhill v Young. As the ‘presence and movements’ of trespassers are ‘unpredictable’, they are ‘not within the zone of reasonable contemplation and he is not a “neighbour” to the occupier or to any other person working or present on the land, and no precautions can reasonably be required to be taken’ to protect the trespasser’s safety. The judge then repeated a statement from Bolton v Stone: ‘The quantum of danger must always be a question of degree. It is not enough that there

157 Ibid at 675-676
158 Ibid at 676-677 per Pearson L.J.
is a remote possibility that injury may occur: the question is, would a reasonable man anticipate it?’ Other precedents were cited to emphasise the ‘unforeseeability of trespassing’. There is also the possibility, according to this judge, that ‘the presence of the trespasser is known to, or reasonably to be anticipated by, the person concerned’. In that case, that person still owes some duty of care to the trespasser’, as the ‘trespasser is a neighbour, though an underprivileged neighbour’. Such a duty, however, ‘is radically different from the duty of care owing to a lawful visitor’.159

Therefore, there are ‘two principles governing liability to trespassers’. First, if ‘the person concerned does not know of or have good reason to anticipate the presence of the trespasser, that person owes him no duty of care’. Second, if ‘the person concerned knows of or has good reason to anticipate the presence of the trespasser, that person owes… a duty of care which is substantially less than the duty of care which is owing to the lawful visitor’. This lesser duty is ‘only a duty to treat him with common humanity and not a duty to make the land and operations thereon safe for the trespasser in his trespassing’. The judge held that as the infant was a trespasser, ‘it is quite clear that… up to a late stage of this tragic incident nobody knew or had reason to anticipate the presence of the infant plaintiff’. This assertion was supported by a statement repeated from Addie v Dumbreck. The judge also found that ‘there was not at any stage any reckless disregard of his presence, or any conduct showing lack of common humanity’. On these bases, the judge affirmed the decision of the court of first instance ‘in respect of the claim of the infant plaintiff’.160

159 Ibid at 677-680
160 Ibid at 680-682
The judge then turned to the appeal of ‘the widow, who claims damages for the death of her husband’. The judge held that the driver ‘in his approach to the station was acting negligently in relation to anyone to whom he owed a duty of care’. The issue then, was whether the driver ‘owed any relevant duty of care to the deceased’. The court of first instance ‘evidently accepted… that the position of the rescuer could not be any better than the position of the person rescued’. However, in this judge’s view, ‘the deceased was the stationmaster, having a general responsibility for dealing with any emergency that might arise at the station’. Therefore, it ‘was foreseeable’ on the part of the driver ‘that if he drove his vehicle carelessly into the station he might imperil the stationmaster, as the stationmaster might well have some proper occasion for going on the track in the performance of his duties’. On this basis, the driver’s ‘careless approach to the station was a breach of a duty owing by him to the deceased as stationmaster, and it caused the accident, and consequently, [the defendants are] liable to the widow and her appeal should be allowed’.161

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161 Ibid at 682-683
This case was an appeal to the House of Lords from a decision of the Court of Appeal. Much of the discussion of the judges relates, in this construction, to the great reluctance of the Lords to refuse to repeat statements of a previous decision of the House of Lords.\footnote{That decision was \textit{Robert Addie v Dumbreck} [1929] AC 358, which was on appeal from the Scottish courts. In that case, a four year old boy was crushed by a wheel that was part of a haulage system at a colliery. The wheel was situated in a field that was protected by a hedge, but the field was still frequently used by children as a playground. The colliery staff were aware of this. When the accident occurred, however, none of the colliery employees had checked to ensure that there were no children in the vicinity when the wheel was set in motion.}

The defendants were ‘the owners of a single line electrified railway’ in Surrey. One segment of this line ran between two National Trust properties. These properties were open to the public and were fenced off from the railway. One section of the ‘fencing had become detached from one of the concrete posts and had been pressed down so that its top curved down to within ten inches from the ground’. It was held by the court of first instance that the ‘fence at this point had been in that condition for at least several weeks and probably for months and that people were using the route as a short cut’.\footnote{[1972] AC 877 at 881}

The plaintiff was a six year old boy who was playing with his two older brothers on one of the National Trust properties. He was ‘found to be missing… [and] was shortly afterwards discovered lying on the electrified rail opposite the point where the fence was broken down’. Further evidence indicated that the ‘mother did not
know that her children were going’ to that property that day and ‘that she had
warned all her children never to go on the railway line and that the two older
brothers understood the warning’. There was also evidence from the ‘stationmaster
at Mitcham Junction that… some seven weeks previous to the accident, children
had been seen at some unspecified part of the line between Mitcham and Morden
Road Halt’.165

Before the House of Lords, counsel for the defendants argued that there was ‘no
question of “allurement” and no doubt that the [plaintiff] had no right to be on the
land and [had] no implied licence’.166 The child was a trespasser ‘for his own
purposes and has been injured through something which was lawfully on the
[defendant’s] land’. Precedents, including *Addie v Dumbreck*, *Latham v Johnson*,
*Cooke v Midland Great Western Railway* and *Excelsior Wire v Callan*, were cited
that showed that the ‘nature of the duty owed by an occupier of premises towards
the trespassers, including infants, has been settled’. The court of first instance held
that as ‘the stationmaster had been told that children had been seen on the line, that
that should have alerted the [defendants] to the possible presence of child
trespassers and that the failure to repair the fence was a breach of duty’. Such a
“principle”, according to the defendants’ counsel, gives rise to the ‘startling
proposition that if a landowner hears that children have trespassed on his land and
there is anything on the land that might harm them, he must either keep them out or
box in the dangerous thing’.167

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165 Ibid at 881-882
166 Counsel for the defendants were Gatehouse QC and Alexander.
167 Ibid at 882-883
Counsel for the defendants argued that if ‘the law limits the landowner’s duty towards a trespasser, it would be strange if it imposed a more onerous duty on him to prevent a person from becoming a trespasser by keeping him out’. Precedents were cited, including *Slater v Clay Cross*,\(^{168}\) in support of the claim that a ‘trespasser has no cause of action for the negligent activities of the occupier’. It was suggested that Parliament had ‘declined to alter the law with regard to trespassers and had trespassers in mind at the time’. In terms of public policy, counsel argued that, if ‘the standard of care towards trespassers whom the landowner knew were likely to be on the premises was that of reasonable care based on reasonable foresight, then when the risk of injury was substantial, grave and expensive preventive steps might be required’. Such a new position, counsel contended, ‘should not be imposed by a judicial body’.\(^{169}\)

Counsel for the plaintiff argued that ‘this branch of law’ is in ‘an unsatisfactory state’.\(^{170}\) Counsel offered four possible judicial solutions,\(^{171}\) with the correct one, in their opinion, being the acceptance of the ‘formulation which commended itself to the Court of Appeal in the present case, holding that a duty arises if the occupier could reasonably have foreseen the trespassers presence’. Statements from *Videan v British Transport Commission* were used to support this statement of the law.\(^{172}\)

Applying that formulation to the current circumstances, counsel argued ‘it was enough to establish that the open spaces lay on either side of the railway line, that,

\(^{168}\) [1956] 2 KB 264
\(^{169}\) [1972] AC 877 at 883-885
\(^{170}\) Counsel for the plaintiff were Hunter QC and Chambers.
\(^{171}\) Counsel put forward a number of precedents as justifications for each of the four solutions. The decisions cited included *Lynch v Nurdin, Heaven v Pender, Cooke v Great Western Railway, Excelsior Wire v Callan and Glasgow Corporation v Muir*.
\(^{172}\) [1972] AC 877 at 885-888
by reasonable inference, children would go there and, by actual knowledge, that some children at some time had come there’. The duty applicable ‘in such a case, is measured by the nature of the peril but it may be discharged either by a warning notice, by exclusion or by removal of the danger’. And further, the ‘duty must be proportionate to the danger and must correspond to the conduct of the reasonable man in all the circumstances. The duty is only to take reasonable steps’. In this case, a ‘notice would be a sufficient warning to an adult, but not to a child’. And as the ‘only possible inference from the facts proved was that for months the public had been crossing the railway. The court can infer complete indifference on the part of the [defendants]. Since nothing was done by them for months, the inference of gross negligence was very easy’.173

Counsel summarised their position with respect to the responsibilities of the defendants and argued that the standard ‘of the reasonable man would not pose an intolerable burden on landowners’. In general, counsel contended, the ‘concept of reasonable foreseeability rests on the creation of an acute danger on land in physical proximity to a place where people normally go, so that a duty of care arises’, as it does in this case.174

THE DECISION

The House of Lords unanimously dismissed the appeal, with the decision being delivered in five separate judgments. Once again, these judgments will be examined in turn. The first judge reported briefly recounted the facts and then

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173 Ibid at 888-889
174 Ibid at 890-891
stated that ‘if the [defendants] owed to potential child trespassers any duty of care to take steps for their safety, they were in breach of any such duty’. However, it was the defendants’ counsel’s ‘main contention… that [the defendants] owed no duty to this child’. This claim was based on the precedent, Addie v Dumbreck, in which occurred the statement that ‘no occupier is under any duty to potential trespassers, whether adults or children, to do anything to protect them from any danger on his land, however likely it may be that they will come and run into danger and however lethal the danger may be’.  

The judge considered various precedents, including Excelsior Wire v Callan, Mourton v Poulter and Edwards v Railway Executive, which either applied similar statements to those in Addie v Dumbreck, or distinguished that case. In one such precedent, close in its facts to the present one, it was held that ‘persistent trespassing by children imposed no duty on the railway to keep them out or protect them’. The judge also considered Videan v British Transport Commission, and he placed emphasis on the statement:

the true principle is this: In the ordinary way the duty to use reasonable care extends to all persons lawfully on the land, but it does not extend to trespassers… But the circumstances may be such that he ought to foresee even the presence of a trespasser: and then the duty of care extends to the trespasser also.

According to this judge, this test of foreseeability provided a ‘new view’ on the legal issue. It specifically went against Addie v Dumbreck where the House held that there was no duty even though ‘the presence of children was not only foreseeable, it was very probable’. This “new view” meant that ‘no satisfactory

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175 Ibid at 892-894 per Lord Reid
176 [1930] 2 KB 183
177 [1952] AC 737. These cases were all highlighted by counsel for defendants in argument.
solution can be found without a re-examination of the whole problem and a reconsideration by this House of its decision in Addie’s case’.  

This judge suggested that ‘child trespassers have for a very long time presented to the courts an almost insoluble problem’. Only two methods can ‘completely safeguard’ them, in his view. Parents ‘must be required always to control… their young children, or occupiers of premises where they are likely to trespass must be required to take effective steps to keep them out or else to make their premises safe for them’. These methods, he argued, are not ‘practicable’. In his view, ‘legal solutions cannot solve the problem. How far occupiers are to be required by law to take steps to safeguard such children must be a matter of public policy’. The decision in Addie v Dumbreck was arguably made as ‘good public policy’ then, but it would be ‘unarguable today’. The judge then expressed a ‘dislike’ for the possibility of usurping the functions of Parliament’ with such a foray into public policy.  

In terms of a legal solution, the ‘first matter to be determined is the nature of the duty owed by occupiers to trespassers’. Addie v Dumbreck contained the statement that there was a ‘duty not to act recklessly’, and that this duty was a ‘humanitarian’ one.

If a person chooses to assume a relationship with members of the public… the law requires him to conduct himself as a reasonable man with adequate skill, knowledge and resources would do. He will not be heard to say that in fact he could not attain that standard. If he cannot attain that standard he ought not to assume the responsibility which that relationship involves.

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178 [1972] AC 877 at 894-897
179 Ibid at 897-898
However, ‘an occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a “neighbour” relationship on him. When they do so, he must act in a humane manner’, there is no reason ‘why he should be required to do more’. Therefore, in this judge’s view, ‘an occupier’s duty to trespassers must vary according to his knowledge, ability and resources’. Trespassers, instead of taking ‘the land as they find it’, should ‘take the occupier as they find him’.  

The judge then made the following statement intended to summarise the “principle” that applied here:

So the question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it. If he knew before the accident that there was a substantial probability that trespassers would come… most people would regard as culpable failure to give any thought to their safety. He might often reasonably think, weighing the seriousness of the danger and the degree of likelihood of trespassers coming against the burden he would have to incur in preventing their entry or making his premises safe, or curtailing his own activities on his own land, that he could not fairly be expected to do anything. But if he could at small trouble and expense take some effective action… most people would think it inhumane and culpable not to do that.

Applying this “test” to the present case, the judge considered the defendants ‘must be held responsible for this accident’. For the facts showed that the defendants ‘brought onto their land… a lethal and to a young child a concealed danger. It would have been easy for them to have and enforce a reasonable system of inspection and repair of their boundary fence… Yet they did nothing’. Therefore, the defendants are ‘liable’ and the appeal should be dismissed.

180 Ibid at 898-899
181 Ibid at 899-900
The second judge reported suggested that if the facts of the case were ‘put to any well-disposed but fair-minded member of the public… [then] the response guided by the promptings of common sense would be that having regard to the dangerous nature of the live rail… the railways board were grievously at fault’. It was then a ‘matter of regret and of concern if the answer of law does not accord with the answer that common sense would suggest’.182

The defendants claimed, according to the judge, that ‘the law must refuse the infant’s claim. In effect they say he was a legal outcast. In short he was a trespasser’. A statement from the decision in Addie v Dumbreck, adopted by counsel for the defendants, was repeated: ‘there must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser’. This was repeated by the judge in the present case as a claim that ‘an occupier is only liable to a trespasser where the injury is due to some wilful act involving something more than the absence of reasonable care’. This judge presented counsel for the defendants as arguing that ‘there was no wilful act done against the infant: the railways board did not know of his presence and did nothing in disregard of his presence’.183

The second judge stressed the differences in the facts of the present case and those in Addie v Dumbreck. This was accompanied by a warning that there ‘is always peril in treating the words of a… judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case’. The question then became whether or

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182 Ibid at 900-902 per Lord Morris of Borth-y-Gest
183 Ibid at 902
not the House ‘should depart… from what was laid down in Addie’s case or whether in the light of developments in the law since 1929 there are some modifications which permissibly can be accepted’.184

The judge considered the history of the relationship between occupiers of land and trespassers. It was noted that in the nineteenth century spring guns were used to protect property, however, it was also noted that ‘the duty to warn was recognised’ by the courts. One earlier judgment, Adams v Naylor,185 was referred to in which the judge ‘saw no reason in principle why an occupier should not be called on to take all reasonable precautions to keep trespassing children out of a place where he knows they will be blown up’. In an 1820 judgment, Ilott v Wilkes,186 it was also recognised that ‘there may be circumstances in which there is a duty to prevent injury to a trespasser… even inaction, when humanitarian impulses would prompt action, might amount to a breach of a duty owed to a trespasser’. The judge found similarities between the use of spring guns and the live rail in the current case, as both situations contained circumstances of ‘expected or foreseen’ trespassers and the possibility of injury to such people. ‘If humanity is to be a guide should it not operate to lessen the risk of foreseeable injury from a danger which has been created even though such injury is not intended?’187

This judge noted that it is ‘basic’ to current ‘legal thinking that every member of the community must have regard to the effect upon others of his actions or his inactions’. Based on ‘reasons of common sense and common humanity… a duty is

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184 Ibid at 902-903
185 [1944] KB 750
186 (1820) 3 B & Ald 304
187 [1972] AC 877 at 904-906
owed by an occupier of land to potential trespassers as well as to actual trespassers of whom he is positively aware’. The decision in *Videan v British Transport Commission* was used as evidence on this point. On the facts of the current case, ‘taking ordinary thought and exercising “common sense and ordinary intelligence” – even apart from the guidance of common humanity’, the judge considered that the defendants ‘would see’ that ‘there was a likelihood that some child might pass over the broken down fence and get on to the track with its live rail and be in peril of serious injury’. 188

The following statement from *Blyth v Birmingham Waterworks* was repeated as the definition of negligence: ‘the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or do something which a prudent and reasonable man would not do’. The judge then suggested that ‘in a civilised community [the] need to take thought as to the result of acts or omissions has long been recognised’. He then repeated the following statement from *Heaven v Pender*:

> whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

The judge then referred to other cases, including *Donoghue v Stevenson* and *Dorset Yacht v Home Office*,189 before going on to say that in the present case, ‘it is abundantly clear that the railways board, if they had taken thought, must have realised that if they allowed the fence to be broken down... there was a considerable risk that a small child would pass through it’. As the child was a trespasser, ‘it

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188 Ibid at 906-907
189 [1970] AC 1004
cannot be said that the railways board owed a common duty of care to the young boy… they did owe to him at least the duty of acting with common humanity towards him’. 190

Such a duty ‘was a limited one. There was no duty to ensure that no trespasser could enter upon the land. And certainly an occupier owes no duty to make his land fit for trespassers to trespass in’. The law, based in part on a reference to Videan v British Transport Commission and statements from Commissioner for Railways (NSW) v Cardy, 191 in this judge’s opinion, still considers that ‘one who trespasses does so at his peril’. Yet, here there ‘were a number of special circumstances’ and, because of those, there was a ‘duty which, while not amounting to the duty of care which an occupier owes to a visitor, would be a duty to take such steps as common sense or common humanity would dictate’. Such steps would be ‘to exclude or to warn or otherwise within reasonable and practicable limits to reduce or avert danger’. This judge found that ‘the plaintiff was entitled to recover… [and] would dismiss the appeal’. 192

The third judge reported summed up the circumstances of the case as a ‘boy was trespassing on the railway… [and] was severely injured. There was no allurement onto the defendant’s land; there is no basis… by which the child can be treated as a licensee’. In terms of the actions of the defendants, ‘there was no wilful intention to injure’ the child ‘nor reckless disregard of his presence. At most there was a lack of care by the board as regards the maintenance of its fences’. 193

190 [1972] AC 877 at 907-909
191 (1960) 104 CLR 274
192 [1972] AC 877 at 909-911
193 Ibid at 911 per Lord Wilberforce
As there is in England no ‘general law as to public enterprise liability… if the plaintiff is to recover, he must rely on our outdated law of fault liability which involves the need to establish a duty of care towards him and breach of it’. For this judge, however, *Addie v Dumbreck* represented a ‘formidable’ obstacle. That case has to be ‘considered in a context, the context of previous and subsequent cases of common law, and the context of bordering but not identical typical situations’. The House is here presented with ‘a cry that this case as a statement of law must be overruled’.\(^{194}\)

The rules in *Addie v Dumbreck* ‘were expressive of certain consequences as regards proximity and foreseeability which flow from the given relationship (occupier and invitee-licenssee-trespasser)’. This meant ‘that the law can, particularly take into account other relevant factors, if they exist, which bear upon these matters of foresight and prudence’. The law already recognised modifications of the rules in *Addie v Dumbreck*, such as the doctrines of allurements, pitfalls and the positions of ‘contractors carrying out work on the land’. The judge then considered several Australian cases in depth for ‘valuable guidance in the search for a modern definition, or at least outline, of the duty of care which may be owed to trespassers in cases such as the present’.\(^{195}\)

The judge held, again with reference to *Videan v British Transport Commission*, that in general, ‘an occupier of land owes no duty to trespassers, or intending trespassers: he is not obliged to make his land safe for their trespassing’. However,

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\(^{194}\) Ibid at 911-912

\(^{195}\) Ibid at 913-918. The Australian cases included *Commissioner for Railways (NSW) v Cardy* and *Commissioner for Railways v Quinlan* [1964] AC 1054. The judge also highlighted the Scottish decision, *Excelsior Wire v Callan* and the Irish decision, *Cooke v Midland Great Western Railway*. 
if ‘he knows, or “as good as knows”, of the actual presence of a trespasser, he is under a duty – as defined in Addie’s case - not to act with the deliberate intention of doing harm to him or to act with reckless disregard of his presence’. But, the judge contended, there is ‘no reason to discard the alternative test of “extremely likely” in relation to the trespasser’s presence… it excludes necessarily any lower duty of foreseeability in the general case by an occupier of trespassers’ presence’.196

For this judge, ‘the question remains whether, in particular circumstances, a man may be under some duty of a particular kind, other than to abstain from wilful injury, or reckless disregard’. In general, an ‘occupier is not under any general duty to foresee the possibility or likelihood of trespass on his land, or to carry out inspection to see whether trespass is occurring or likely. To suppose otherwise would impose impossible burdens’. Further, an ‘occupier is under no general duty to fence his land against trespassers, or even child trespassers’. To these generalities there were exceptions, such as the doctrine of allurements, which could be seen as imposing a ‘duty to take reasonable steps not to place in the way of small children potentially hurtful and attractive objects’.197

‘In the particular case of railway companies’, the judge added, ‘there is no general duty to erect or maintain fences sufficient to exclude adults or children… the only duty is to mark off railway property’. However, the judge continued, the courts must ‘take account of the placing of electrical conductors above or on the ground all over our overcrowded island’. This may affect the requirements of ‘foresight and care’. Any variations in a duty ‘must stem from the inevitable proximity to

196 [1972] AC 877 at 918-919
197 Ibid at 919-920
places of access... from the continuous nature of the danger, from the lethal danger of contact and from the fact that to children the danger may not be apparent’. There still can be ‘no duty to make the place safe, but a duty does arise because of the existence, near to the public, of a dangerous situation. The greater the proximity, the greater the risk, and correspondingly the need of foresight and a duty of care’. When considering such a duty, the judge stated, ‘it must be remembered that we are concerned with trespassers, and a compromise must be reached between the demands of humanity and the necessity to avoid placing undue burdens on occupiers’. The extent of the duty, in this judge’s view, would depend on the circumstances, on the ‘nature and degree of the danger’ and on ‘the difficulty and expense of guarding against it’.¹⁹⁸

The judge then applied these statements of law to the present case. The facts showed that the ‘stationmaster at the nearest station... had been informed some six weeks earlier that on one occasion children had been seen somewhere on the line’. Despite the lack of evidence as to his precise knowledge of the maintenance and condition of the fences, ‘there remains the fact of this electrified line lying between two open spaces... and of the broken down chain link fence at a point near to where children might play’. The fence was ‘designed to be adequate, in view of the existing risk, and became inadequate through lack of maintenance’. Therefore, ‘in relation to the special duty of care incumbent on the board in the relevant place, there was a breach of that duty amounting to legal negligence’. The judge dismissed the appeal.¹⁹⁹

¹⁹⁸ Ibid at 920
¹⁹⁹ Ibid at 921-922
The fourth judge reported considered the ‘fundamental distinction’ between the duty owed to the lawful visitor and that owed to the trespasser. The distinction, according to this judge, was that the occupier ‘does not owe to the trespasser a duty to take such care as in all the circumstances of the case is reasonable to see that the trespasser will be reasonably safe in using the premises for the purposes for which he is trespassing’. That does not mean, in his view, that ‘the occupier never owes any duty to the trespasser’. As long as the ‘presence of the trespasser is known to or reasonably to be anticipated by the occupier’, then the occupier owes a ‘duty to treat the trespasser with ordinary humanity’, which is a ‘lower and less onerous duty than the one which the occupier owes to a lawful visitor’. 200

Such a description of the duty was, according to this judge, a ‘vague phrase’. Addie v Dumbreck provided the ‘authoritative formulation’ but that is ‘severely restrictive and… now inadequate’. Previous statements of law, from cases including Ilott v Wilkes, Bird v Holbrook, 201 Cooke v Midland Great Western Railway and Excelsior Wire v Callan, suggested that ‘normally… the occupier is not at fault, he has done as much as is required of him, if he has taken reasonable steps to deter the trespasser from entering or remaining on the premises… in which he will encounter a dangerous situation’. If these deterrents are ignored by the trespasser, the trespasser ‘must take the condition of the land and the operations on the land as he finds them’. This formulation is subject to a ‘proviso: if the occupier knows or as good as knows that some emergency has arisen where the trespasser has been placed in a position of imminent peril, ordinary humanity requires further steps to be taken’. 202

200 Ibid at 922-923 per Lord Pearson
201 (1828) 4 Bing 628
202 [1972] AC 877 at 923
The judge then considered the ‘reasons why an occupier should not have imposed upon him onerous obligations to a trespasser’. Four reasons were presented. These included the ‘unpredictability of the possible trespasser both as to whether he will come on the land at all and also as to where he will go and what he will do if he does come on the land’. A discussion of Videan v British Transport Commission was included to establish this point. The second reason was that, even if the trespasser’s ‘presence is known or reasonably to be anticipated, so that he becomes a neighbour, the trespasser is rightly to be regarded as an under-privileged neighbour’. The third reason why an occupier should not suffer onerous obligations with respect to trespassers was that it ‘would in many, if not most, cases be impracticable to take effective steps to prevent trespassers from going into or remaining in situations of danger’. The last reason is ‘moral’. ‘Apart from trespasses which are inadvertent or more or less excusable, trespassing is a form of misbehaviour, showing lack of consideration for the rights of others. It would be unfair if trespassers could by their misbehaviour impose onerous obligations on others’.  

The judge reiterated the statement that ‘the occupier does not owe to a trespasser the “common duty of care” [and] the occupier does not owe to the trespasser any general duty of care’. A large number of judgments were referred to, including Commissioner for Railways v Quinlan, Addie v Dumbreck, Latham v Johnson, Videan v British Transport Commission and Donoghue v Stevenson, with the judge concluding that past ‘exclusive and comprehensive formula[e] defining the duty of occupier to trespasser… [have] created difficulties and aroused criticisms’, or have

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203 Ibid at 924-925. Extensive statements were repeated in this discussion from Hillen v ICI [1936] AC 65 and Munnings v Hydro-Electric Commission (1971) 45 ALJR 378
been ‘too narrow and inadequate’. The statements from Addie v Dumbreck are ‘plainly inadequate for modern conditions, and [the decision’s] rigid and restrictive character has impeded the proper development of the common law in this field.’ 204

According to this judge, ‘the duty of the occupier should remain limited’. However, in his view, the ‘railway board in the circumstances had a duty to take reasonable steps to deter children from straying from the public space on to the electrified railway line… But the railway board failed to repair the broken down fence’. Therefore, he held there ‘was a clear breach of the duty’. The judge held the appeal should be dismissed.205

The fifth judge reported stated that ‘anyone endowed with common humanity would say that the common law ought to afford to the injured child a legal right to compensation against the railway authorities; and that if it did not there was something wrong with the common law’. In the court of first instance, the defendants, ‘elected to call no witnesses’, a ‘legitimate tactical move under our adversarial system of litigation’. A party who chooses that path, however, ‘cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold’. For example, a ‘court may take judicial notice that railway lines are regularly patrolled by linesmen and gangers. In the absence of evidence to the contrary, it is entitled to infer that one or more of them in the course of several weeks noticed what was plain for all to see’. Further, a ‘court is entitled to infer from the inaction of the

204 [1972] AC 877 at 926-930
205 Ibid at 930
[defendants] that one or more of their employees decided to allow the risk to continue of some child crossing the boundary and being injured or killed’.206

The judge recognised the ‘obstacle’ of Addie v Dumbreck. He also stated that all the courts involved in the present case have been ‘convinced that the plaintiff’s claim ought to succeed; and… are determined that it shall’. He then gave a brief history of the duties owed by occupiers of land toward trespassers, including an overview of Addie v Dumbreck itself. This history included an examination of the use of the ‘fiction of a “licence” to persons who would otherwise be trespassers’.207 The judge then commented that such a fiction had served a purpose, but he thought that it was ‘ripe for discard’. The judge considered that it was ‘surely time now for this House… to discard the fiction of a “licence” to meritorious trespassers’.208

Donoghue v Stevenson was mentioned as being of importance for the ‘recognition that conduct likely to cause injury to another person could in itself create the legal relationship between the parties to which the duty attached’. In the case of trespassers, the judge stated,

once the conduct of the occupier is recognised as being capable in itself of creating a legal relationship to another person which attracts duties owed to that person in respect of his safety, it is no longer necessary in cases where that conduct attracts a duty to take reasonable steps to deter another person from entering a dangerous part of the occupier’s land, to sub-divide his duties to that person into a duty to deter his entry, a breach of which gives rise to a subsequent duty to take reasonable steps to enable him to avoid the danger. To deter his entry is merely one way

206 Ibid at 930-931 per Lord Diplock
207 This history included references to, and statements from, decisions such as Donoghue v Stevenson, Commissioner for Railways v Quinlan, Cooke v Midland Great Western Railway, Latham v Johnson, Edwards v Railway Executive and Lowery v Walker [1911] AC 10.
208 [1972] AC 877 at 931-934
of enabling him to avoid the danger. The whole duty can be described as a duty to take reasonable steps to enable him to avoid danger.

Such an ‘approach clearly runs counter to that of this House in Addie’s case’, the judge argued, but is ‘in harmony with the general development of legal concepts since 1929 as to the source of one man’s duty to take steps for the safety of another’.209

In terms of the relationship between two people, any ‘duty imposed by common law upon one person to take steps to avoid harming another arises out of some relationship recognised by the common law as subsisting between the two persons’. In cases like the present, there is a ‘relevant distinction between a person who is lawfully upon the occupier’s land with the occupier’s consent and a trespasser’. That distinction is that for a lawful visitor ‘the occupier has consented to the creation of the relationship from which the duty flows’; whereas for a ‘trespasser the relationship has been forced upon the occupier against his will and as a result of a legal wrong inflicted on him by the trespasser himself’.

According to this judge, this distinction affected the content of the duty owed by an occupier. ‘It would be an unjustifiable burden for the law to impose upon an occupier for the benefit of wrongdoers, a duty to make inspections and inquiries in order to ascertain whether or not trespassers are likely to come onto his land’. The extent of the duty depended, in this judge’s view, on the facts of the situation. The test of whether an occupier is under any duty to a trespasser to do more than to keep the danger within the boundaries of his land is whether he is actually aware of facts which make it likely that some trespasser will come onto that part of his land where the danger is.

209 Ibid at 934-935
210 Ibid at 936
That is, the test is ‘not what the occupier would have been aware of if he had exercised more diligence or foresight than he did’.\textsuperscript{211}

The judge then addressed the content of the duty through a consideration of the history of the duty owed to licensees. After his review of the precedents, including \textit{Indermaur v Dames} and \textit{Gautret v Egerton},\textsuperscript{212} the judge stated that

there is no duty owed by an occupier to any trespasser unless he actually knows of the physical facts in relation to the state of his land or some activity carried out upon it, which constitute a serious danger to persons on the land who are unaware of those facts. He is under no duty to any trespasser to make inspections or inquiries to ascertain whether there is any such danger. Where he does know of physical facts which a reasonable man would appreciate involved danger of serious injury to the trespasser his duty is to take reasonable steps to enable the trespasser to avoid the danger.

The extent of such ‘reasonable steps will depend upon the kind of trespasser to whom the duty is owed’.\textsuperscript{213}

The judge then turned to consider the ‘class of trespassers’ owed such a duty, and more particularly, ‘the degree of expectation on the part of the occupier that the trespassers will come on to his land which, in the absence of actual knowledge of his presence, is sufficient to give rise to the duty’.\textsuperscript{214} The judge held that

if the danger is created by an occasional or intermittent activity upon the land… the test of the creation of the occupier’s liability to the injured trespasser is his expectation of the trespasser’s presence at the point of danger at that moment of activity. Whereas if the danger lies in some permanent condition of the land… the test is his expectation of

\textsuperscript{211} Ibid at 937
\textsuperscript{212} (1867) Law Rep 2 CP 371
\textsuperscript{213} [1972] AC 877 at 937-940
\textsuperscript{214} The judge considered the cases of \textit{Adams v Naylor} and \textit{Commissioner for Railways v Quinlan} in this context.
some trespasser’s presence at the point of danger at any time while that condition continues to exist…

In terms of ‘an occupier’s expectation of a trespasser’s presence’, he contended, the law was that

the test of appreciation of the likelihood of trespass is whether a reasonable man knowing only the physical facts which the occupier actually knew, would appreciate that a trespasser’s presence at the point and time of danger was so likely that in all the circumstances it would be inhumane not to give him effective warning of the danger or, in the case of a child too young to understand a warning, not to take steps to convey to his infant intelligence that he must keep away.215

The judge then considered ‘an occupier’s duty to trespassers on his land’ as having four characteristics. The first is that the ‘duty does not arise until the occupier has actual knowledge either of the presence of the trespasser upon his land or of facts which make it likely that the trespasser will come on to his land’. The second characteristic is that ‘once the occupier has actual knowledge of such facts, his own failure to appreciate the likelihood of the trespasser’s presence… does not absolve the occupier from his duty’. The third is that the ‘duty when it arises is limited to taking reasonable steps to enable the trespasser to avoid the danger’. The final characteristic is that the ‘relevant likelihood to be considered is of the trespasser’s presence at the actual time and place of danger to him’.216

In the present case, the judge argued, the defendants ‘did know the physical facts that made it likely that little children playing… would trespass on [the railway] line and, if they did so, would run a serious risk of grave if not mortal injury from the

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215 [1972] AC 877 at 940-941
216 Ibid at 941
electric rail’. Therefore, ‘[b]reach of the other characteristics of the duty which then arose is… established’. The judge held that the appeal should be dismissed.\textsuperscript{217}

\textsuperscript{217} Ibid at 942
ANALYSIS

There was less variation in the articulations of liability in the cases examined in this Chapter when compared to the decisions in the period covered in Chapter Five. Despite this relative stability, the judgments of the period still showed the effects of the processes of legal change. The practice of repetition of past legal statements can be considered to have contributed to both the stability and the change evident in this period.

In this section, the practice of repetition will be discussed, as will the “visibility” of the defendants on the part of the judges. I have also included a discussion of the way in which the courts “saw” the plaintiffs, as some of the judges in the earlier twentieth century decisions began to speak of the behaviours and characteristics of the plaintiffs during the assessment of the liability of defendants. This practice became more pronounced later in the century and was reflected in the way in which the “visibility” of the defendants was articulated. The practice, with respect to plaintiffs, developed in a manner similar to that with respect to defendants. The way in which judges “saw” both defendants and plaintiffs was developed through the repetition of past legal statements. It is this practice of repetition that will be discussed first.

REPETITION OF LEGAL STATEMENTS

One of the first things that emerged from my research on this period was that all the members of the legal profession, the judges and counsel, repeated an increasing number of statements from earlier cases as the century wore on. The judgments that
were referred to where also not as limited as was evident in my research for Chapters Four and Five. That is, the twentieth century judges repeated statements from a wider range of jurisdictions than earlier judges did. However, in another sense the judges were more limited. That is, twentieth century judges were more likely to restrict the statements they repeated to those put forward by counsel in argument. Whatever changes might have been adopted with respect to the source that previous legal statements were drawn from, the changes that are evident in the articulations of liability can be considered to be based on the repetition of legal statements.

One example of the relative stability evident in this Chapter is that all of the cases excavated in this Chapter repeated statements with respect to the “duty” potentially owed by the defendants to the plaintiffs. The qualification of the “duty”, however, can be seen to be an example of the change evident in the Chapter. That is, the decisions from the early part of the twentieth century considered “duties” only arose with respect to “things dangerous in themselves”, whereas later twentieth century judges used the notion of “duty” without this restriction.

For example, the judges in Blacker v Lake considered liability in terms of duties owed with respect to “things dangerous in themselves”. The plaintiff in Blacker v Lake was injured as a result of a product which they did not buy directly from the manufacturer. One issue for the court was whether or not the trial judge’s direction to the jury, that they should decide whether the lamp was a thing dangerous in

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218 Interestingly, Blacker v Lake is a case the facts of which are similar to those in George v Skivington and yet the judges in George v Skivington did not repeat statements about “things dangerous in themselves”. George v Skivington, however, was described as “much doubted” by the first, reported judge in Blacker v Lake. The second said of George v Skivington that “it cannot be regarded as good law”.

itself, was correct. The first judge reported considered this in terms of the duty of manufacturer to the end-user of their product. Of particular importance was the characterisation of the product itself. If the product was categorised as a thing “dangerous in itself” then a “special liability” may be imposed. If it was not a “dangerous thing” then there was no additional duty on the part of its manufacturer.

Where a product “is a dangerous thing then the maker owes a duty of care and skill”. This statement was supported through the use of precedents, and the direct quotation from two of them, even though they were considered irrelevant (as the judge in the present case did not consider the lamp to be a thing dangerous in itself). Where the product was not dangerous in itself the judge stated that there was “authority for the proposition that a man is entitled to let a tumbledown house, and I think there is no law which says that a man may not sell a cheap lamp”. This first judge reported only used the word “duty” in the context of statements concerning liability outside of contract, that is, where a manufacturer owed a duty with respect to things dangerous in themselves. When the judge discussed the liability of a manufacturer to a purchaser of a product then the judge said the manufacturer had a “contract to use care and skill”.

The second judge in Blacker v Lake repeated the law as being that before there “could be liability there had to be a duty”. As the plaintiff in this case did not buy the lamp from the manufacturer “there could be no implied or express term in contract for liability which means that the plaintiff has to show a duty outside of contract”. The judge rephrased these sentiments in terms of there being a “long line of authorities that show that whatever may be the want of care that want of care can
be taken advantage of only by the person towards whom the care should have been exercised”.

The “principles” that created liabilities on the part of manufacturers toward those not party to a contract with the manufacturer were highlighted in Blacker v Lake. The circumstances necessary for liability were repeated as being based on either fraud on the part of the manufacturer, where the product amounted to a public nuisance, or where the article was a thing dangerous in itself. A further category was added which related to people who were in “dominion or control” of dangerous things. Of these four sets of circumstances, it was only in terms of dangerous things that the judge applied the term “duty”. If a “vendor sells a dangerous chattel to one person contemplating or knowing that it will be used by another, he is under a duty towards the person who he knows will use it not to represent its real nature”. Whereas a “person who is in control of a dangerous thing, to which he knows other people will resort, owes a duty to those persons to take reasonable care that it shall be safe”. The judge concluded with the statement that a “manufacturer is no more bound, as between himself and a stranger, to take reasonable care in the manufacture of the article than if the chattel were not dangerous, because the only duty, when a chattel belongs to the dangerous class, is to disclose its true character”.

The scope of the word “duty” in cases such as Bolton v Stone, Videan v British Transport Commission and British Railways Board v Herrington can be seen as different to its scope with respect to “things dangerous in themselves”. “Duty” was repeated as a “duty to exercise such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise
such reasonable care”. The issue in *Bolton v Stone* was the foreseeability of a person on a road being hit by a cricket ball. The issue in the later two cases was whether or not particular people on railway tracks were foreseeable.

These statements constructed liability in terms of the likelihood of the incident happening. This was characterised in *Bolton v Stone* as a question of fact and not law. As it was a question of fact, the judges could leave the determination of the likelihood of the event to the judge in the court of first instance. The appeal judges, therefore, repeated the statements of the findings of the court of first instance. In this case, the risk was too remote, despite the fact that it was foreseeable.

Also of interest in *Bolton v Stone* was the repetition of statements from *Blyth v Birmingham Waterworks*. *Blyth v Birmingham Waterworks* was decided prior to *George v Skivington*. The characterisation of negligence in *Blyth v Birmingham Waterworks* is similar to the “duty” considered in the cases excavated in this project decided after 1950. *Bolton v Stone* is the first decision, however, of those discussed in this thesis to refer to *Blyth v Birmingham Waterworks*.219 Also of note is the fact that in *Bolton v Stone*, *Blyth v Birmingham Waterworks* was repeated as part of a decision denying liability, but, in *British Railways Board v Herrington*, in which it was also referred to, statements from *Blyth v Birmingham Waterworks* were part of a discussion in which liability was found to exist.

An examination of the decisions handed down in the period between *Blacker v Lake* and *Bolton v Stone* does not show a “reason” or “cause” for the shift in the understanding of “duty” that appears to have occurred. Such an examination only

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219 It was, however, referred to by counsel in argument in *McDowall v Great Western Railway*. 
demonstrates that judges repeat previous legal statements. There is no possibility of a “more complete” understanding of the change emerging, given the understanding of the archaeological method adopted here, though a wider, genealogical, perspective may allow it.

In *McDowall v Great Western Railway Company* the bulk of the judgments turned on the limits to the thought processes in which a reasonable person engages. In the words of the first judge reported, “at the conclusion of the plaintiff’s case there was really no case to go to the jury at all – no evidence of the neglect on the part of the defendant railway company of any duty the neglect of which would have led to this accident”. This understanding was supported by the legal statement that “in those cases in which part of the cause of the accident was the interference of a stranger or a third person, the defendants are not held responsible unless it is found that that which they do or omit to do… is itself the effective cause of the accident”.

This statement of “the law” was qualified with the statement that where the “circumstances are such that anyone of common sense having the custody or control over a particular thing would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury”. Another statement of “the law” was repeated: “if a stranger interferes it does not follow that the defendant is liable if the negligence of a servant of his is the effective cause of the accident”. For the judges in this case these statements were “common sense”, they did not need to be supported by specific reference to specific precedents. However, their “common sense” can be understood to reflect the repetition of past legal statements.
These legal statements constituted the context for their decisions with respect to the appeal.

In _Hodge v Anglo-American_, all three judges took the barge to be a dangerous thing (although there was some discussion of the difference between a “thing in its nature dangerous” and a “thing dangerous due to negligent construction”), and therefore, all discussions of a possible duty was limited to duties that arose in relation to articles that were dangerous in themselves. For the first judge, the defendant was taken to be under a double duty. They were under a duty to “use reasonable means for securing the efficient cleaning out of the tank” and a duty to “give any necessary warning of the dangerous character of the tank”. The former duty was owed to all “who necessarily came into contact with the tank in the course of carrying out the repairs” and the second duty was owed to those who were not “already aware of the danger or who might reasonably be assumed to be aware of it”.

The second judge in this case suggested that the “state of authorities in England is not very satisfactory” in terms of the extent of liability of those who put dangerous items into circulation, particularly where there was no contract. The authorities that, nonetheless, were mentioned included _Longmeid v Holliday_ and _Blacker v Lake_. A statement from _Earl v Lubbock_ was highlighted in which the was said to be that a “repairer or constructor is under no liability to a person whom he might reasonably expect to use it, but with whom he has no contract”. _George v Skivington_ was reduced to a “much-doubted” case and the law stated in _Heaven v Pender_ was not repeated on the grounds that the defendant in that case had “invited the plaintiff and his class to use the article without examination”.

The judge highlighted a distinction between “things dangerous in themselves” and things that became dangerous as a result of some introduced fault or problem. For this judge, if the barge was a thing dangerous in itself, the defendant was under a duty “to take proper and reasonable precautions to prevent damage to people likely to come into contact with it”. However, if the barge was only dangerous because it had been insufficiently cleaned and the owner does not know of its dangerous character then the law for this judge was that the owner is not liable for any damage suffered by those with whom he has no contract. As the judge considered that the barge was a thing dangerous in itself, then the owners were under a “duty to take reasonable precautions to prevent damage which might be satisfied by adequate warning of its danger if not obvious”.

The third judge reported stated that “if a person manufactures a dangerous article such that it is likely to cause injury to third persons who in the ordinary course of affairs come into its vicinity, it is his duty to such third persons to take reasonable precautions to make it as little dangerous as possible”. This meant that the defendants in this case “owed a duty to third persons whom the barge might affect to take reasonable precautions to see that the explosive vapour was removed”.

The court in *Farr v Butters Brothers* treated the wider understanding of “duty” in *Donoghue v Stevenson* as obiter dicta (in the same manner that the minority judgment in *Heaven v Pender* was considered obiter). That is, these statements of the law were treated as not requiring repetition or other explanation of a refusal to
repeat. Statements of the narrow understanding of duty, therefore, were treated as those that required repetition (unless the decision could be “distinguished”).\footnote{The explaining of why the wider neighbour “principle” was repeated as law (as evidence in \textit{Bolton v Stone}) rather than the narrower liability that had been around since the majority opinion of \textit{Heaven v Pender} is beyond the scope of an archaeology.}

The “narrower” statements from \textit{Donoghue v Stevenson} were repeated in \textit{Farr v Butters Brothers}. These statements related to the finding that the defendant in \textit{Donoghue v Stevenson} was liable because of the opaque nature of the ginger beer bottle. That is, the manufacturer was liable for the damage suffered by the plaintiff because the consumer could not examine the contents. This proposition was applied to the crane manufacturer in this case. But, as the crane was inspected prior to use by someone deemed to “know” about such matters, the manufacturer was not held to be liable for the injury that resulted from the use of the defective crane.

The third judge reported stated a further legal “principle”. That “principle” was that “mere negligence in itself is not a cause of action. To give a cause there must be negligence which amounts to a breach of duty towards the person claiming”. As the manufacturer has “left a reasonable possibility of examination”, there was no duty, and, therefore, no cause of action against the manufacturer.

The practice of repeating past statements highlighted another legal issue in the last two decisions examined in this Chapter besides the repetition of statements associated with the defendant’s “duty” to the plaintiff. Both \textit{Videan v British Transport Commission} and \textit{British Railways Board v Herrington} related to injuries suffered by trespassers on railway tracks. In the earlier case, the court repeated statements from \textit{Addie v Dumbreck}, amongst others, which limited the liability of a
railway company with respect to trespassers. In *British Railways Board v Herrington* the court also referred to *Addie v Dumbreck* but found that the railway company could be liable for the damage suffered by a trespasser. The question in the later case was whether or not the judges *had* to follow the statements in *Addie v Dumbreck*.

The judges in *British Railways Board v Herrington* were bound by the practice of repeating past statements. The decision in *Addie v Dumbreck*, another Scottish case, had been as important in terms of the liability towards trespassers as *Donoghue v Stevenson* has been considered to be in terms of negligence law. The judges in *British Railways Board v Herrington* also had to repeat statements which delimited findings of liability in terms of reasonable foreseeableability, as discussed in *Bolton v Stone*. Their findings reflected an acceptance of established exceptions to *Addie v Dumbreck* and a reluctance to apply the statements in *Addie v Dumbreck*.

The judges constructed their own statements in terms of “over-ruling” *Addie v Dumbreck*. This reflects the importance the Law Lords placed on the decision in *Addie v Dumbreck*. Prior to 1966, it was considered that the House of Lords was bound by previous decisions of the Law Lords. There was great reluctance on the part of the House in this case to over-rule *Addie v Dumbreck*, despite the admission that the law already recognised modifications to its statements. The judges referred to “fair-mindedness” and “developments in the law since 1929”, or claimed that the

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221 It can be noted that, in terms of the discussion of liability in this thesis, *Addie v Dumbreck* is more important than *Donoghue v Stevenson*, despite the “notoriety” of the latter case. None of the last four cases excavated in this project “turned” on the decision in *Donoghue v Stevenson*, that is there was little discussion of the case after which the statements from it were accepted completely. However, statements from the decision in *Addie v Dumbreck* were central to both *Videan v British Transport Commission* and *British Railways Board v Herrington*. 
earlier decision was “severely restrictive and... now inadequate”, in order to justify their departure from Addie v Dumbreck. None of these statements are “true” but each served to mask a refusal to repeat that is fundamentally at odds with the practice of stare decisis.²²²

It is arguable whether this departure constituted an “over-ruling” of Addie v Dumbreck. What is clear is that, through the repetition of these legal statements “justifying” the change, the House of Lords created legal statements about the duty owed to trespassers that did not agree with its statements in Addie v Dumbreck. In doing this, however, they followed statements from Videan v British Transport Commission, which, in turn, followed Addie v Dumbreck. These statements related to the potential of extending liability to include damage suffered by trespassers if the “circumstances were such that the defendant ought to foresee the presence of a trespasser”. The judges also contended that there were already “modifications” to the rule in Addie v Dumbreck, including the doctrines relating to allurement and pitfalls. Further, statements from the decision of Addie v Dumbreck itself were repeated that included the requirement that defendants act according to a “humanitarian duty not act recklessly”. From the perspective adopted in this thesis, the decision in British Railways Board v Herrington does not contradict the decision in Addie v Dumbreck, it merely demonstrates how the law can change over time through the repetition of previous legal statements.

²²² Over-ruling may be seen to be “at odds” with stare decisis, however, it can be understood to be an allowed practice of the discursive practices of repetition, as long as the refusal to repeat a particular statement is because of the availability of other legal statements for repetition.
VISIBILITY OF DEFENDANTS

The courts in this period “saw” the defendants in a relatively uniform manner. All judges recognised that any person may be owe a duty of care to another person. The judges also can be considered to have “seen” the defendants as individuals who had the capacity to be “reasonable” and to exercise foresight. It can be contended that the manner in which the judges in the twentieth century “saw” defendants was different to the manner in which earlier judges “saw” defendants. There are two main characteristics that the “modern” judges “saw” in “modern” defendants that were not evident, to the same degree, in earlier judgments. These two characteristics are “imputed knowledge” and “foresight”. These two characteristics will be discussed later in this section.

As was discussed in Chapter Two, one of the discursive practices of the twentieth century included the practice of referring to the standard of the “reasonable man”.\textsuperscript{223} This “reasonable man” was, and still is, considered to exhibit these attributes of “knowledge” and “foresight”. For the purposes of this project, however, it is more useful to consider the “reasonable man” in terms of the specific characteristics attributed to “him” rather than to focus on the construct “itself”.

The defendants in the cases examined in this Chapter were not “personally” involved in the incidents that gave rise to the injuries.\textsuperscript{224} The defendants were still

\textsuperscript{223} As was seen above, however, the reference to the “reasonable man” is not limited to the twentieth century. The judgment in \textit{Blyth v Birmingham Waterworks}, cited in \textit{Bolton v Stone}, also included a reference to the “reasonable man”.

\textsuperscript{224} All the cases involved defendants who were not “natural” people, but rather companies. In \textit{Farr v Butters Brothers} it was the company, rather than the workers, that defended the action. In \textit{Bolton v Stone} it was the cricket club, not the batter who hit the ball, that was the defendant. And in the first and last two decisions in the Chapter the defendants were railway companies.
“seen”, however, to have particular characteristics that were relevant to the events that gave rise to the legal action. That is, the legal construction of the defendants included the projection of an “internalised” set of norms of behaviour against which actions and inactions could be judged. The characteristics associated with the “reasonable man” were not uniform through all the cases, but they were still governed by the repetition of past legal statements.

In *McDowall*, the judges described the standard against which the behaviour of the defendants was assessed as that of “an ordinary person of common sense”. The legal question to be posed was, then, “did a want of reasonable care and skill on the part of the defendant’s servants materially and effectively cause the plaintiff’s injury?” In other words, the judges “saw” the defendants as being “ordinary people” who were supposed to exhibit “reasonable care and skill”. According to the judges, the servants of the defendants did everything necessary to live up to that standard. It was acknowledged that the servants could have done more but that were found to have done enough to fulfil their obligations to people using the highway below.

The issue of the knowledge of the defendants was also raised in this case. No trespassers in the past had done as much as the ones who had caused the van to roll down the incline, so this knowledge of past trespassers did not amount to “knowledge” of the possibility that the trespassers would act as they did. The defendants were not to be considered liable just because they were in control of rolling stock that caused someone injury. They could only be considered liable if it could be shown that there were specific circumstances (knowledge) which meant that they should be judged differently from other people who controlled rolling
stock. The judges can be understood to be “seeing” the defendants as separable from their profession, separable on the basis of their knowledge concerning the behaviour of previous trespassers on their property.

In *Blacker v Lake* a manufacturer was seen to be liable for breach of contract or, if they were dealing with dangerous articles, then they were seen to be under a certain duty to people with whom they did not have a contract. The manufacturer was seen as a person who is supposed to use care and skill in the manufacture or repair of an article. That is, the manufacturer would be liable if they had made a defective article and it had injured the purchaser of the item. There was no statement of the level of skill or care necessary. If the manufacturer had constructed a defective product then they would have been liable for the injuries suffered.

If the manufacturer had produced a dangerous item, and they knew who the user was to be, then they would have been under a duty to ensure that the user (not the purchaser) of the product knew of the dangerous nature of the product. This “duty” did not extend to a higher standard of care necessary in the manufacture of the article. This duty only existed if there was knowledge of the user on the part of the manufacturer. It was not a general duty to all consumers to warn them of the dangerous nature of the manufacturer’s product. The manufacturer was seen as part of a class of defendants with particular responsibilities given particular circumstances. There was no discussion of an internalised standard, or norm, to which a reasonable manufacturer should conform. If the defendant was a manufacturer and the other circumstances of the case satisfied the legally established criteria, then the defendant would be liable.
In *Hodge v Anglo-American*, the statements introduced to describe the potential liability of the defendants required that their actions had to be seen to be “reasonable” in the circumstances. That is, the first judge considered the defendants to be under a duty to use “reasonable means to secure the cleaning of the tank” and the judge considered that defendants had to provide a warning unless it could be “reasonably assumed” that the warning was unnecessary. The second judge reported argued that if the barge was a “thing dangerous itself”, the owners were under a duty to “take proper and reasonable precautions to prevent its doing damage”. The third judge agreed with the statement that in situations involving dangerous articles, manufacturers, and others, are under a duty “to take reasonable precautions to make the article as little dangerous as possible”. The third judge also held that the defendants should not be liable, as the plaintiff “failed to exercise reasonable care; and… that such negligence contributed to the disaster”. The judges do not appear to have been seeing the defendants (or plaintiffs) as subject to liabilities based on their profession, the judges can be understood to have assessed the conduct of the defendants against a separate standard of “reasonableness”.

Other terms that these three judges used in classifying and characterising the behaviour of the defendants included “foreseeability” and “knowledge”. With respect to the degree of foresight required on the part of the defendants, the first judge reported considered that “no one could possibly have anticipated the reckless act of a person employed to repair the tank using a naked light”. In terms of knowledge, the amount of knowledge that the defendant had with respect to the nature of the “thing” in question was important, particularly when liability was not controlled by a contract. Both knowledge as to the level of danger presented by an article and the dispersal of such knowledge in the form of a warning were
important to a finding of liability. The defendants were constructed as potentially being legal subjects who could be expected to know of any inherent dangers and who could be expected to warn others of any such dangers. The warning, according to the second judge, need only be “adequate” to satisfy the legal requirement.

This “duty of care” meant, in *Farr v Butters Brothers*, that, if there had not been the opportunity for intermediate inspection by a person qualified to conduct the inspection, that the manufacturer had a duty to take reasonable care in the construction of the crane. The statements in that case, with respect to the duty owed by the manufacturer, are articulated in terms of a norm of conduct. The manufacturer *should* take extra care where they *should* know that the end-user will not have the opportunity to sufficiently check the safety of the product. In this case, the plaintiff’s own actions prevented the defendant from being held liable. This did not prevent the judges making statements about the nature of the liability of manufacturers in general.

As mentioned above, the capacity for, and use of, foresight was important to the judges’ construction of the defendants who came before them. That is, the judges “saw” defendants as having a capacity for foresight and treated this capacity as part of the “norm” of conduct against which the behaviour of defendants was measured. This characteristic of foresight is particularly evident in the last three cases presented in the Chapter. In *Bolton v Stone*, the court stressed that the standard of care was determined by what a reasonable person would consider appropriate. “The standard of care in the law of negligence is the standard of an ordinarily careful man… an ordinarily careful man does not take precautions against every foreseeable risk”. Given the “crowded conditions of modern life”, the question was
whether a “reasonable man… would have thought it right to refrain from taking steps to prevent the danger”\textsuperscript{225}. That is, the standard of care reflects a norm of behaviour. An ordinary, careful person \textit{should} not take steps to prevent all possible harm that might befall others. An ordinary, careful person should only seek to guard against harm that was \textit{reasonably} foreseeable.

The actions of the defendants were compared with those to be expected of “the ordinary careful man”. The defendants had to live up to the standards of behaviour of that “ordinary careful man”. This standard required the defendants to consider potential risks to innocent third parties. This standard did not require the defendants to protect possible third parties from all risks, but only from reasonably foreseeable risks.

Foreseeability was also central to the decision in \textit{Videan v British Transport Commission}. That all three judges considered the infant plaintiff to be a trespasser did not automatically deny him the possibility of being owed a duty of care by the defendants. The statements with respect to liability and respect to trespassers that were repeated in the judgments suggested that the matter was one of the foreseeability of injury. If the driver should have reasonably foreseen that a trespasser would be on the tracks at that time, then the defendants might have been held liable. In this case, the court held, based on previous legal statements, that there was no relationship that could give rise to legal liability between the infant plaintiff and the defendants, as the presence of a trespasser, such as the child, could not be reasonably anticipated.

\textsuperscript{225} Perhaps it is also possible to argue that a “reasonable man” in this case could be seen as a person who wants cricket to be unencumbered. Such an argument is, however, beyond a strictly archaeological reading of the judgments.
The court was also unanimous with respect to the relationship between the stationmaster and the defendants. In this case, all three judges found that the driver, and therefore the defendants, owed a duty of care to the deceased. The driver should have foreseen that the stationmaster, or other railway workers, may be on the tracks near a station. That is, the driver was “seen” as having a capacity for foresight and as being required to use that foresight to avoid the accident. These people may have been on the tracks to carry out maintenance works or to effect a rescue. These railway workers were constructed as “neighbours” of people such as trolley drivers. Drivers, in this period, are seen to be people who are under a duty to act with reasonable care toward neighbours when approaching stations. This particular driver was taken to have breached that duty and so the defendants were liable.

Tied to the question of foreseeability was the issue of the knowledge that the defendants, as ordinary reasonable people, can be assumed to have had. That is, judges considered that defendants should have particular knowledge and should be required to have acted on that knowledge. One of the judges in Videan v British Transport Commission stated that there was no evidence that the children were in the habit of trespassing on that stretch of track. The importance of any history of children trespassing on railway tracks was also discussed in McDowall v Great Western Railway. As there was no such knowledge, it was less foreseeable that a child would be on the track. However, with respect to the station-master, as the driver should have known that maintenance workers, or even the station-master himself, may have been on the line, the driver should have exercised more care. Foreseeability, and therefore liability, was based, in part, on the knowledge, either actual or imputed, of the defendant.
Statements concerning foreseeability in *Videan v British Transport Commission*, which were repeated in *British Railways Board v Herrington*, illustrated an aspect of the processes of legal change. The judge in one of the judgements in *Videan v British Transport Commission* recognised that the use of foreseeability as a test for liability to trespassers was a “new view”. Foreseeability, however, was only new in relation to trespassers. The introduction of this “view”, however, was instituted through the repetition of a single previous legal statement that highlighted the need for foreseeability on the part of defendants. This change did not take effect in *Videan v British Transport Commission*, where the “principle” was first stated, however was effective in *British Railways Board v Herrington* when the statement concerning foreseeability was repeated. These new statements then became available to be repeated by later courts when faced with questions of liability concerning injuries to trespassers.

Foreseeability was not the only characteristic of the defendants that was discussed in *British Railways Board v Herrington*. Statements were repeated which held that if the defendants choose to assume a relationship with members of the public then the law requires the defendants to conduct themselves as a reasonable person with adequate skill, knowledge and resources would do. They will not be heard to say that in fact they could not attain that standard. If they cannot attain that standard they ought not to assume the responsibility which that relationship involves.

In other words, the standard of care was used as the norm of behaviour. This was the standard of the humane person.

The judges in *British Railways Board v Herrington* held that the standard of care that occupiers of the land owed to trespassers was that of the “humane person”. The standard of the humane person was a normative measure which was articulated in a
number of ways in the different judgments. It was evident in statements concerning a “humanitarian duty to take care” and the standard of a “humane man”. This statement of the law in terms of the “humane person” can be seen as a “new” statement of the law. The statement still, however, includes the repetition of previous statements of duties in negligence with “new” words the judges introduced into the statements.226

In terms of the facts of the case, the defendants were held to have failed to live up to that standard, to have failed to act “normally”. As people using “common sense” and “ordinary intelligence”, the defendants could easily have prevented the accident by instituting a system of inspections in order to ensure that access to the line from the recreational areas was prevented. As they failed to have prevented access onto their land, and as the plaintiff was severely injured, the defendants were considered to have not lived up to the norm. The defendants were considered liable, in part, because they could be taken to have known of the hole in the fence and, in part, because they should have known that there was a hole in the fence. That is, the judges “saw” them as having this knowledge (because a reasonable person would have know about it) and being liable because they failed to act appropriately on that knowledge. The defendants knew of the danger posed by their property. They were seen as having known about the uses of the land surrounding their property. They should have ensured, therefore, that there was no access to their property.

The final characteristic of the defendant that was important to the judges was the knowledge they were taken to have. As the plaintiff was a trespasser, the

226 A search for the origin of the words “humane” and “humanitarian” is outside the scope of this thesis, in the same manner that a search for the origin of the word “duty” in the nineteenth century judgments is outside the scope of the project.
knowledge of the defendant was only considered in terms of what they did, in fact, know, rather than what they should have known (the standard that would have been applied if the plaintiff was a lawful visitor). In other words, the judges in this case “saw” the defendants as being reasonable people who owed a duty to act humanely based on specific knowledge on their part. The defendants had specific knowledge of the trespassers but failed to act on the knowledge. The defendants, therefore, failed in their duty and were liable for the damage suffered by the plaintiffs.

VISIBILITY OF PLAINTIFFS

Two of the cases discussed in this chapter included the judges’ assessment of the characteristics of people involved in the action who were not defendants. These assessments were articulated in the context of establishing the liability of the defendants. In these two cases, Hodge v Anglo-American and Blacker v Lake, the characteristics of the plaintiffs did not affect the liability of the defendants. Therefore, in a traditional reading of the cases, these articulations would be seen as obiter dicta. However, in this project, these articulations are important because they are repeatable legal statements.227

It was the knowledge of the other party that was important in both of the earlier cases. In Blacker v Lake, one of the judges said that the ‘person who bought such an instrument for use… must have realised that in the course of its use it might be a

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227 Not all plaintiffs were considered in terms of the particular attributes they “should” or did possess. The judgments in Bolton v Stone and McDowall v Great Western Railway did not consider the characteristics of the plaintiff. It is possible to read a gender bias in this given that the plaintiff in the later case was a woman and the plaintiff in the earlier was not described in terms of her or his gender.
source of some danger’. 228 In *Hodge v Anglo-American*, it was held that if the owners ‘hand a dangerous barge to competent people who had full knowledge of the probability of danger, even if they did not know the exact amount of it, [then, it] appears... to involve no further liability on the owners’. 229

The importance of the knowledge of parties other than the defendants was repeated in *Farr v Butters Brothers*. The defendants were held not to be liable in that case because of the knowledge of the plaintiff. The facts of the case resulted in findings that not only did the plaintiff have the opportunity to inspect the machinery, he was also a “skilled erector” of cranes. His knowledge was such that the judges considered him to be responsible for his actions. That is, the plaintiff was not seen as the sort of person to whom a duty was owed by the manufacturer. The actions and knowledge of the plaintiff meant that, within the legal discursive formation, the defendant could no longer be considered legally responsible for the incident.

In *Videan v British Transport Commission*, there were two plaintiffs. These plaintiffs, the infant and the station-master, were “seen” differently by the court. Two people suffered injuries, but the defendants were only liable for the damage suffered by one of them. In terms of the station-master, the behaviour of the trolley driver was measured against that of the reasonable man. That is, a reasonable man driving a trolley would have slowed down as he neared the station, just in case an employee or other authorised person was on the track. Therefore, the driver was responsible for the father’s injuries.

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228 (1912) 106 LT 533 at 534
229 12 LIL Rep 183 at 189
If the driver in this case had taken the precaution of slowing down he may not have hit the child, but he was not held liable for the boy’s injuries. This leads to an incongruous situation in which the driver was considered to have failed to have lived up to the required standard of the reasonable driver, but was only legally liable for one set of injuries. If he had acted according to the appropriate norm, neither plaintiff would have been injured.

The defendants did not owe the infant a duty to take care because the child was a trespasser. As a trespasser, the child was not “seen” as being entitled to the full protection of the law. In a sense, the child was “seen” to be “outside” the law. Statements were repeated to the effect that trespassers were not totally without legal recourse if they were injured through a negligent act. However, they could only receive compensation if their presence was reasonably foreseeable and if the defendants in such circumstances had failed to live up to the lesser duty of treating the trespasser with “common humanity”.

In *British Railways Board v Herrington*, as in *Videon v British Transport Commission*, one of the key issues related to the legal construction of trespassers. The members of the legal discursive formation have long repeated statements to the effect that those legal subjects who have ventured onto another’s land without permission or lawful excuse cannot be treated in the same manner as other legal subjects on the land. In this case, the judges emphasised the point that a trespasser could not be placed in a better position than a lawful visitor on the land. The standard of the reasonable person could not be applied in the same way, therefore, as it would be if a lawful visitor had been injured by the railway line.
In *British Railways Board v Herrington*, the plaintiff, as a trespasser, was characterised as a “legal outcast”. The plaintiff was also, however, an infant. That he was only a child meant that his knowledge was an important factor in this case. For the child, the electrified line was a “concealed danger”. This child, then, is likely to have been “seen” in a different way from that which older plaintiffs may have been “seen” if they had been injured in similar circumstances. A child the age of the plaintiff was not constructed to have the same level of awareness as other members of the community.

This characterisation of the plaintiff was important in terms of the assessment of liability of the defendants in *British Railways Board v Herrington*. Given the age of potential trespassers, based on the knowledge of the defendants, a system of mere warning would have been insufficient to render the defendants free from liability. That is, normal legal subjects, such as the defendants, were constructed to know that a child would not understand the danger or any warning signs.

As the defendants maintained a dangerous activity on the land, they were under an obligation to take certain steps to minimise the danger to others. In their judgments, the judges discussed people, and the defendants in particular, consciously forming relationships with other members of the public. Once such a relationship was formed, certain consequences followed. Even though trespassers “forced” such a relationship upon occupiers, this did not render the relationship devoid of obligations on the part of the occupier. No longer could trespassers in the position of the plaintiff be considered legal outcasts, as the occupiers were still under certain obligations to limit the potential for harm to such a trespasser.
The House acknowledged that no “wilful act” had been done against the infant plaintiff, however the relationship was established and the defendants were liable for the injury suffered. It was considered “basic” to current “legal thinking that every member of the community must have regard to the effect upon others of his actions or his inactions”, more specifically, “anyone endowed with common humanity would say that the common law ought to afford to the injured child a legal right to compensation… and if it did not there was something wrong with the common law”.

CONCLUSION

The twentieth century was a period of relative stability in the articulation of legal liability with respect to negligent actions causing harm to legal subjects. Over time, and as a function of the repetition of legal statements, a test was established as the dominant statement for the legal obligations that constructed all legal subjects with respect to their relationships with others. All legal subjects were to be held to a particular standard of care in terms of their awareness and treatment of other people who may be affected by their actions or inaction. The establishment of the test, and the changes in liability from those evident in the early to mid-nineteenth century, can be understood as a function of the processes of legal changes.

The change that happened was neither necessary nor pre-ordained and it was not smooth. For example, the decision in *Blacker v Lake* seems to owe more to the “vocation as category” basis of liability than to the later discussions of “duty” as contained in decisions like *Heaven v Pender*. That is, in *Blacker v Lake*, the court assessed liability in terms of the responsibilities of a vendor *qua* vendor. There was no standard of “reasonableness”, there was no mention of the “ordinary vendor”. The defendant was a vendor and so the defendant owed particular obligations to those who contracted with him. This is not significantly different to statements concerning the liability of common carriers in *Govett v Radnidge*, *Garnett v Willan* and the eighteenth century judgments dealt with in this thesis.

The decision in *Farr v Butters Brothers* also demonstrates a lack of total, instant change. The recourse in that case to statements associated with the construction of legal subjects evident prior to the decision in *Donoghue v Stevenson* is indicative of
the slow process of legal change. Although statements regarding a wider “duty” in Donoghue v Stevenson had been made by the time of the judgment in Farr v Butters Brothers, it was distinguished by the judges. More specifically, one of the judges claimed that the “duty” “is wider than is necessary”. The judges in the Farr v Butters Brothers could repeat the statements made in Donoghue v Stevenson and could repeat them as statements of the English common law, but they did not repeat them in justifying their decision in this case. The characterisation of the defendants, and the articulation of the circumstances where they could be considered to be liable, therefore, were repeated from statements of the legal discursive formation that were made prior to the acceptance of statements from Donoghue v Stevenson.

Bolton v Stone was the first decision in this archaeology to repeat the legal statement of the wider “duty” with approval. The statements as to a general duty from Donoghue v Stevenson were accepted as the supplying appropriate norm to be applied in this situation. The actions of the defendants were compared with the standards of the “reasonable man”. The Lords found that the defendants, acting as “reasonable men”, could overlook foreseeable risks if those risks were “too remote”. Therefore, the court in Bolton v Stone held that the men at the cricket club were not in the wrong for not taking any further precautions.

In the final case examined, British Railways Board v Herrington, the judges considered a similar set of facts to Videan v British Transport Commission, but, unlike the earlier case, held that there was a relationship between the infant plaintiff and the defendants. There were four aspects of the decision in British Railways Board v Herrington that demonstrated something of the processes of legal change. The first was the re-statement of law in terms of children trespassing on railway
tracks. The second was the judicial debate on the possibility of over-ruling, or distinguishing, the decision of *Addie v Dumbreck*. The possibility of a shift from the position in *Addie v Dumbreck*, was brought about through the repetition of past legal statements. The third was the recognition by one of the judges of the introduction of statements that related to “foreseeability” into the law relating to liability toward trespassers. The final aspect of the decision that demonstrated the processes of legal change was the introduction of statements relating to the “conscientious humane man”. Each of these changes provide some support for the claim that the law changes discursively. The law changes incrementally, through the repetition of single legal statements, usually from the highest level of appellate courts.

In general, the twentieth century saw the acceptance of statements that constructed legal subjects as potentially owing a “duty” to other legal subjects. In the later cases in this chapter, this “duty” was considered to be a general duty of care that connected these legal subjects as “neighbours”, the duty however, was still limited. These relationships were defined in terms of a general duty, that is, they pre-existed any damage or injury suffered. These relationships became part of the constitution of legal subjects. People were “seen” as being capable of considering others, and expected others to consider them and were held liable if they failed to be sufficiently considerate of others. In the courts, the actions or inaction of defendants were compared with legal statements as to the standards of behaviour expected of legal subjects as “reasonable men”. The defendants were held liable if the defendants did not live up to the required standard.
These general potential relationships of liability were not total. The norms of behaviour did not require the legal subjects to take every precaution, or to have the “prophetic vision of a clairvoyant”. The norms did include a set of duties, however. These included limitations, such as those with respect to what a “reasonable man” was expected to consider in terms of the “remoteness” of damage and of the “foreseeability” of injury. The articulations of the duties and of the limitations to these duties are always subject to change. The legal discursive formation is not a static discursive formation. Some of the duties and discursive practices changed in this period, but the legal discursive formation can be understood to have retained its legitimacy, its role in the governance of society, despite these changes.
CONCLUSION

The aim of this thesis was to undertake a tentative application of Foucault’s archaeological method to a “discourse in action”. The discourse chosen was “law”. This was, in part, a result of the fact that there has been some very important work done linking Foucault’s ideas with the manner in which law operates in our society. In addition to that work, there has also been a significant amount of work done in terms of expanding our understanding of Foucault’s historical methods. The work done has been more theoretical than applied and this project is, I feel, another small step in investigating this well-discussed, but relatively under-utilised, method.

“Law” was chosen as the focus of this application for two reasons. First, because it appears to be one of the fundamental discourses in our society, and therefore, an examination of it with a different historical method presented the possibility of interesting results relevant to our community. Second, the manner in which “law” is written appeared to make judicial decisions ideal monuments for an archaeological examination, as the rules for their production depend so heavily upon the law and the judges’ legal training.

The relationship between the monuments and the discourse is important for this application of the method. In the discursive understanding of the law discussed in this project, judges in the English common law are trained in specific ways to write their judgments in a specific way. That is, the legal discursive practices can be seen to construct judges to write their judgments in a particular manner, consequently legal judgments can be understood to reflect the legal discursive practices. The
focus of this thesis, then, was on the discursive practices as evidenced in the written judgments of courts of review in the English common law.

This Conclusion will consist of two substantive sections. The first will recap the narrative produced by the application of the archaeological method as it was understood in this project. The second will include a discussion of the apparent effectiveness of this application of the method. This second section has been included because of an apparent expectation built up around Foucault’s methods that any narrative produced by an application of one of his methods will be radically different from a narrative produced in more traditional histories. This expectation, in the words of Kendall and Wickham, results in the view that ‘a Foucault that does not disturb the obviousness of something is no Foucault at all’.¹ As this project has been a tentative application, there was no certainty, in my mind, that a disturbance of the obviousness of negligence law would be produced. It seems necessary, then, to consider the differences between the narrative produced here and more traditional legal histories and to assess why any differences detected between them may not have been as great as those who expect disturbance of the obviousness of negligence law might hope for.

NARRATIVE PRODUCED IN THIS APPLICATION OF THE METHOD

This use of an archaeological method was established with an examination of 220 years of case law. This application of the method was intended to produce two basic outcomes. The first was a deeper understanding of the fundamental relationship between the law and the legal profession, as a Foucaultian might see it.

¹ Kendall & Wickham, Using Foucault’s Methods at 119
This involved demonstrating how the practices that construct the law and the legal profession allow for, and produce, change in the law, whilst maintaining the integrity of the law as a system of governance. The second outcome, which was coupled with this description of legal discursive change, was a description of an apparent change in the construction of legal subjects in articulations of relationships of liability within the English common law.

The perspective on the law and on legal change that was presented in this thesis was founded on discourse theory. That is, the law and the legal profession were understood as being constituted by a set of discursive practices. The profession, from this perspective, can be seen as a self-regulating, self-perpetuating discursive institution. This form of governance privileges the written word and perpetuates itself in terms of practices of reading and repeating of written statements. Some of these practices around reading and repetition can be considered to limit the production of written judgments. The sum of these judgments can be understood to be the common law. From this perspective, the common law can be seen as a cohesive body of statements. And further, as the judges and lawyers, from the perspective adopted in this thesis, are a relatively cohesive body of subjects of the legal discursive formation, the legal profession can be seen to be governed by, and perpetuate, the discursive practices that constitute the legal discursive formation. These subjects, then, can be considered to be governed by, and perpetuate, the common law.

The subjects of the discursive formation function within an hierarchical structure. Those members who are taken to display the skills in an exemplary fashion are authorised, via promotion within the formation, to make authoritative statements of
the law. In order to be appointed to the bench, those who become judges must be recognised as sufficiently skilled in the use of the set of governing practices associated with the production of the law (though this might not be the only criterion for promotion). The privileged form of communication within the law is that of the written judgment. Judges produce the law in the form of legal judgments. From this perspective, judges are authorised “speakers” for the law and they “speak” the law in their judgments.

While judges can be understood to be “authors” of their judgments, some of the most important elements of judgments are the statements by previous judges that have been chosen for restatement. Judges, in the writing of their judgments, repeat statements of law that were written by previous judges. To understand the law, then, judgments and patterns of repetitions of statements must, from this perspective, be examined. The law, in this understanding, is that which is evidenced in the writings produced by judges in the carrying out of their professional duties. The law is that which is written by judges in accordance with their training. More specifically, the law can be understood as produced by the repetition of legal statements by judges in accordance with the practices of the legal discursive formation.

It is the discursive practices, the legal training, of subjects of the discursive formation that can be seen as perpetuating the profession. It is these very practices of the discursive formation, however, that also can be understood to allow for change in the law. From the perspective adopted in this thesis, these practices, both those of continuity and discontinuity construct the members of the discursive formation, and the members of the discursive formation internalise these practices.
When these members of the legal profession act as lawyers and judges they repeat the discursive practices that they have internalised. Understood in this way, the law is that which lawyers and judges do.

Legal discursive practices can also be understood to play a role in the construction of other subjects of the law. For these discursive practices determine the manner in which lawyers and judges constitute those legal subjects who come before them. The discursive practices of the legal discursive formation construct, though only in part, all legal subjects and the relationships that are found to exist between them. For the law can be considered to be, and to have been, one of the main discourses of governance in English society. The legal subjects of this society can be seen to learn, and internalise, their norms of behaviour from a variety of sources. The legal profession is one of these sources. As the statements of law change with regard to a particular area of behaviour, the standards of normal behaviour are affected and the internalised norms of legal subjects may be modified.

From the perspective adopted in this project, discursive practices constitute the law and allow for change in the law. The most fundamental of these practices can be understood be the repetition of past legal statements. The use of previous statements, “precedents”, can be seen to organise and reproduce the hierarchy of the courts. “Precedents” can be taken to be those sections of legal judgments that are repeated by future lawyers and judges. The practices associated with this practice order the law and the legal discursive formation providing for both stability and change.
On the surface, the practice of repetition operates through the privileging of past judgments. The practice limits and controls the use of these past judicial statements. The practice can also be understood to work at a deeper level, to limit and control the lawyers and judges with respect to the legal statements they can repeat in legal argument. The effect of this practice is that lawyers and judges are trained to repeat the law as single legal statements. These statements are usually written by members of the appellate courts. Judges, in particular, can be understood to be trained to choose from a myriad of available legal statements in order to write their judgments. These judgments, in turn, contain statements that may be used as precedents that both perpetuate and change the law.

From the perspective adopted in this thesis, this process of repeating legal statements permits the law to be both continuous and discontinuous. The discursive practice that is the repetition of legal statements perpetuates the profession, whilst changes in the statements that are repeated introduce changes in the profession and the law. Statements from past cases in the same area of law can be repeated in any given judgment. Legal statements from other branches of the law can also be “imported” and repeated in any judgment. Even legal statements from other jurisdictions can be introduced into a judgment. This process of the repetition of legal statements is a mechanism through which any given area of law can “grow”. Such growth can be understood to enable the English common law to both perpetuate itself and undergo change.

In other words, cases can be understood to be sites within which judges “choose” from a number of possible legal statements made by preceding judges. Their “choice” is, however, controlled through a variety of principles. The common law
can be seen, therefore, as a process in which statements by particular judges in specific cases are valorised, primarily through repetition, until alternative statements are largely, but never completely, excluded. From this perspective, it is these statements that largely exclude all others that come to be taken as the law. A decision, in which a previous statement is followed, is a moment in which a judge “chooses” to repeat a specific utterance by a preceding judge as “the law”. While the selection of a statement for repetition is affected by court hierarchies, a decision is as much a process of refusing other possible utterances than it is one identifying “the law”.

The importance of the repetition of written legal statements in the production of law is reflected in the method used in this thesis. That is, written legal judgments are central to both the law and this application of the archaeological method. The method, as understood here, involves the examination of discursive monuments in order to demonstrate the discursive practices that produced them. The members of the legal discursive formation produce written judgments. The archaeological method, as understood in this project, takes these texts to be monuments of the discourse. The texts are privileged and not their authors. The latter can be understood to be little more than the sum of the practices through which they are constituted. That the discursive practices of the legal discursive formation also privilege texts means that the archaeological method is, for me, eminently suited to an examination of the law.

This application of the method, as understood here, to the law can only provide a description of the decisions discussed. The archaeologist may, however, highlight similarities and differences in these descriptions. In this thesis, in-depth
descriptions of certain cases, with a chronological ordering, were used to highlight certain characteristics of those decisions. The area of law that the judgments were taken from was negligence law. The period covered was 1750 to 1972. This covered a time from after the point when the judges were independent of the English Crown to when the English common law came under the jurisdiction of the European Court of Justice.

The first period examined included some of the decisions from the eighteenth century that were part of the “web of decisions” associated with British Railways Board v Herrington, the last case that was discussed. Decisions in these cases were based on a variety of writs including action on the case and trespass. In order to establish liability in these cases, the courts had to be satisfied with respect to three criteria. First, that the plaintiff had suffered damage. Second, that the defendants were of a category of legal subjects who could be found liable. And third, that the plaintiff had sued under the appropriate writ. That is, legal liability was recognised after the court established that the circumstances of the case and the writs pleaded satisfied the legal requirements. There was no consideration of the state of mind, or intent, of the defendant.

The courts of the time can be understood to have contributed to what can be seen as the perpetuation of the feudal form of governance through their categorisation of the defendants according to their station in life. A defendant could be an apothecary, which meant that they were imbued with certain characteristics essential to being an apothecary. They were not constituted as individuals who merely worked as apothecaries. The apothecary was their station in life. That was who they were. Their intentions in the carrying out of their jobs were not important
when it came to establishing their liability for harm suffered by a patient. If a
patient in their care was harmed then they were responsible, irrespective of any
question of negligence or evidence that they had done everything possible to look
after the patient. If the court found that the plaintiff had suffered harm, that the
right writ was pleaded, and that the defendant filled a category of legal subjects
who would be found liable for the harm, then the court would find the defendant
liable.

The second group of cases examined in this project were from the nineteenth
century. The decisions from the early part of the century can be understood to have
continued to reflect the understandings of liability that were evident in the
eighteenth century cases (at least as they were presented in the preceding chapter).
Later decisions, however, can be taken to suggest that the articulations of liability
were undergoing change. These changes in articulation were reflected in statements
in the judgments of the time.

An examination of these judgments suggested that at the beginning of this period
the word “duty” began to be used in the context of ascertaining the liability of
defendants. That is, the early decisions included the word “duty” while the judges
continuing to decide liability in the same manner as in the eighteenth century
decisions (as represented here). The word “duty” was then repeated as a delimiting
factor in assessing liability in later judgments. In other words, the articulations of
liability in the nineteenth century changed, but the use of the word “duty” remained
throughout the century. Such a word can be seen as a condition of possibility for
the introduction of a general notion of potential liability in the twentieth century.
The analysis of the decisions examined in Chapter Five suggested there were three significant articulations of liability evident in the nineteenth century. The first was the articulation that was associated with decisions in the eighteenth century. Another articulation was founded on the notion of duties based on “things dangerous in themselves”. The third articulation, not however repeated in a majority judgment in the cases examined, was one that suggested a generalised “duty of care”.

Some decisions of the nineteenth century, therefore, were still based on the specific assessments of the circumstances, with particular emphasis on the vocation of the defendant; however, the language used to justify the finding of liability can be understood to have been shifting. The shift was not a deliberate or intended outcome consciously pursued by the members of the discursive formation. There was no evidence of an intention to change the articulations of liability in any particular direction. The shift that did occur, however, can be understood to have made possible the later construction of liability based on a general duty to take care.

The courts of the nineteenth century still appeared to base their judgments on the earlier criteria for finding liability. The practices of constructing defendants in the same manner they were in the eighteenth century, however, were not continued. It was not sufficient for the liability of defendants to be considered simply in terms of their membership of a particular category of legal subjects. The members of the legal discursive formation can be understood, through the statements they used in their judgments, to have been beginning to consider the “mind” of the defendants when they assessed their liability. In particular, it may be considered that the judges
began to look at the intentions and the knowledge of the defendants before they came to a finding of liability.

In terms of the understanding of the law adopted in this thesis, this can be understood to be a process in which judges in the nineteenth century had begun to include statements in their judgments that allowed for a shift away from what can be understood as “feudal” categorisations of the defendants specifically, and the other legal subjects more generally. This shift was apparent whether the judges articulated liability in terms of “things dangerous in themselves” or in terms of a more general duty. Statements were made in which legal subjects were constituted with attributes that did not derive merely from their station in life. The members of the legal profession, however, did not switch straight from, what might be called, a feudal characterisation of legal subjects to another, perhaps modern, characterisation. The nineteenth century was a period where multiple possibilities for the constitution of legal subjects existed.

The decisions examined from the twentieth century also suggested that the articulations of liability was changing. The early cases continued the understanding of liability that was evident in the later part of the nineteenth century. The later decisions, however, considered liability in the context of statements associated with a more general “duty of care”. This general duty was owed by all legal subjects to other legal subjects who may be affected by their actions or omissions. Once that duty of care is held to exist in a particular case, then the judges must consider whether the defendant had lived up to the appropriate standard of care.
This duty and this standard are norms of behaviour that the courts use to assess whether the defendants should pay compensation for the damage suffered by the plaintiff. These norms have been internalised by legal subjects. They are not divine or monarchical edicts. The internalisation of these norms represents, in part, the modern form of governance. This modern form can be seen as constructing all legal subjects as self-regulating and self-reflexive subjects.

The members of the legal profession, as they are part of one of the dominant institutions of governance in England, can also be understood to constitute the legal subjects who come before them as self-regulating and self-reflexive subjects. In doing so, judges consider the states of mind of the defendants, their level of knowledge and their training before they rule on the question of their liability. The profession of the defendant is no longer sufficient, in itself, to establish liability. The defendant’s profession is only relevant to the extent that it affects her/his knowledge and experience.

These three periods provide some indications of the discursive legal change that is evident in articulations of liability. In the eighteenth century, the circumstances of the incident and the ensuing legal procedure had to fit the appropriate criteria for liability to be established. If the law did not recognise the relationship of liability through the appropriate use of the appropriate writ, then it did not matter that the plaintiff deserved compensation. The members of the profession in the eighteenth century were trained to recognise only this manner of liability.

For much of the twentieth century members of the legal discursive formation were constituted to recognise a general duty to take care. The legal subjects of the time
were constructed to consider others, to be conscious of their neighbours and to foresee the likelihood of their neighbours being affected by their actions, or inactions. If these legal subjects did not live up to the legally accepted standard of behaviour, members of the legal discursive formation, in particular the judges, would consider them liable for any damage that resulted, and require them to compensate the injured party. This assumed relationship could be negatived, however, if the circumstances of the case meant that the damage was too remote, or was not reasonably foreseeable.

The judgments examined in Chapters Five and Six demonstrate the processes of legal change particularly well. Legal statements were selected by the judges and repeated in their judgments. Some of them were repeated with approval, some were distinguished and some were imported from other areas of the law. These legal statements were brought before the court in the form of “precedents”. The use of previous legal statements allows for and produces legal change. It was through the application of the archaeological method that this narrative was produced in this project; for the practices of repetition are that which constitute an inextricable link between the law and the legal profession. In this application of the archaeological method, “the law” can be seen as the sum of the practices of the profession and their writings.

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2 This, however, may simply be an unintended effect of my method of case selection.
3 It is also arguable that, though it is not something that can be resolved here, legal change can be seen as a function of a decrease in the level of specificity of statements. For example, the obligation owed by an inn-keeper “became” a duty owed by the average person, or a duty with respect to “things dangerous in themselves” “became” a duty with respect to all things in the care of the average person.
EFFECTIVENESS OF THE APPLICATION OF THE METHOD IN THIS PROJECT

My application of the archaeological method had one explicit and one implicit purpose. The explicit purpose was to attempt an application of the method. This involved two steps. The first was the development of the method and the second was the use of the method as I understood it. The implicit purpose was to see if the application of the method, as I understand it, would produce a narrative of the history of “the law” that is different from more traditional legal histories. That is, the implicit purpose can be seen as an interest in considering the effects of the application of the method.  

The first section of this analysis of the effectiveness of the application will deal with the implicit purpose. That is, I will consider differences between the story I have told and normal legal history, as I understand it. After I have assessed that aspect of the project I will discuss how my understanding of the method may have affected the narrative produced in this project.

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The Introduction to this project included a description of some of the features of traditional legal history. This section of the Conclusion will examine how the narrative produced in this project differs from normal legal history. The two types of histories that my narrative will be compared with are what Conaghan and Mansell referred to as “internal” histories and histories in which the law is seen to

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4 As has been suggested throughout this project, there can also be seen to be a “suppressed” purpose behind this thesis. This “suppressed” purpose was my interest in exploring the genealogical intuition about the shifts in governance that have produced “modern” legal subjects.
change as a result of external forces. In the first instance, the narrative produced in this thesis can be differentiated from both, inasmuch as there is a deliberate and explicit application of an historical method. That is, few legal historians self-consciously and explicitly engage with specific historical methods in writing their histories. One of my desires in writing this project was to reflect on the ways in which the application of a specific method affects the narrative produced.

More specifically, the narrative in this project seems differentiable from “external” histories, such as those of Horwitz, on the basis that it is an attempt to develop a history of law from within. External histories explain changes in the law on the basis of external factors. Horwitz, for example, linked the changes in nineteenth century negligence law to the changes in the economic structures of the time. My inclination toward discursive understandings of society leads me to conceive of legal change as open to explanation from within. The application of the archaeological method, as understood in this thesis, suggests that such an explanation is available. I must add, however, that I am not claiming that my narrative is better because of its internal focus, only that the focus of my narrative produces a different story to external histories.

There are also differences between the narrative in this project and the narratives of “internal” legal historians, such as those produced by Winfield. These differences are produced, in part, through the manner in which cases are treated. Unlike traditional, internal legal histories, using the archaeological method led me to focus on the whole of past decisions. That is, identifying practices of repetition led me to an examination of the statements of counsel, the statements of dissenting judges and the statements of the majority judges. The examination of all statements was a
function of and contributed to a greater understanding of the role of the repetition of past legal statements. The narrative produced in this project derived from the view that the practice of repetition extends beyond the repetition of the *ratios* of past decisions. A broader understanding of the role of the discursive practice of repetition requires that attention be paid to any past legal statement, whether it be from a majority or minority judgments, or whether the statement was supplied by counsel or one that arose in another jurisdiction. In a “normal”, traditional history, on the other hand, attention is on a more limited set of statements which are understood as the *ratios* of particular judgment. For example, a traditional history of negligence law would highlight the three sentences from *Donoghue v Stevenson* that comprise “neighbour principle” rather than examining, in detail, all the judgments written by the Law Lords who heard the final appeal.

Another significant difference that may be identified between this narrative and traditional legal history is the lack of focus on “marker cases”. Some of the statements examined in this project were amongst those produced or repeated in relatively well-known cases and others from decisions that, on the whole, have been forgotten by members of the profession. The use of the archaeological method meant that no case, in this thesis, would be considered to be any more important than any other case. The focus of the application of the method was on the statements of the law that were available at the time of the writing of the judgments. Consequently, current opinions concerning the selection of statements that reflected the importance of particular judgments were avoided in order to avoid

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5 This lack of focus was intended to be supported by the organisation of the discussion of the decisions in terms of the century in which they were decided.
limiting the relevance of some of the statements that were available when statements of the law were being produced.

One of the results of the application of the method used in this thesis, and a result of the shift away from “marker cases”, is a characterisation of “the law” as being more continuous than it is usually considered to be. It is worth highlighting two examples of this continuity. The first is that the abolition of the writ system in the 1830s did not immediately affect the practices of writing judgments or the articulations of liability contained in judgments delivered in the following decades.

A second example of continuity is that particular “marker cases” seem not to have represented as radical a shift as may be suggested in traditional legal histories. The introduction of the “duty of care” in Donoghue v Stevenson (a case that is often cited as a major turning point in the history of negligence) did not represent a “magic wand” that instantaneously produced a change in the characterisation of liability in negligence law. Statements that expressed similar duties are evident in nineteenth century decisions such as George v Skivington and Heaven v Pender. While the case of Blyth v Birmingham Waterworks can be added to the decisions examined in that Chapter which included statements reflecting a wider scope of liability than was recognised in the nineteenth century and before. Further, the “duty of care” in Donoghue v Stevenson did not extend much further than the “duty” found in George v Skivington, as is evidenced by statements in the judgments in Farr v Butters Brothers and Videan v British Transport Commission.

Interestingly, despite the fact that the decision was brought down in 1856, none of the nineteenth century decisions examined in this project made reference to it. The first reference in the cases in this thesis was by counsel in McDowall v Great Western Railway (but the judges in that decision did not refer to it) and the only other references were by one judge in Bolton v Stone and one judge in British Railways Board v Herrington.
The continuity evident in this narrative may separate it from other legal histories but the continuity does put this history at odds with some readings of Foucault’s historical methods. The relationship between my use of the archaeological method and expectations of the use of the method is discussed next.

* It is clear from the narrative produced by my application of Foucault’s archaeological method that, while the story is different from traditional legal histories, it is not “radically different” from more familiar understandings of “the law”. Whether an application of Foucault’s ideas produces a “radical” perspective on the discourse in question may depend on either the use of Foucault’s ideas or the discourse examined. This section will include discussion of a number of factors that could contribute to this. These factors include the discursive nature of the law itself and the role of the archaeologist.

There are two significant issues that appear to merit attention in a discussion of the discursive understanding of the law applied in this thesis and the nature of the reading of the law generated. The first concerns whether the law can be understood as a single discourse. The second concerns whether the law is a discourse that is

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7 Or perhaps a combination of both. A project of this scope does not allow for a complete assessment of all the ways in which Foucault’s ideas may be applied. I have chosen to attempt an understanding of one method of application and then apply that method. I have not sought to compare my method of application to other possible methods. I recognise that there may be significant differences between how I have used Foucault’s ideas and how others may choose to use them, therefore, I recognise that others may produce a radically different narrative from their use of Foucault’s ideas than I have. An attempt to engage with other such readings did not seem feasible in a project of this length.
suitable for examination through the use of the archaeological method. These two points will be discussed in turn.

One of the assumptions made in the discussion of “the law” in Chapter Two was that “the law”, in the period covered by this project at least, was a single discourse. This assumption may now be questioned in light of the less than radical reading of the law produced herein. One possibility is that “the law” is a single discourse but that the thesis does not cover a long enough period to show any “radical” changes in that discourse. Support for this view might be based on the argument that the ‘linguistic structures’8 underlying the law between 1750 and 1972 are too similar for an application of the archaeological method to highlight any “ruptures”. An alternative view could be based on the contention that the statements of liability in the eighteenth century are a different ‘enunciation’, and therefore represent a different ‘discursive set’,9 from the statements of liability written in the twentieth century.

As discursive sets can be ‘established [by] the existence of a series of permanent and internally consistent concepts’10 a question then arises as to how different two concepts have to be to represent different discursive sets. There are both similarities and differences in the articulations of liability written in the eighteenth and twentieth century. How can an archaeologist (or reader) be certain as to whether two groups of statements are from the same, or from different, “discursive sets”?

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10 Ibid at 316
Foucault’s own archaeologies operate as ‘chartings of the epistemic breaks that account for the sudden appearance of new disciplines and the equally rapid demise of certain old ones’.11 “The law”, as understood in this project, may not suggest either the “appearance of a new discipline” or the “demise of an old discipline”. That is, this continuity of “linguistic structures” of the law could indicate that, unlike the narrative produced in Foucault’s own work, there is no evidence that, in the context of the law, the ‘threshold of modernity can be placed at the end of the eighteenth century’.12

Yet there seems to be significant differences in the articulations of liability in eighteenth century judgments from those of the twentieth century that justify the contention and my genealogical intuition that eighteenth century judgments reflected an almost feudal understanding of English society relative to twentieth century judgments. Most of the twentieth century judgments examined in this project can be understood as constructing the legal subjects as self-aware, self-disciplined subjects who were expected to live according to the dictates of internalised norms generally applicable in the community. This can be seen, at least from a Foucaultian perspective, as a “modern” understanding of society.

A somewhat more radical move, at least in the context of this thesis, is to consider “the law” discussed in this thesis as reflecting two separate “discursive sets of enunciations”. Flynn has suggested that an indicator of different discourses, highlighted in Foucault’s work, can be found in the questions asked by the members of a discourse. An indicator of the epistemic break in the medical

11 Flynn, ‘Foucault’s Mapping of History’ at 31
12 Fleming, M., ‘Working in the Philosophical Discourse of Modernity’ at 170
discourse, for example, is the shift in the questions asked by physicians. The question of the ‘clinician’ changed from the ‘essentialist “What is wrong with you?”’ [to] the nominalistic “Where does it hurt?”’. The judges’ “question” posed of defendants, as evident in this project, can be seen as shifting from the eighteenth century “of what vocational group are you part?” to the twentieth century “did you behave in accordance with the standards of the ‘reasonable man’?”. This apparent shift may be understood to indicate that two separate “discursive sets of enunciations” are evident in the first and last periods examined in this project. The middle period can then be understood as reflecting the breakdown of one discourse and the emergence of another, both of which were called “law”.

Another explanation for a lack of “radicalness” in this project may lie in the fact that the law, as understood here, is not a discourse that is easily examinable with the method, at least as it is understood here. There are two issues that need discussion in this context. First is the fact that Foucault himself only applied the archaeological method to the “human sciences”. Second, the archive that is constituted by legal judgments may not be the most appropriate archive of legal monuments to produce a “radical” narrative about “the law”.

If the archaeological method is to be taken as best suited to an examination of the “human sciences”, then the question that arises in this context concerns whether “the law” can be seen as a “human science”. It is arguable that the ‘central idea, from our [Foucaultian] point of view, is that the human sciences contain a

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13 Flynn, ‘Foucault’s Mapping of History’ at 32
14 Smart stated that ‘Foucault’s archaeological analyses actually address a quite specific and limited range of discourses’ and then questioned whether the method is applicable to the ‘less controversial and more mature sciences of mathematics, physics or chemistry’ (Smart, Michel Foucault at 510)
particular manner of conceiving what human beings are.\footnote{15} That is, “Man” can be understood as being the focus of “human sciences”.\footnote{16} If, then, “Man” is not the focus of “the law”, the archaeological method may not operate in the same manner as it does with respect to the “human sciences”. If the law is not a human science then an application of the archaeological method may not serve to illustrate any rupture in the law and an account may not evidence any discursive disruption. This may not require the conclusion that this tells us nothing about the archaeological method, however, as it has been suggested that ‘consideration of questions [of the scope of application of the method] may help to clarify further the distinctiveness of archaeological analysis’.\footnote{17}

The view that the law is not a human science may be supported through reference to the claim that “the law” is produced and reproduced through the use of past legal statements. The rules of dispersion of statements seem to operate on the use of statements themselves. “Man” is not central to the dispersion of statements. “Man” cannot be central to the “Truth” of the legal discursive formation if the “Truth” of the formation is more closely tied to the repetition of past legal statements. The practices of “the law” in relation to the “human body” were highlighted by Foucault to good effect in \textit{Discipline and Punish}. Negligence law does not privilege the “human body” in the same manner as legal practices of punishment.\footnote{18}

\footnote{15} Wartenberg, T. E., ‘Foucault’s Archaeological Method: A Response to Hacking and Rorty’ (1984) 15 \textit{Philosophical Forum} 345 at 360
\footnote{16} ‘Our limited sense of the nature of human beings – as Man – gives rise to a limited awareness of how society structures the nature of our lives – as Men’ (id).
\footnote{17} Smart, \textit{Michel Foucault} at 51
\footnote{18} The “punishment” in relation to liability in negligence is the payment of “compensation”. “Compensation” is not exacted from the “human body”. From the ‘dawn of the common law… tort liability… provided a means whereby the victim could be “bribed” into abstaining from retaliation by the prospect of being able to compel the perpetrator to render him [sic] monetary compensation for the wrong done’ (Fleming, J., \textit{An Introduction to the Law of Torts}, 2\textsuperscript{nd} edition, Clarendon Press, Oxford, 1985 at 1-2).
Perhaps the closest negligence law gets to a focus on “Man” is the “reasonable man”. As was suggested in Chapter Two, however, the “reasonable man” can be understood to function as a norm of behaviour, a legal discursive practice, rather than as the focus of the discourse.

Another reason to believe that the law is not an appropriate object of archaeological analysis derives from an understanding of Foucault’s methods as questioning ‘how entities (including the self) become objects of knowledge’.19 It is arguable that “the law”, as understood in terms of judgments, does not function in a manner that creates “the self” as an object of knowledge in a wider sense. That is, judgments may be constitutive of members of the legal discursive formation, but not of the wider community. The language of judgments, therefore, at least from this perspective, cannot include statements of the ‘emergence of “Man”’.20

“The law”, as presented in this project, might not have been a suitable discourse for archaeological examination for another reason. In his histories, Foucault can be understood to have ‘sought to reveal what is so obvious and so superficial that it is passed over and accepted without further comment’.21 From this perspective, there is only value in revealing the obvious if it is passed over and accepted without comment. The practices of the legally trained may be such that the minutiae of decisions are not passed over. It is common for lawyers to place great emphasis on specific words, and specific grammatical constructions, even in judgments that extend for hundreds of pages. If this is the case, then the archaeological method

20 Kendall & Wickham, Using Foucault’s Methods at 25
21 Deacon, ‘Theory as Practice’ at 129
may not be as effective in the context of the law as it is when it is applied to other discourses and discursive practices.

Another possible similarity between Foucault’s methods and legal discursive practices that reduces the possibility of a disruptive reading of the law derives from the view that ‘Foucault’s archaeological method is designed to analyse knowledge without giving a privileged role to the epistemological subject’. It has been argued that the functions of the ‘legal method’, at least as the “legal method” is understood by critical theorists, is to make individuals ‘become obscured and indeed almost disappear’. From this perspective, the legal subject is removed from sight by legal discursive practices. If this is the manner in which “the law” works, then an application of a method that also directs attention away from the individual subject may not be as effective as it would be if used to examine discourses in which the individual is privileged.

In addition to those problems for a non-disruptive reading of the law that are associated with the characterisation of the discursive nature of “the law”, there are other factors, which relate to the role of the archaeologist in this project, that merit consideration. I will discuss three of these in the following section. The first is the range of decisions that I made in the conceptualisation, construction and presentation of this thesis. The second is the “qualifications” that may be required

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22 Gutting, ‘Foucault’s Genealogical Method’ at 343
24 This applies to both the individuals who appear before the court, as discussed in Beaman’s work, and in the way in which judges are (not) considered when past judgments are read, as highlighted in Chapter 3. Again, however, it must be stressed that this is how the practices of law operate in the use of law, it is not necessarily how histories of the law treat individuals.
of an archaeologist undertaking an archaeology of a particular discourse. The third, and perhaps the most important, factor is the very choice of the method itself.

I chose to apply the archaeological method to a series of judgments because I considered that the cases would make a suitable archive for a Foucaultian historical investigation. The archive I chose, however, may be more suited, if a “radical” story was to be told, to a genealogical, rather than an archaeological, examination. Shumway has suggested that ‘archaeology is an inadequate method when used in isolation’ and that genealogy can ‘take into account… the power relations in which every discursive formation must be situated’. Therefore, if I wanted to produce a “radical” narrative that effectively highlighted shifts in the characterisation of legal subjects by the legal profession, then it may have been better to have chosen the genealogical method.

As has been evident in the narrative produced in this project, it is difficult to apply an understanding of the archaeological method without some, limited, genealogical intuitions. One of the original motivations for this project was to examine how the “duty of care” came to be a part of “the law” and how this “duty” changed the construction of legal subjects. Without my intuition that the “duty of care” was important in the changes in “the law” that represented a shift in the construction of society, this project would not have taken the form that it did. I recognise that it is

25 Shumway, Michel Foucault at 101. Further, Switala has argued that ‘archaeology did not succeed… because it was an attempt to eliminate, rather than to describe the mutation of, the Modern subject’ (‘Foucaultian Mutations of Language’ (1997) 41 Philosophy Today 166 at 172).
26 For example, as has already been suggested, a discussion of the shift from the “feudal” to “modern” legal subject would only be possible through a use of the genealogical method.
27 The shift that I was interested in was the shift to a recognition of legal subjects, admittedly in limited circumstances, existing within relationships of “care” with other members of the community. This exploration of the “relationship of care” was intended to counter accusations that “the law” sees legal subjects as separate individuals, an accusation that, may be founded on a limited
my “training” in “the law” and “politics” that produced the genealogical intuition that contributed to this project.

In addition, it is possible that the practices that constitute me as a law graduate and legal researcher make me unsuitable for the task of applying the archaeological method to “the law”. As highlighted in Chapter Three, there is a question surrounding the appropriate qualifications of an archaeologist with respect to her or his knowledge of the discourse to be examined. It is arguable that an archaeologist should be as separate as possible from the discourse to assist in the process of “revealing what is so obvious and so superficial that it is passed over and accepted without further comment” by those constructed within the discourse. The alternative argument is that some knowledge of the discourse is required in order to “distinguish when two different utterances are the same serious speech act and when two identical utterances are different speech acts”.28 The narrative produced by my application of the method may suggest that I am too well-trained in the reading of case-law to effectively apply the archaeological method to “the law” as characterised in this project.

One point of where my subjectification by legal practices may have adversely affected the application of the method is the “archive” that I chose to excavate. That is, one of the more significant of these decisions related to the “monuments” understanding of contract law. An archaeology of judgments highlighting the doctrine of “unconscionability” may have served the same purpose as this archaeology of judgments in negligence law.

28 An alternative perspective would be that there are “limits” to the practices of governance in the training of discursive subjects. That is, no processes of subjectification are complete (for a discussion of this point, see Malpas & Wickham, ‘Governance and Failure’). From this perspective, an archaeologist’s ability to excavate a discourse in which she or he is trained may “sit” in the “gaps” left by the practices of the discourse.
that were to be excavated through the use of the method. The choice of documents may have been inappropriate for an application of the method. Unfortunately, none of the commentators on the method, nor Foucault himself, discussed what documents should form the archive for the purpose of an application of either the archaeological or genealogical method. I felt, therefore, that it was open to me to select any archive of legal documents that fitted the description of “statements controlled by a system of dispersion”.

The decision to focus on a number of cases that were from a “web of decisions associated with” a particular case was in order to attempt to problematise the apparent continuity in law. More precisely, my goal was to problematise the sense of teleology that is evident in many discussions of law. That is, I decided use, as the archive, all the decisions that contributed to the final decision in order to show the contingent nature of articulations of liability. The decisions in the archive included judgments that were followed, those that were distinguished and those that were “overturned”. In other words, all decisions that contributed statements for repetition formed the “archive” of cases from which I selected the 19 for excavation.

This method of selection may be open to accusations of linearity. However, I feel the inclusion of decisions that were not followed, and the use of both majority and minority judgments, could be seen to have reduced such an appearance. In addition, it would be difficult to examine a number of decisions without some suggestion of linearity. Irrespective of the relationship of a decision to any “final” decision (in the context of this project, the last decision was British Railways Board v Herrington)
there will be appearances of linearity.\textsuperscript{29} That is, most twentieth century decisions will involve a reference to \textit{Donoghue v Stevenson}, most decisions after \textit{Heaven v Pender} will refer to that decision. This is likely to be true whether I focussed on reported or unreported judgments. As one of the fundamental legal practices is the repetition of past legal statements, almost all decisions will include references to previous cases and, in most circumstances, will include references to “marker cases” such as \textit{Donoghue v Stevenson}.

Given the inter-relatedness of decisions, another purpose for the “web of decisions” archive was to demonstrate that there was no suggestion of “progress” associated with changes in “the law”. The judges wrote their judgments using the legal statements available at the time. Even with the advantage of hindsight, there is no evidence that the judges were “working towards” some ideal articulation of liability. I believed that this lack of “progress” would only be evident if the decisions examined using the method were limited to the decisions used by the judges in their judgments.

Despite the nature of the narrative produced by my application of the method, I still consider that my choice of archive represents a valid choice for an application of the method. A method of case selection was needed, and for the reasons highlighted above, I used the method that I did. Nonetheless, I recognise that a different choice of archive may have produced a different narrative of “the law”.

\textsuperscript{29} In addition, it is arguable that any discussion of more than one decision would have some appearance of linearity. It would be difficult to conceive of, and construct, a project that removed the chronological dimension from a discussion of multiple monuments (whether the monuments are judgments, statements of claim or statutes). Given the tendency of readers to engage with multiple documents with at least one eye on their chronological sequence, to construct a project that actively disrupts that ordering could perhaps focus too much on that disruption and detract from the reader’s engagement with the substantive points of this project.
Another decision I made that contributed to the narrative produced in this project was the “problem” that I chose to “solve”. As highlighted in Chapter Three, Foucault’s historical methods are problem-based. Perhaps the problem I selected to be the focus of this project was inappropriate for the method. It has been suggested that:

Foucault is not looking for a “method” which will be superior to other methods in objectivity and comprehensiveness but is forging tools of analysis which take their starting point in the political-intellectual conflicts of the present. His method is an anti-method in the sense that it seeks to free us from the illusion that an apolitical method is possible.30

As a result, to treat the archaeological method as a method that can be applied to any problem in any discourse may be an inappropriate use of the method. The problem selected for this project, paraphrased as “how did the statements in a particular decision come to include the statements it did?”, may not be sufficiently “political” to produce the “radical” political narrative that may be expected. My choice, as a legally trained archaeologist, of “problem” and “archive” may have contributed, therefore, to the nature of the narrative produced in this project.

CONCLUDING COMMENTS

The purpose of this project was to attempt to apply Foucault’s archaeological method. It is this attempt that, for me, represents the contribution of this project to the field of Foucaultian, and legal, scholarship. I must repeat, however, that this application was intended to be tentative and that I recognise that no application of

the method can be either “complete” or “final”. The previous section highlighted possible reasons for the narrative “failing” to be as “radical”, or disruptive, as might be expected. This, however, can still be considered to be an exploration of Foucault’s ideas and, perhaps, an indicator of how Foucault’s archaeological method should not be applied.

Applying the method to the law as a “discourse in action” was an attempt to add to the understanding of the law and the way that it operates in society. The use of the method, at least as it is understood in this project, illustrates how the law changes through the repetition of past legal statements. The use of the method also shows that the law has not progressed over the past 250 years, the law has simply changed.

The examination of the cases in this thesis did not show that the judges were planning change, or were trying to “improve” the law. The judges were stating the law in the manner in which they were trained to do this. That is, they stated the law through repeating past statements of the law. The judges brought about change by perpetuating the practices that regulated their own behaviour. It is only through change that is brought about by the repetition of the practices that constitute the discourse that the law can change without losing its legitimacy. It is in these processes that the law exhibits its continuous, yet discontinuous, nature. In a sense, it would appear that it is only through the repetition of statements about the archaeological method that change, with respect to the use of the method, can come about. This, in effect, was my purpose in writing this thesis.

31 As was highlighted in Chapter Three, an application of the method may remove a mask or two of interpretation from a monument, however, “all that might be traces of other masks”.
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