

CONNECTING CANENGUS TO THE UNIVERSITY CURRICULUM

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The article ‘The Canengusian Connection: a Kaleidoscope of Tort Theory’ was published over twenty-five years ago, yet it retains a place on the reading list of many tort modules.¹ This essay seeks to explore why, after this lengthy period of time, the article remains relevant and stimulating, and to consider how it can be incorporated into the delivery of a modern tort law module. ‘The Canengusian Connection’ is a sort of ‘Case of the Speluncean Explorers’ for tort law.² It is a fictional decision set in the imagined island of Canengus which is a common law jurisdiction operating a mix of Canadian, English and American law. It contains a simple factual scenario and the opinions of five fictitious judges, each aligned with a particular theoretical viewpoint. Each judge is almost a caricature of the theory he or she represents, seeing the positive in their view and the negative in all other views. This gives the article a number of uses as a teaching tool. ‘The Canengusian Connection’ can serve as an introduction to various theories of tort law. Its value, however, goes far beyond this. Incorporating the article into the delivery of a tort module provides a more stimulating, holistic experience of law by ensuring that theoretical concerns are not isolated from practical decision-making. This is particularly helpful in aiding students to develop coherently reasoned opinions about tort law.

The first section of this essay describes and analyses the judgments in ‘The Canengusian Connection’ before pointing up its usefulness in the context of a course on tort law. As we will see, Hutchinson and Morgan encourage understanding of the criticisms that students (and other critics) might level at any single theory in its pure form. They also give an insight into judicial reasoning that may assist students to develop their own arguments in a more coherently reasoned manner. As well as developing these points, this essay dwells on a trend towards corrective justice-based systems of liability that has grown in the years since Hutchinson and Morgan published their essay.

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¹ A.C. Hutchinson and D. Morgan, ‘The Canengusian Connection: a Kaleidoscope of Tort Theory’ (1984) 22 *Osgoode Hall Law Journal* 69.

² L. Fuller, ‘The Case of the Speluncean Explorers’ (1949) 62 *Harvard LR* 616.

Canengus: an introduction to Tort Theories

The facts of the scenario are relatively uncomplicated. The victim, Derek, was driving along an unlit road and saw a single headlight coming towards him which he assumed to be a motorcycle but was in fact a car driven by Allan. Upon realising that it was a car, Derek applied the brakes but they were not functioning properly so he swerved and was injured when his car landed in a ditch. A neighbour, Martin, heard and saw the accident but did nothing to check whether anyone was injured, nor did he call the emergency services. Finally, Derek's same-sex partner was later informed about the accident over the telephone by hospital staff and was told that Derek was still in intensive care which led to him suffering psychiatric illness.

These facts enable the article to address not only basic negligence but a spectrum of issues including contributory negligence, omissions liability, and liability for psychiatric illness from different theoretical foundations. This provides the opportunity not merely to explain what the various theories are, but to apply them to concrete challenges such as how to apportion liability between a careless defendant and a careless claimant, and understand how each theory tackles particular issues. Besides what the article says about judicial decision-making, it also provides a clear exposition of the different theoretical approaches to negligence. Since each judgment is focused on the same set of facts, it is easy for readers to compare different approaches to the various issues raised by Hutchinson and Morgan. However, the article goes beyond identifying examples of applications of the different theories in real case law and presents an ideal solution to the problem from each perspective.

The authors' fictional format enables them to present their readers with a collection of unconventional judgments in the law of negligence. Hutchinson and Morgan are able to present particular theories (*e.g.*, the economic analysis of Mill J) in their pure form. Thus the reader is not confronted by judges who are constrained by the normal language of tort law, such as duty, breach and remoteness. Nor are these judges bound by fears of 'opening the floodgates' or creating new areas of liability. This allows them to make a complete paradigm shift and suggest how the problem should be resolved without recourse to tort law (*e.g.*, Lefft and Prudential JJ).

The first of the judges, Doctrin C.J., adopts a formalist approach to resolving the case. She begins by stating that although the case appears to

raise some moral issues her sole concern is the legal aspect of the case.³ To this end, her task is to apply ‘the law as it is, and not as some think it ought to be’.⁴ By breaking down Doctrin’s judgment and some of the criticisms levelled at it by the other judges, the weakness of this approach becomes apparent. Doctrin adheres to a strict model of the separation of powers and aspires to ‘the formal and neutral application of the rules’.⁵ The ‘rules’ that she applies are obviously derived from case law that was up-to-date twenty-five years ago, so some of this has been superseded by later decisions, although it is perhaps surprising how little has changed.

Doctrin begins by addressing the relative responsibility of the victim of the accident, a driver who had not maintained his brakes in working order, and the defendant, another driver of a car with only one functioning headlight. Doctrin notes that both drivers owed a duty of care as road users, both were negligent because both failed to maintain their cars in a roadworthy condition, and concludes that a fifty percent reduction in damages is appropriate. She does not explain whether this reduction is based on each party’s relative causal potency or relative blameworthiness or any other basis. Doctrin next turns to the question of the (possible) omissions liability of the nearby resident who saw and heard the accident but did nothing to assist. This she answers by holding that there is no legal duty to rescue outside of those special relationships, statutorily specified, that establish such a duty. The expansion of these categories of relationship, in her opinion, is the role of the legislature, not of the judiciary. Accordingly there is no duty to rescue in this instance. Finally, she turns to the claim for psychiatric illness by the same-sex partner of the victim of the car accident who was informed of the accident via telephone by the hospital staff and was told that his partner was in intensive care and that it would be some time before there was any definite news. After noting that the courts are gradually expanding recovery for psychiatric illness in line with increasing medical understanding, Doctrin declines to continue this expansion. The victim’s partner did not see the accident, nor did he come upon its aftermath. Doctrin recognises previous expansions including the abandonment of the rule that the claimant should have witnessed the accident and the adoption of the rule that he or she must have been in the accident’s immediate aftermath.⁶ This particular development was justified by the ‘fundamental nature’ of the mother and family relationship. In the absence of a similarly fundamental relationship in

³ Above n 1, 71.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *McLoughlin v O’Brian* (1982) 2 WLR 982.

this instance there is, in Doctrin's view, no justification for further expansion.

In taking a formalist approach to this problem, Doctrin does not seek to explain why recovery for psychiatric illness is limited to those who witnessed the immediate aftermath of an accident, nor why the closeness of the family ties matter to the outcome. Her priority is 'to maintain certainty and generality so as to avoid a doctrinal wilderness of single instances'.⁷ The existing 'patchwork quilt'⁸ of liability for psychiatric illness is perhaps testimony to the failure of such an incremental approach to avoid the 'wilderness' she fears.

In ways reminiscent of Doctrin CJ, students (particularly those new to law) often want to know 'the answer'. Faced with uncertainty and disagreement, they want to know 'what the law is'.⁹ This can lead to students making demands for certainty from those teaching them. This demand for certainty seems to be a symptom of the shift from curriculum-based school education to university education. Students are accustomed to being provided with a comprehensive, detailed curriculum which tells them exactly what they will be examined on. In contrast, the 'learning outcomes' provided for university modules are brief and much more vague. Students often express anxiety at this lack of certainty about what they are expected to know because they are accustomed to being tested on their knowledge rather than on their skills.

'The Canengusian Connection' serves as a useful reminder to students that certainty is rare. Moreover, it should reassure them that uncertainty can be tackled by developing a strong grounding in theoretical arguments. McFarland argues that students are thrown into 'the sea of common law' and '[w]hile they think they are drowning and are disoriented, many will stop asking "what is just?" and instead, looking for a plank floating in the water, only ask "what is the rule?"'.¹⁰ By challenging Doctrin's justifications and conclusions, students may see more clearly that it is not enough to know 'the law as it is'. Suppose, for example, that Derek's partner arrived at the hospital just as Derek was being brought in. In such circumstances, his claim would then depend on how widely a judge construes the concept of the 'immediate aftermath'. In order to justify where the line is drawn, one

⁷ Above n 1, 75.

⁸ R. Mulheron, 'The 'Primary Victim' in Psychiatric Illness Claims: Reworking the "Patchwork Quilt"' (2008) 19 *King's Law Journal* 81.

⁹ J. Boyle, 'The Anatomy of a Torts Class' (1985) 34 *Am. U. L. Rev.* 1003, 1007-1008.

¹⁰ R. McFarland, 'Teaching the Law of Wrongs without Searching for What is Right' (2009) *J. Juris* 323, 330.

must have an overarching theory of liability in mind and understand where the immediate aftermath rule fits in to it.¹¹

While Doctrin recognises that there are rules and exceptions, the problem remains as to where to draw the line. She does not present a clear theoretical foundation for liability, accepting only that judges can shift the line on an incremental basis. The lack of a firm basis for her decision about where to draw the line is criticised by the other judges, one of whom seeks to ‘clear away the rhetoric behind which her cloak-and-dagger approach to public policy lurks’.¹² Morgan has observed that judges lack an empirical basis from which to address certain public policy issues such as the fear of police defensive practice, yet he argues that ‘[i]t would be strange to require the courts to close their eyes to such manifest social consequences of their decisions’.¹³ By adopting an unthinking, formalistic approach, Doctrin commits this error of closing her eyes to the social consequences of her decisions.

At the opposite end of the theoretical spectrum to Doctrin, we find Lefft J who represents the Critical Legal Studies Movement. For Lefft, the legal process ‘is a major force in creating, sustaining and justifying our social situation’ which is characterised by vast inequalities.¹⁴ Attacking the perception that the law is objective and neutral, he argues that ‘judges hold in place the deep structure of [a] society that sacrifices people for profits’ and set out in their decisions ‘rationalizations of our ideological prejudices’.¹⁵ He identifies the two dominant and conflicting ideologies of individualism and welfarism that have exerted influence over tort law, criticising all of the other judgments as presenting accidents as ‘an inescapable and natural feature of modern life’.¹⁶

In this vein, the economic efficiency approach to tort law receives the greatest criticism, but no theory, even the no-fault insurance scheme

¹¹ Indeed the decision of the High Court of Australia in *Annetts v Australian Stations Pty Ltd* [2002] HCA 35 supports the view that the immediate aftermath requirement is an arbitrary barrier to recovery. See also H. Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Oxford, Hart Publishing, 2009), 69 (arguing that ‘[i]nvidious distinctions are inevitable when the “immediate” aftermath is treated in isolation, as a crude notion of temporal proximity’).

¹² Above n 1, 76.

¹³ D. Morgan, ‘Policy Reasoning in Tort Law: the Courts, the Law Commission and the critics’ (2009) 125 *LQR* 215, 221.

¹⁴ Above n 1, 104-105.

¹⁵ *Ibid*, 105.

¹⁶ *Ibid*, 106.

proposed by one of his colleagues (Prudential J), is exempt from criticism. Lefft considers the concept of financial compensation to have the dehumanizing effect of turning people into property. There is a clear danger that an economic analysis of negligence could have this effect. But, arguably, in more moralistic, justice-based approaches, people retain an intrinsic value - it is just that financial compensation is the most appropriate method of repairing the damage inflicted. Lefft's focus is on reduction of risk and ensuring that 'all persons can decide the risks to which they are individually exposed' by undertaking a 'complete restructuring of all aspects of social life'.¹⁷ Noting that currently 'the elite in our society hold a monopoly on knowledge',¹⁸ he advocates the democratization of information and risk. On this basis he declines to pass judgment on the case at hand. Although this is a critique of law generally, it may open students' eyes to the context in which tort law operates and the relationships it maintains.

Situated between these two extremes of formalism and critical legal scholarship, are three judgments based on more familiar concepts of corrective and distributive justice, strict- and fault-based liability, that seek to explain or remodel the negligence system. Due perhaps to the trends in tort theory at the time the article was written, and perhaps to the preferences of Hutchinson and Morgan, 'The Canengusian Connection' does not put forward a coherent corrective-justice based account of negligence liability.¹⁹ The closest approximation to corrective justice in 'The Canengusian Connection' is the judgment of Wright J. Wright rejects the more utilitarian economic efficiency approach as failing to 'take individuals seriously', holding instead that '[w]hen one person harms another, the injured has a moral right to demand and the injurer a moral duty to pay compensation'.²⁰ Insofar as Wright's view is individualistic and centres around the causation of harm, it is a reflection of corrective justice. It is not, however, an entirely fair portrayal of corrective justice and is more useful as an example of strict liability. Corrective justice is a system of individual responsibility that

¹⁷ *Ibid*, 108.

¹⁸ *Ibid*.

¹⁹ The dominant theory today is that we can best explain negligence law and tort more generally by reference to the ideal of corrective justice. See for example E. Weinrib, *The Idea of Private Law* (Cambridge, MA, Harvard University Press, 1995); S. Perry, 'The Moral Foundations of Tort Law' (1992) 77 *Iowa Law Review* 449; J. Coleman, 'The Practice of Corrective Justice' in D. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Oxford University Press, 1995). See also the more recent contribution in A. Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007). On corrective justice, see below n 20 and associated text.

²⁰ Above n 1, 87.

requires a person who causes wrongful loss to another to correct that loss. In a system of fault-based liability, 'wrongful loss' is loss caused by faulty conduct, that is, by a lack of reasonable care. In contrast, strict liability identifies loss as 'wrongful' if a particular activity causes it (often an activity that involves significant risk of harm) regardless of the level of care taken to try to prevent harm.

Thus both fault-based liability and strict liability are suitable systems of implementing corrective justice. Strict liability is more advantageous for victims because they are not required to prove a lack of care on the part of the defendant, only that the defendant's conduct caused the harm. Because of this, Wright prefers strict liability over fault-based liability. This leads him to focus solely on the causation requirement of corrective justice: 'the focus is rightly placed upon the activity rather than the defendant's conduct: the *what* happened is more important than the *how* or *why*'. Wright states that 'within such a regime, causation becomes not *a* basis for liability but *the* basis'.²¹ This, he believes, enables him to do corrective justice more comprehensively because cases will no longer fail because of the absence of fault. He therefore finds that Allan's faulty headlight set a causal chain in motion, and so is the cause of the losses to Derek and his partner. Derek's faulty brakes 'may well have extended the causal chain' but they did not set the chain in motion. This leads Wright to reject the contributory negligence argument. He also considers that the psychiatric illness suffered by Derek's partner is another consequence in the same chain of causation and the fact that the harm is emotional rather than physical does not provide sufficient justification for rejecting his claim.

Wright J presents this strict liability approach as being more coherent than Doctrin's formalism because it pursues an overarching goal (doing corrective justice), but at the same time strict liability is portrayed as being neutral or objective because it depends only on causation and not on a finding of fault. The heavy emphasis on causation in this model provides a good opportunity for discussion of developments in the understanding of causation. The term 'causation' in an objective sense relates only to factual causation: was the defendant's negligence *a* cause of the harm. In their work on causation, Hart and Honoré showed that any event does not have one single cause, but it caused by the convergence of a set of conditions which were together sufficient for its occurrence. This is known as the NESS (Necessary Element of a Sufficient Set) test. An example commonly used to illustrate this is that of a fire. The 'sufficient set' of conditions for the occurrence of a fire is

²¹ *Ibid*, 91. See also, P. Cane, *The Anatomy of Tort Law* (Oxford, Hart Publishing, 1997), 47-49 (on 'outcome-based' strict liability).

oxygen, a flammable substance, and a source of ignition. If you take away any one of these three elements there will not be a fire, so the presence of each element is equally necessary in order to start a fire. Each element is therefore equally deserving of being called *a* cause of the fire. Richard Wright, building upon the ‘NESS’ test elaborated by Hart and Honoré, has shown that each of the conditions that together were sufficient to bring about the harm was *a* cause of the harm.²² The designation of one particular event, such as the defendant’s conduct or the defendant’s negligence, as *the* cause, is shorthand for it being the *responsible* cause.²³ This still calls for an attribution of responsibility.²⁴ Building upon the example of a fire, we might ordinarily say that a person dropping a lighted match is the cause of the fire. The match is just one cause along with oxygen and flammable material, and we designate it as the *responsible* cause when the dropping of a match is out of the ordinary. If the fire occurred during a manufacturing process that required the absence of oxygen, then we would no longer deem the source of ignition to be the responsible cause. Instead, we would call the presence of oxygen the responsible cause.

In the negligence inquiry, the task of labelling something as ‘out of the ordinary’ is fulfilled by the ‘breach of duty’ question. There must be a basis on which particular conduct is labelled the *responsible* cause and for Wright J this basis is still, implicitly, faulty conduct. This can be seen in Wright J’s statement that Allan’s *faulty* headlight set the chain of causation in motion. A system of strict liability could equally decide that any driver, careless or not, is responsible if he is involved in an accident which injures someone else.²⁵

By presenting a model of strict liability that claims to be objective, the authors are able to exploit Wright J’s judgment to further their argument that judicial decision-making is not neutral. In this sense, Wright J is a straw man, also used by the authors to attack corrective justice. They could have used Wright’s judgment to develop a theory of corrective justice using fault-based liability where the moral, social and other concerns surrounding liability would be discussed more openly. Instead they have impliedly

²² R Wright, ‘Causation in Tort Law’ (1985) 73 *Cal. L. Rev.* 1735; Richard Wright, ‘Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts’ (1987) 73 *Iowa L. Rev.* 1001; H.L.A. Hart and T. Honoré, *Causation in the Law*, (2nd ed. Oxford: Oxford University Press, 1985).

²³ Richard Wright, above n 22, 1012.

²⁴ In *Stapley v Gypsum Mines Ltd* [1953] AC 663 Lord Asquith identified the responsible cause by asking whether the negligence was the ‘real’ or ‘effective’ cause. More recently in *South Australia Asset Management Corp. v York Montague Ltd* [1997] AC 191 Lord Hoffmann asked whether the harm was within the scope of the defendant’s duty of care.

²⁵ See, for example, the French loi du 5 juillet 1985 sur les accidents de la circulation.

equated corrective justice with strict liability and their arguments concerning the policy decisions concealed by the strict liability approach could be seen as being valid concerns about corrective justice too. It is therefore important to maintain the distinction between corrective justice and its expression in the form of strict liability in order to make it clear that the authors have only really highlighted some of the fallacies of strict liability. Corrective justice then emerges relatively unscathed from Wright's judgment.

Despite these criticisms of Wright J, his judgment can still be a useful aid in addressing the distinction between factual and legal causation and the idea that 'causation' in the sense of '*the* cause' rather than '*a* cause' involves a choice in the allocation of responsibility. Moreover, it drives home the point that choices of the sort we are considering need to be justified.

The remaining judgments present two differing distributive models for negligence law: economic efficiency and the compensatory imperative. In itself this can reinforce appreciation of the idea that 'distributive justice' concerns the allocation of resources among a wider population, but does not prescribe a single criterion of merit on which the allocation should be based. This may clarify for students the point that 'public policy' is not, of itself, an argument. Public policy may require maximisation of wealth, it may prioritise compensation according to need, or it may pursue some other objective.²⁶

Mill J takes the view that the law is primarily a reflection of public policy as decided by the judiciary: 'The common law is a vast and intricate doctrinal edifice, but its chief architect has been policy and not logic'.²⁷ He calls for the judiciary to discuss openly these issues of public policy and in order to achieve consistency in judicial opinions, he says that they should be 'guided by a systematic theory of civil liability'. For Mill, that theory is economic efficiency, in other words the sole objective is the maximisation of overall wealth. 'Rules of tort law must be designed and implemented so as to facilitate and simulate the operation of a free and competitive market'.²⁸ This approach treats overall financial gain as desirable and ignores the human cost. He later states that the rule of liability 'will determine whether resources are used in an economically efficient manner' and 'must as closely

²⁶ On public policy arguments, see J. Bell, *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983), 23-24 and ch 3.

²⁷ Above n 1, 77.

²⁸ *Ibid*, 80.

as possible approximate the apportionment of risk that would have been arrived at by the litigants *if they had been able to bargain*.²⁹

This economic approach to liability involves an application of the Learned Hand formula.³⁰ Under this formula, accident precautions are justified so long as their cost (B) is outweighed by the seriousness of the injury (L) multiplied by the probability of the injury occurring (P). In other words, where $B < P \times L$ the precautions should have been taken and the defendant will be liable, but where $B > P \times L$ the defendant will not be liable. This is a potentially off-putting formula for students to apply. However, 'The Canengusian Connection' addresses it with clarity by assigning costs to the precautions that the parties could have taken and balancing them against the likelihood of harm and seriousness of harm. Mill states that the loss to Derek (L) is approximately \$1 million and the probability (P) of this was 0.001 so that accident cost is \$1000. The cost to Allan of repairing his headlight (B) was \$250 so, in this instance, the cost of the precautions is outweighed by the cost of the accident. Mill also looks at the cost to Derek of preventing the accident by repairing his brakes (B) which is \$200 - so also outweighed by the cost of the accident. Mill then asks, as between Derek and Allan, who could have avoided the accident the most cheaply. Derek could have repaired his brakes for \$50 less than the cost of replacing Allan's headlight, so Derek is the 'cheaper' cost-avoider of this accident.³¹ Consequently, responsibility falls entirely on Derek. Mill also holds that the neighbour should be liable for his failure to rescue because it was an 'easy rescue' with minimal costs.³² Finally he considers that the only barrier to recovery for psychiatric illness should be proof that the harm is real. If the harm is real and the cost of prevention by the defendant is lower than the expected cost of the harm then the defendant will be liable.

Critics of the economic approach applied by Mill often focus on the extent to which it ignores the human cost of accidents. As Conaghan and Mansell have argued, the Learned Hand formula is 'ideologically objectionable in its shallow and impoverished view of human activity'.³³ In 'The Canengusian Connection', Wright draws on the Ford Pinto case to illustrate the moral

²⁹ *Ibid.*

³⁰ *United States v Carroll Towing Co* 159 F 2d 169 (2d Cir 1947).

³¹ Above n 1, 84.

³² Above n 1, 86.

³³ J. Conaghan and W. Mansell, *The Wrongs of Tort* (London, Pluto Press, 1999, 2nd edn), 62.

shortcomings of economic efficiency.³⁴ Moreover, this approach to judging is broadly comparable to the cost-benefit analysis that English courts currently undertake (which also considers the practicality of the precautions and the potential deterrent effect of liability). A concern with the potential deterrent effect of liability is also apparent in s.1 Compensation Act 2006 which requires courts to have regard to the desirability of the defendant's activity.³⁵

A further point for discussion concerning Mill J's efficiency-based approach is the degree to which he individualises the calculation involved. Since the goal is the maximisation of overall wealth in society, his is an aggregative approach to accident compensation.³⁶ As such, it is concerned with individual costs only in so far as they reduce overall wealth. Mill combines this with the Learned Hand formula to determine who should have avoided the relevant costs. To this end, he makes an *ex post* comparison of the costs of avoiding the accident for the specific individuals involved. However, if the economic efficiency model requires liability to fall on the *cheapest* cost-avoider, then the structure of tort law is an inappropriate mechanism for achieving this. Tort law only looks at the parties involved in the particular dispute now before the court. Hence, the question Mill J addresses is whether the claimant or the defendant could have avoided the accident most cheaply. Yet in so far as the economic efficiency-based approach seeks to maximise wealth in society as a whole, it ought to be open to the court actively to seek out alternative methods of avoiding the accident that may (other things being equal) be cheaper still. For example, in this particular case the accident occurred as the parties were driving around a bend and it may be cheaper for the local authority to place streetlights on dangerous bends.

Another way of approaching the question of economic efficiency is to focus it less on the particular accident that occurred, but to apply the Learned Hand formula to the risk created by the parties. This involves an *ex ante* comparison between the cost to the individual of taking precautions against a risk and the value of that risk. Viewed from this standpoint, Allan's faulty headlight is a source of risk for all other road users, so the expected cost of

³⁴ *Grimshaw v Ford Motor Co.* 174 Cal. Rptr. 348 (1981). For further discussion of this case, see Man Chun Siu, 'Conflict in Canengus: the Battle of Consequentialism and Deontology' (2010) 7 *J. Juris*, 539, n 36 (and associated text).

³⁵ Interestingly it has been found that neither English nor American courts tend to apply the Hand formula in such a formulaic and purely financial way: R Wright, 'Hand, Posner and the Myth of the "Hand Formula"' (2003) 4 *Theoretical Inquiries in Law* 145.

³⁶ On aggregation, see J. Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1971), 36-37. See also 22-24.

harm is the probability of harm multiplied by the average value of loss amongst that population. If Derek's loss is roughly equivalent to the average cost of accidents within the scope of the risk created by Allan, then, as Mill calculated, the cost for Allan to repair his headlight is lower than the value of the risks he has created. Likewise, by driving with faulty brakes Derek has created a risk of accidents to other road-users generally and the cost of mending the brakes, as Mill calculated, is lower than the value of this risk. Prior to the occurrence of this specific accident, economic efficiency would therefore require both Derek and Allan to repair their cars. Using the facts of 'The Canengusian Connection' can therefore provide a concrete focal point for discussion of whether economic efficiency requires an *ex ante* or *ex post* calculation of costs.

The other distributive model proposed in the article, by Prudential J, is the replacement of the tort system with a no-fault compensation scheme. Prudential first finds justification for such an approach in the difficulties faced by claimants in establishing legal causation. For him, the most important goal is compensation and 'proximate causation' remains an indeterminate and uncertain barrier to recovery. Prudential's concerns seem in part to have motivated recent developments in the approach courts take to factual causation, such as the development of the concept of 'material contribution to risk' as the test of causation in cases of evidential uncertainty³⁷ and the effective circumvention of the rules on causation in *Chester v Afshar*.³⁸

Prudential J first notes the frequency with which accidents occur. He also notes the role of technological developments in particular: 'accidents regularly befalling large numbers of...citizens are not so much due to human error as to the complicated and uneasy environment in which we live'.³⁹ Against this, echoing the figures found by the Pearson Commission,⁴⁰ Prudential contrasts the inefficiencies of the tort system: forty-five percent of those injured never recover anything, only one percent reach the courts and many of them still settle, often below value.⁴¹ Of those who settle, the

³⁷ *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22, [2003] 1 A.C. 32.

³⁸ [2004] UKHL 41; [2005] 1 A.C. 134.

³⁹ Above n 1, 102.

⁴⁰ Royal Commission on Civil Liability for Compensation for Personal Injury (Cmnd. 7054, 1978).

⁴¹ See P. Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge: Cambridge University Press, 2006, 7th edn), 464 (noting that: '[m]uch has changed in the past 40 years; but the situation the Pearson Commission uncovered in the 1970s remains, in its essentials, unchanged').

cost of legal representation and administration of the system amounts to over fifty percent of the value of their compensation.

In ways reminiscent of Atiyah, Prudential J concludes that the tort system is a 'litigation lottery'.⁴² He claims that society is already heading in the direction of socialised compensation, arguing that the growth of insurance schemes shows that it is considered appropriate to spread the costs of accidents over a whole community. As with the other judgments, the themes addressed here serve as a concise introduction to those ideas addressed more thoroughly elsewhere, such as the inefficiencies of the current 'patchwork of a tort system and private insurance' and the pitfalls of opting for a system of first-party liability insurance.⁴³ Prudential concludes that 'if loss-distribution is our intended goal, a patchwork of a tort system and private insurance is a less than efficient way to proceed'.⁴⁴ The most important word here is 'if'. *If* loss-distribution and compensation are the goals, then the tort system is inefficient; *if*, however, the goal is to vindicate individual responsibility, then as will be argued below, a corrective justice-based tort system is appropriate.⁴⁵

As we have seen, each judgment presents a theory in a nutshell and explains how a concrete problem would be resolved from that perspective. This section has highlighted some limitations and discussion points related to the various theories. It has also noted, in passing, the pedagogical usefulness of the judgments. We will now examine the pedagogic value of 'The Canengusian Connection' in more detail.

A challenge for students: relating Canengus to a corrective justice-based theory

As noted earlier, a number of corrective justice-based accounts of tort law have emerged since the publication of 'The Canengusian Connection' and corrective justice is arguably now the dominant theoretical foundation for negligence.⁴⁶ Since there is not a strong corrective justice-based account of negligence in Canengus, a fruitful exercise is to ask students to develop a sixth judgment makes more effective appeal to this ideal. It also provides an

⁴² Compare to P. Atiyah, *The Damages Lottery* (Oxford, Hart Publishing, 1997).

⁴³ Above, n 1, 99. See also J Conaghan and W Mansell, 'From the permissive to the dismissive society: Patrick Atiyah's Accidents, Compensation and the Market' (1998) 25 *Journal of Law and Society* 171.

⁴⁴ Above n 1, 99.

⁴⁵ On the interpretative consequences of placing emphasis on particular considerations in the field of accident compensation law, see E. Mickiewicz, 'An Exploratory Theory of Legal Coherence in Canengus and Beyond' (2010) 7 *J. Juris*, sections 4-5.

⁴⁶ See A. Beever, above n 19, 46-50.

opportunity to consider the interrelationship, if any, of corrective and distributive justice.

This is a task to which Leff J's judgment is highly relevant. For he observes the conflicting directions in which negligence is pulled, between corrective justice on the one hand, and distributive concerns on the other: 'tort law is generally based on broad individualistic principles However, there exist certain counter-principles which ensure that the less fortunate in society are not excluded from relief'.⁴⁷ He later notes, for example, that 'in rescue situations, there is a robustly individualistic principle which does not require rescue, but this is being constantly eaten into by a communally-inspired requirement to act in cases of a special relationship'.⁴⁸ Whilst Hutchinson and Morgan use this to support Leff's argument that the whole of tort law is a matter of politically significant choice, it can be used to advocate a mixed corrective- and distributive justice-based approach to negligence. If negligence is conceived as a system of individual responsibility then it should primarily implement corrective justice because this, rather than distributive justice, relates to individual interactions. However, there are certain distributive 'tools' which are required for the practical implementation of a system of corrective justice: insurance enables compensation to be paid, as does the doctrine of vicarious liability. There will also be areas, such as public authority liability, where the distributive impact of the law is clearly relevant. In cases involving public authority liability, individual judgments impact on the distribution of goods within the wider community because the defendant has limited resources provided by the public purse. But, as Jonathan Morgan has argued, negligence will lose coherence if the focus of those who elaborate it shifts away from corrective justice and individual responsibility and towards the availability of insurance.⁴⁹ Where this happens, a distributive mechanism affects liability decisions.⁵⁰

Distributive concerns such as delivering compensation to accident victims and spreading losses as widely as possible are collective rather than individual concerns. They therefore require structures for implementation that also involve the whole of society rather than the individualistic structure of a negligence claim. If the focus of the courts shifts away from individual responsibility towards compensation and loss-spreading, as it has done in a number of recent decisions where the availability of insurance to one party has affected the allocation of liability, then negligence will lose coherence as

⁴⁷ Above n 1, 106.

⁴⁸ *Ibid.*

⁴⁹ J Morgan, 'Tort, Insurance and Incoherence' (2004) 67 *MLR* 384.

⁵⁰ *Ibid.*

a system of individual responsibility.⁵¹ Furthermore, the individualistic structure of negligence will prevent it from adequately addressing distributive concerns. Insurance is a useful tool that enables negligence law to have practical effect, but for the reasons described above it ought not to become a factor in the attribution of liability. By containing the significance of insurance in assigning liability and refocusing on corrective justice, the courts may also go some way to addressing the perception that there exists a 'blame culture'.⁵² Atiyah has expressed concern that aspects of tort law have been 'stretched' in order to pursue a compensatory objective at the expense of the coherence of the law.⁵³ Clearly refocusing on corrective justice would not solve all the problems of the perception of a blame culture. But if courts are less willing to stretch the law to enable claimants to pin responsibility on a defendant with a 'deep pocket', they may at least begin to address the issue.

Students could discuss and reflect upon the corrective justice-based approach, in the context of *Canengus*, by defending it against the views of the other judges. In corrective justice causation is not *the* basis of liability but *a* factor in liability along with factors determining wrongfulness. Despite initially appearing to base his decision on corrective justice, Wright J claims that causation is the sole basis of liability and in so doing conceals considerations of wrongfulness within his exposition of causation. Wright's decision is criticised by Mill and Prudential for placing excessive emphasis on causation and for claiming that causation provides an objective basis for liability. However, as argued earlier in this essay, these are valid criticisms of strict liability but not of corrective justice. Unpacking the criticisms of Mill and Prudential in more detail makes this clear.

Mill argues that Wright's strict liability model places excessive emphasis on causation. He argues that proof of causation can often be problematic and as such is a barrier to recovery. In his view the Learned Hand formula avoids the difficulties associated with causation because it is premised not on causation of harm but on risk of harm. If harm occurs then liability will fall on whoever could have reduced the risk of this harm most cheaply. In this way, Mill avoids an *ex post* determination of causation by shifting the entire focus of the negligence inquiry to an *ex ante* consideration of the cheapest cost-avoider. This means that in a case such as *McGhee v National Coal*

⁵¹ See for example *Lamb v Camden LBC* [1981] QB 625, 637-8; *Vowles v Evans* [2003] 1 WLR 1607; *Gwilliam v West Hertfordshire NHS Trust* [2003] QB 443.

⁵² On blame culture generally see R Mullender, 'Negligence Law and Blame Culture: A Critical Response to a Possible Problem' (2006) 22 PN 2.

⁵³ P Atiyah, *The Damages Lottery* (Oxford, Hart Publishing, 1997), chapter 2.

Board,⁵⁴ where proof of causation would have been a barrier to recovery had the House of Lords not developed the ‘material contribution to the risk of harm’ approach, the claimant would be able to recover under an economic efficiency system because the defendant could have reduced the risk of harm more cheaply than those at risk. For liability to be imposed it therefore seems to be enough that the defendant was responsible for a source of risk of the particular harm, regardless of whether it can be shown that the specific risk for which the defendant was responsible is the risk that eventuated in harm. Mill’s criticism of strict liability is not a criticism of how the causation requirement operates, but a criticism of the fact that there is a causation requirement at all. In effect, then, this is an objection to a system of individual responsibility, and this is natural because Mill’s vision is, as we noted earlier, aggregative.

Prudential also criticises Wright’s view because of its emphasis on causation which Prudential calls ‘a labyrinth for which Wright J. offers no realistic through-route’. Again, these are valid criticisms of Wright’s understanding of causation, but not valid criticisms of corrective justice. This is because, as noted earlier, Wright confuses issues of factual and legal causation. Prudential rightly asserts that Wright ‘has to smuggle in basic value judgments as formal causal criteria’. Prudential is also right to object that ‘within any compensation scheme based on fault, the conundrum of causation represents an insuperable barrier to the achievement of personal or social justice’, but this is because he is referring to a ‘compensation scheme’.⁵⁵ If the objective is compensation of those who have suffered injuries then it is arbitrary for the outcome to depend upon proof that the harm was caused by somebody else’s fault. If, however, the scheme is not primarily one of compensation but of individual responsibility, then it is entirely appropriate for recovery to depend on causation.⁵⁶ This will result in some injuries going uncompensated in negligence, and some risk-creators going unsanctioned. But just as punishment of conduct has its place in criminal law, and compensation has its place in welfarism, individual responsibility also has a place, and that place is in negligence law. When viewed as calls for additional institutional structures rather than the wholesale replacement of negligence, Mill and Prudential’s approaches leave corrective justice untouched. ‘The Canengusian Connection’, therefore, provides much more than an illustration of how to apply tort to a concrete

⁵⁴ *McGhee v National Coal Board* [1972] 3 All ER 1008.

⁵⁵ Above n 1, 95.

⁵⁶ See, for example, Honoré’s discussion of ‘outcome responsibility’: T. Honoré, ‘Responsibility and Luck. The Moral Basis of Strict Liability’, in T. Honoré, *Responsibility and Fault* (Oxford, Hart Publishing, 1999).

scenario and an examination of alternative approaches to accident compensation. It also provides a context in which students can consider how fault-based liability and corrective justice can be defended against those who argue for alternative means of compensation.

The next section considers the pedagogic value of alerting students to the various discourses examined by Hutchinson and Morgan in their essay.

Canengus and judicial reasoning: Building student competence

Tort theory continues to be an area of debate and, as noted by Lefft J, this can result in tort law being stretched in opposing directions. For a student to be able to understand tort law they need to be able to understand and identify the theoretical assumptions underlying judicial decision-making. ‘The Canengusian Connection’ is divorced from the reality of case law in the sense that each judgment exclusively pursues one theoretical objective and is able to express the underlying theory explicitly. Mill and Wright JJ do relate their positions to case law, but the fictional format employed by the Hutchinson and Morgan enables them to explore solutions outside the framework of traditional tort concepts. This can still aid students to identify the theoretical assumptions underlying the reasoning of real judgments because they have gained an understanding of how each theory would be reflected in practice.

Building on students’ increased capacity to recognise different theoretical approaches, it becomes easier for them regularly to recognize the links between theory and practice (and, likewise, the place of theory *within* practice).⁵⁷ We must not, however, assume that a lack of sensitivity to theory is solely the responsibility of students. McFarland has criticised American law schools for neglecting moral and legal philosophy.⁵⁸ He argues that students with some grasp of these subjects would be better equipped ‘to exercise judgment between that which is good and that which is not’.⁵⁹ Whether this is true of English universities or not, legal philosophy and legal reasoning seem to be addressed in discrete modules such as jurisprudence, legal skills, and analysing law. There is a risk that students see the skills learnt

⁵⁷ Inability to grasp links between law and relevant theory provides an example of ‘aspect blindness’ in the (Wittgensteinian) sense specified in E. Mickiewicz, above n 45, section 4. On theory as a feature of practice, S.E. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford, Oxford University Press, 1989), ch 17.

⁵⁸ Above n 10, 324.

⁵⁹ *Ibid*, 331.

in such modules as being divorced from the skills required in the study of each branch of the law. ‘The Canengusian Connection’ has the value of taking a range of philosophies relating to tort law and presenting them in concrete rather than abstract terms. Asking students to consider how each theory, or each judge, would approach other cases that they study, or other fictional scenarios, can help incorporate this searching, analytical approach throughout the whole module. Exploring theoretical responses to problem scenarios thus helps avoid the numbing repetition of ‘facts’, ‘held’, exemplified by Doctrin CJ.

‘The Canengusian Connection’ can also help students express their opinions in a reasoned manner. As Hutchinson and Morgan make plain, the law is malleable.⁶⁰ When applying doctrine to factual situations, students should be able to present a reasoned argument. This means not only having their own ideas about what the solution ought to be, but being able to explain and argue *why* it ought to be that way, finding support in case law and academic writing. Boyle has said that students ought to make arguments about the law, but these arguments will only be valid if they can ‘think like a lawyer’.⁶¹ Duncan Kennedy has argued that students ‘learn a list of balanced, formulaic, pro/con policy arguments that lawyers use in arguing that a given rule should apply to a situation despite a gap, conflict or ambiguity, or that a given case should be extended or narrowed. These are arguments like “the need for certainty” and “the need for flexibility”, “the need to promote competition” and “the need to encourage production by letting producers keep the rewards of their labor”’.⁶²

Incorporating ‘The Canengusian Connection’ into the teaching of a tort module helps counter this simplistic pro/con model and students learn instead that issues can be approached from a range of perspectives.⁶³ It also challenges the unthinking repetition of received policy arguments by emphasising the need to situate policy concerns within a wider theoretical framework (embracing, *inter alia*, ideals of justice and relevant political

⁶⁰ Above n 1, 76-77 (discussing *Home Office v Dorset Yacht Co Ltd* [1969] 2 QB 412, 426, *per* Lord Denning MR).

⁶¹ Above n 9, 1008. (Among other things, Boyle’s point concerns the process of enculturation in a disciplinary community, as described in J. Seeley Brown and P. Duguid, ‘Space for the Chattering Classes’, *Times Higher Education Supplement*, 10 May 1996 (Multimedia Feature, iv, iv-vi).)

⁶² D Kennedy, ‘Legal Education as Training for Hierarchy’, in D Kairys (ed.) *The Politics of Law: A Progressive Critique* (New York, Basic Books, 1998, 3rd ed.), 59.

⁶³ See P. O’Callaghan, ‘Monologism and Dialogism in Private Law’ (2010) 7 *J. Juris*, section 4.

philosophy). ‘The Canengusian Connection’ can help bridge the gap between a student’s instinctive opinion and being able to express it in a doctrinally and theoretically informed manner. By taking a problem scenario and presenting five rather stylised solutions to it, ‘The Canengusian Connection’ provides a reference point for students who are beginning and perhaps struggling to articulate their own opinions. If their instinct is, for example, that Martin ought not to be liable, they can go beyond the formalism of Doctrin CJ’s argument that the law has simply not extended that far yet, and argue that it also ought not to go that far by expressing their ideas in terms of corrective justice, rights, economic efficiency. Thus, Hutchinson and Morgan have given those students who read their essay a valuable reference point. This reference point helps those who read the essay to identify particular viewpoints. Moreover, it may encourage them to combine elements from the judgments and, in so doing, work up their own hybrid approach.

From Canengus to Leicester

This year, law students at the University of Leicester were required to read ‘The Canengusian Connection’ in preparation for tutorials addressing duty of care and some of the exceptional duty scenarios such as duties for pure economic loss, or public authority duties of care. When responding to problem questions they were asked to consider how each of the five Canengusian judges would approach the solution. One such problem scenario involved police liability to the victim of a serial killer for negligent investigation and failure to prevent her death.⁶⁴ Addressing the problem from the perspective of Doctrin CJ allowed students to apply the existing case law such as *Hill v Chief Constable of West Yorkshire Police*,⁶⁵ *Osman v Ferguson*,⁶⁶ and *Smith v Chief Constable of Sussex*.⁶⁷ Students then went on to unpack any ideas they had found in such cases about economic concerns, compensation, and rights-based arguments as well as contributing arguments from further reading. For example, from a rights-based approach, some argued that since there is no general ‘right to be rescued’, the police ought not to owe a corresponding duty to rescue. Responses of this sort could be linked to relevant wider reading: for example, the Law Commission’s recent consultation paper on administrative redress, which considers some of the

⁶⁴ For an analysis of the current state of the law relating to duties owed by the police see C. McIvor, ‘Getting Defensive about Police Negligence: The *Hill* principles, the Human Rights Act 1998 and the House of Lords’ (2010) 69 *CLJ* 133.

⁶⁵ [1988] 2 All ER 238.

⁶⁶ [1993] 4 All ER 344.

⁶⁷ [2008] UKHL 50.

economic arguments specific to public authority defendants.⁶⁸ Moreover, the benefits of this approach became apparent when some students built on an argument, advanced by Claire MacIvor, which concerns child-welfare claims against local authorities. On McIvor's analysis, the real problem in cases of this sort is under-funding and under-staffing.⁶⁹ In light of this point, the students argued that the same may be true in relation to police forces.

This provided an opportunity to ensure the students had understood 'The Canengusian Connection' and to discuss some of the ideas contained in it. Moreover, because public authority liability is such a policy-laden area of tort law, it was also beneficial to provide the students with a range of clear theoretical starting points from which to discuss the approach taken by the courts. Mullender has said that tutorials provide 'a setting in which knowledge of legal product and its limitations can be supplemented with an understanding of legal process: *i.e.*, the repertoire of argumentative strategies which make it possible to offer plausible (if not unquestionably correct) answers to legal problems'.⁷⁰ The main strategies that Mullender highlights are analogical arguments, appeals to the law's purposes and appeals to public policy. 'The Canengusian Connection' introduces students to certain arguments about the purposes of negligence law and the place of public policy within this branch of tort, and incorporating it into tutorials in the way described earlier helps students to articulate these kinds of arguments.

Finally, 'The Canengusian Connection' highlights the idea that many legal terms lack concrete meaning and have been assigned specific legal definitions. As is the case throughout the law, the law of negligence assigns a technical definition to conceptual labels in order to give them meaning. Terms such as 'negligence', 'proximity' and 'assumption of responsibility' have no concrete meaning. In the context of duty of care, some authors have argued that concepts such as foreseeability and proximity 'are not bland but are meaningful terms that do, or at least can, play a justificatory role in deciding cases'.⁷¹ Yet as Lord Bridge recognised in relation to 'proximity' and 'fairness', they 'are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in

⁶⁸ Law Commission, 'Administrative Redress: Public Bodies and the Citizen' (Law Commission Consultation Paper No 187 (2008)).

⁶⁹ C McIvor, 'The negligence liability of child welfare professional and policy-based immunities: A critique of recent English developments' (2006) 14 *Torts Law Journal* 205.

⁷⁰ R Mullender, 'Law, Undergraduates and the Tutorial' [1997] 3 *WebJCLI*: <http://webjcli.ncl.ac.uk/1997/issue3/mullen3.html>

⁷¹ A. Beever, above, n 19, 9.

effect to little more than convenient labels to attach to the features of different specific situations which...the law recognises pragmatically as giving rise to a duty of care'.⁷²

'The Canengusian Connection' serves to illustrate this point with clarity, taking for example the first question asked by Doctrin: was Allan negligent? The answer, according to Doctrin, is whether, 'in failing to have his car in proper working order, [Allan] breached the standard of care to which a reasonable man would adhere'. Doctrin largely focuses on the fact that there is a statutory duty to have properly functioning headlights, and whilst the statutory provision may not have been intended to set the standard of care in negligence, breach of a statutory duty can be taken as a starting point for finding that the duty in negligence has been breached. In a somewhat confusing statement, Doctrin states that '[a] defendant can rebut the *prima facie* case by showing that the statutory breach occurred without any negligence on his part. I agree with the trial judge that the malfunctioning headlights could reasonably have been discovered'.⁷³ Doctrin's reasoning is circular because she uses 'negligence' as part of the definition of 'breach of duty', and fails to explain *why* the malfunction could 'reasonably' have been discovered. Students should be able to challenge Doctrin's reasoning, asking, for example, what is it that makes Allan's conduct reasonable or unreasonable? When could he have discovered the fault? If he could only have discovered it whilst on the journey in question, ought he to have stopped his journey until he was able to replace the headlight? Would it have been reasonable for him to continue his journey so long as he took a route that avoided unlit roads, or drove at a slower speed? Doctrin applies a concept of negligence without explaining what that entails. 'The Canengusian Connection' can thus alert students to the need to question what judges mean by their use of particular terminology.

In contrast, Mill provides a definition of 'negligence' which asks whether 'it would have been cheaper for the defendant to have avoided the accident than to make good the expected losses'.⁷⁴ This definition is purely economic, weighing up the financial cost of the precautions (repairing the headlight, \$250) against the probability of the accident (0.001) multiplied by the cost of the accident (\$1million). On this basis, Allan was negligent because he could have avoided an expected loss of \$1000 by spending \$250. In further contrast, Wright refuses to judge Allan's conduct at all, preferring instead the

⁷² *Caparo Industries v Dickman plc* [1990] 2 AC 605, *per* Lord Bridge. See also, J Steele, 'Scepticism and the Law of Negligence' (1993) 52 *CLJ* 437.

⁷³ Above n 1, 72.

⁷⁴ Above, n 1, 83.

definition that ‘fault amounts to an interference *per se*’. On this view, somebody is negligent if they cause harm. Wright therefore seems to adhere to a strict-liability model of tort liability. Yet Wright still attaches liability to the failure to repair the headlight, rather than to the mere act of driving, so without acknowledging it he is making the judgment that it is Allan’s negligent (undefined concept) conduct that sets in motion the chain of events that leads to Derek’s injury. We can contrast this with the French system of motor accident compensation which provides that where the victim is injured in an accident involving a motor vehicle, the driver or guardian of the vehicle is responsible.⁷⁵ Indeed where the victim was another driver whose conduct was faulty, as Derek was in this instance, Allan would only escape liability if Derek was the sole cause of the accident. This is obviously a strict liability argument so it is of limited use in understanding the meaning of ‘negligence’. However, Wright’s argument that Canengus’s fault-based liability regime ought to take account of the human as we all as financial costs of accidents provides support for the conclusion that ‘negligence is a term that has no inherent meaning.’⁷⁶

Conclusions

This essay has argued for a stimulating and rigorous study of tort law and has considered (by reference to practical experience in Leicester) how ‘The Canengusian Connection’ can assist in accomplishing this goal. Only rarely, will students encounter in the case law frank judicial discussion of the theoretical foundations of negligence law of the sort that we see on display in ‘The Canengusian Connection’. In cases where judges speak with the frankness on display in Canengus, their decisions provide, like the essay we have been examining, a valuable pedagogic resource. One such case is *White v Chief Constable of South Yorkshire Police*, where theoretical considerations (concerning, *inter alia*, corrective and distributive justice) divided the court.⁷⁷ The understanding of corrective justice and other theories acquired from ‘The Canengusian Connection’ should assist students to recognise the corrective justice-based concerns of Lord Goff in *White*,⁷⁸ critically to assess the validity of the policy arguments surrounding psychiatric illness and

⁷⁵ Above n 25.

⁷⁶ Above, n 1, 87.

⁷⁷ [1999] 2 AC 455. Lords Steyn (at 495) and Hoffmann (at 510) appealed to distributive justice and the injustice that would exist if the police claimants had succeeded while the claims of bereaved relatives had failed; Lord Steyn further noted that negligence is an ‘imperfect system of justice’ (at 491) where corrective justice would necessarily be limited by the distributive need to treat like cases alike.

⁷⁸ *Ibid*, 488.

rescue, and to challenge Lord Hoffmann's reliance on distributive justice and what the ordinary person would think fair between classes of claimants.⁷⁹

The approach to the delivery of a tort module we have examined shows that 'The Canengusian Connection' has a value that goes beyond enhancing students' understanding of, and ability to recognise, the various justificatory theories of tort law. Its incorporation into the teaching of a tort module can help academics to teach process as well as knowledge of legal sources.⁸⁰ Where this happens, students will find themselves in an environment where the onus is on relating particular doctrines (on which they tend to focus) to the underlying theories that shape, among other things, fault-based and strict liability regimes.⁸¹ Moreover, the understanding and skills gained from the use of 'The Canengusian Connection' will aid them to develop a coherent overview of negligence law and other branches of tort rather than seeing them as no more than the sum of their doctrinal parts. It is to be hoped that this may also influence students' approach to law and the contexts in which it is embedded: that instead of seeing particular areas of law in isolation they will see the importance and value of understanding law as one entity that is intertwined with, *inter alia*, politics, economics, morality, sociology and history.

⁷⁹ *Ibid*, 510.

⁸⁰ Above n 70.

⁸¹ The widespread tendency among undergraduates (particularly those new to the study of law) to focus on legal sources may reflect not just a desire for certainty but also the emphasis in Britain's strongly positivist legal culture on the law as 'laid down'. See P.S. Atiyah and R. Summers, *Form and Substance in Anglo-American Law* (Oxford, Clarendon Press, 1987), 258 and 397.