

Reflecting on Continuity and Discontinuity in “The Law” -

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

Chris Dent LLB/BA (Hons)

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

.....

Christopher Michael Dent

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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