

# **The Dissociation of Notions as a Tool for Justification: A study on practical reasoning in common law decisions**

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As an instance of the typical interaction between general argumentation theory and judicial argumentation practice, this paper uses the dissociation of notions, a concept elaborated by the former, possibly as from observations on the latter, to reexamine two well-known common law cases, in which the judges justify an interpretation grounded on the spirit of the law as opposed to a narrow interpretation of precedents. The author compares two current rival theoretical perspectives on the dissociation of notions. The first is inherited from Aristotle's *Sophistical Refutations* and the second from Aristotle's *Rhetoric*. It is argued that choosing Aristotle's *Rhetoric* as a standpoint offers a better insight into the rationality of common law decisions. The two cases are *Donoghue v. Stevenson* (1932), in which moral liability and legal liability are dissociated, and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963), in which apparent logic and deep logic are distinguished.

*Keywords:* rhetoric, common law, dissociation of notions, Aristotle, Perelman, rationality

## **1 Introduction**

General argumentation theories have often been developed as from the study of legal or, more specifically, judicial argumentation: the latter inspired Toulmin's Model (Toulmin, 1964, pp. 7-8) and, as Kennedy puts it, "it was the needs of the democratic law courts in Greece that created the discipline of rhetoric as taught and practiced in the West" (Kennedy, 1998, p. 208). Likewise, Perelman and Olbrechts-Tyteca

(1969 [1958]) defined several of their concepts, as from an analysis of legal argumentation. This paper examines one of those concepts, the dissociation of notions, and argues its relevance for the study of judicial argumentation.

It has often been noted that, at some stage of their argumentation, judges reflect on what the law “ought to be” instead of setting out what the law is (Stevens, 1971, Symmons, 1971, Smith & Burns, 1983, Weaver, 1985). It is argued here that, in *Donoghue v. Stevenson* (1932) and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963), Lord Atkin and Lord Delvin, respectively, use the dissociation of notions to depart from the letter of precedents and to uphold what they believe should be the law.

The purpose of this article is not only to show that the concept of the dissociation of notions is descriptively useful for case law analysis. It is also to participate and take a stand in the debates within the theory of argumentation on the standard of argumentative clarity and within the theory of law on rationality. Concerning in particular the dissociation of notions, there are two rival approaches: a normative, rationalistic approach, derived from Aristotle’s *Sophistical Refutations*, which imposes a standard of clarity on the use of the technique, and a rhetorical approach, inherited from Aristotle’s *Rhetoric*, which considers that the standard of clarity obscures the very purpose of the technique.

The paper is divided into two parts. I shall first present and justify the theoretical framework from which I shall study the dissociation of notions. In the process, I shall explain the idea of a necessary link between rationality and rhetoric in common law argumentation. I shall then turn to my case studies.

## **2 Theoretical framework**

The dissociation of notions can be studied from different theoretical perspectives, engaging different epistemological viewpoints. After briefly presenting the concept of dissociation, I will turn to the theoretical debate.

## 2.1 The concept of dissociation

First of all, as it is argued by Perelman & Olbrechts-Tyteca (1969 [1958], p. 412) the dissociation of notions is an argumentative technique that concerns the premises of argumentation: “The dissociation of notions brings about a more or less profound change in the conceptual data that are used as the basis of argument”. With the use of dissociation, an orator will redefine the standpoint of argumentation by changing the hierarchy of values associated with a given notion.

Secondly, the authors present the need for an orator to dissociate a notion as “always prompted by the desire to remove an incompatibility arising out of the confrontation of one proposition with others, whether one is dealing with norms, facts or truth” (Perelman & Olbrechts-Tyteca, 1969 [1958], p. 413). A telling example of this technique can be found in Barack Obama’s speech<sup>1</sup>, when receiving the Noble Peace Prize. He pointed out the ambiguity about receiving the award while being “Commander-in-Chief of the military of a nation in the midst of two wars”. Then, he dissociated between some aspects of war that “do have a role to play in preserving the peace” and some other aspects “that promise(s) human tragedy”. In other words, the notion of war, which is, in the context of a celebration of peace, consensually negatively valued, is dissociated between just and unjust aspects. In doing so, Obama can temporarily solve the incompatibility of being the head of a state engaged in wars while receiving Nobel Peace Prize.

The third and last element I would like to borrow from Perelman and Olbrechts-Tyteca concerns the argumentative effects of the dissociation of notions (1969 [1958], p. 415): “once the concepts have been dissociated and restructured, compromise tends to appear as the inescapable solution”. This reveals an interesting aspect of dissociation: it not only redefines the terms of the discussion, it also supports a representation of reality in accordance with an orator’s argumentative purpose. It is worth stressing on this point because the issue of the persuasiveness of the dissociation of notions is at the heart of a controversy between specialists of argumentation. I will now argue that both positions in this debate are inherited from Aristotle’s work.

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1 <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>

## 2.2 Studying dissociation

I now turn to the different perspectives from which the dissociation of notions can be studied. I will present two theoretical frameworks, both having their roots in Aristotle. Indeed, it can be argued that Aristotle followed two distinct paths in the study of argumentation. The first one is illustrated by the *Sophistical Refutations*. In this work, Aristotle was concerned with the identification of fallacies (i.e. arguments that appear to be valid while not being genuinely valid). In his *Rhetoric*, Aristotle chose a different perspective. Indeed, he defined his work as an inquiry “to determine, in each case, the available means of persuasion” (Rhet., I, 2, 1356a).

Following Kock (2009), I would like to argue that the difference between those two distinct paths for the study of argumentation is better understood if one takes into account the respective fields of the two surveys conducted by Aristotle. In *Sophistical Refutations*, Aristotle was concerned with dialectical discussion, and an ideal of philosophical inquiry, which involved a clarification of the arguers’ standpoints. In his *Rhetoric*, Aristotle was rather concerned with the functioning of institutions: celebrating and revivifying common values (epideictic genre), discussing and deciding policy guidelines (deliberative genre) and implementing the law (forensic genre). Considering this, the evaluation of an argumentative technique has to be balanced with the issue of its suitability for specific institutional goals. In the field of forensic argumentation, an argument offering an efficient justification of a legal decision can be said to be relevant. The challenge is that the efficiency of an argumentative technique cannot necessarily be assessed in terms of validity.

I will now argue that the duality in Aristotle’s work is still relevant to understand the way current argumentative theories study the dissociation of notions. Notably, the dissociation of notions has been studied by Agnes van Rees, in a comprehensive book published in 2009, in the light of “a normative ideal of rational resolution of conflicts of opinion” (van Rees, 2009, p. 93). Such a theoretical standpoint appears to be close to Aristotle’s purpose in his *Sophistical Refutations*. Indeed, the main question Agnes van Rees tries to answer is: “whether and when dissociation is a sound argumentative technique” (van Rees, 2009,

p. 94). In the last section of her book, she gives her conception of a sound dissociation of notions:

As long as the dissociation is put up for discussion and, if not accepted at first hand, is conclusively defended by showing that the distinction not only can be made, but must be made for reasons of greater conceptual clarity, there is no problem. Then dissociation can contribute to creating clarity about standpoints, to generating shared starting-points for presenting and attacking arguments, and to ensuring that the conclusions drawn from the discussion are optimally precise, while at the same time creating a position for the speaker that is rhetorically advantageous. (van Rees, 2009, p. 121)

From this perspective, dissociation is considered as a useful argumentative technique if it aims at creating a “greater conceptual clarity” and as far as it leads to conclusions that are “optimally precise”. I would like to argue that such a normative approach to dissociation (while it may be useful in the context of philosophical debate) is of little help when trying to seize the complexity of argumentation in common law decisions.

In order to understand the limits of a normative approach as far as legal argumentation is concerned, we will have to consider the situation of a judge in higher judicial institutions (for example a judge of the former House of Lords or the Supreme Court that has replaced it). Such a judge must decide cases that have found no resolution in the lower courts. Therefore, two hypotheses emerge: (1) The absence of resolution of cases is due to an incomplete knowledge of the law by the judges of the lower courts or to the limits of their reasoning abilities; (2) The absence of resolution is due to the fact that, in some cases, there are no certainties to be found. Choosing this second hypothesis might require one to abandon the idea that the usefulness of an argumentative technique is related to its capacity to bring more clarity or to lead to conclusions that are optimally precise.

It is the reason why, in this paper, I will rather embrace the theoretical perspective inspired by Aristotle’s *Rhetoric*, that is, an inquiry into the means of persuasion in relation with the functioning of institutions. This was Chaïm Perleman’s view on argumentation.

Throughout his work, Perelman underlined the limits of formal logic when the resolution of practical problems in the institutional sphere is concerned. If we agree that the decisions of judges have to do with the resolution of practical problems, then their decisions may not be entirely justified in logical terms and even in philosophical terms. In this context, I shall argue that the dissociation of notions is one of the tools that a judge can use in order to justify his/her decision while the principle on which it is based cannot be wholly expressed. Following the theoretical approach developed by Danblon (2002, 2012a), I will try to show that the study of such an argumentative technique gives an insight into the rationality of human decisions in circumstances where there are no certainties to be found.

### 3 Case studies

#### 3.1 *Donoghue v. Stevenson*<sup>2</sup>: moral liability/ legal liability

The first example I should like to study is an instance of dissociation between moral liability and legal liability in *Donoghue v. Stevenson*. This case was about a woman who having been offered a drink, drank it and fell ill, because there was, allegedly, a decomposed snail in the bottle. The question the judges had to answer was whether in the absence of a contract of sale, the manufacturer owed the consumer a duty to make sure that no elements within their product might be harmful. The House of Lords gave a positive answer to this question. This decision was of great importance because, as a consequence, “the foundations of liability in the law of negligence have shifted from that of a negligent causing of harm to a duty to prevent harm” (J.C. Smith and Peter Burns, 1983).

The dissociation I shall now study comes from Lord Atkin’s judgment. It may be argued that this dissociation originates from a feeling of inconsistency between closely following precedents and the feeling of justice. Indeed, Lord Buckmaster interpreted the precedents as requiring the appeal to be dismissed: “with the exception of *George v. Skivington*, no case directly involving the principle has ever succeeded in the Courts, and were it well known and accepted much of

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<sup>2</sup> *Donoghue v Stevenson* [1932] UKHL 100: <http://www.bailii.org/cases/UKHL/1932/100.html>

the discussion of the earlier cases would have been waste of time". In Lord Atkin's view, a narrow interpretation of precedents was contrary to the sense of justice: "My Lords, I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong".

But, at the same time, Lord Atkin could not reshape the legal scope of the notion of liability and, therefore, had to present his judgment as if it were nothing but an application of a general principle contained in precedents: "At present I content myself with pointing out that in English law there must be and is some general conception of relations, giving rise to a duty of care, of which the particular cases found in the books are but instances".

The problem is that the "general conception of relations" on which Lord Atkin sought to base his judgment is not a notion that can be clearly identified nor demonstrated. This is what, in my opinion, explains the use of the following dissociation:

The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa" is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

In his statement, Lord Atkin dissociates between, on the one hand, an ethical level in which the liability for negligence is "based upon a general public sentiment of moral wrongdoing for which the offender must pay" and, on the other hand, the practical world, in which acts or omissions, even though they may be morally reprehensible, cannot "be treated so as to give right to every person injured by them to demand relief". In other words, by the means of this dissociation, Lord Atkin reasserts the distinction between a conception of liability that has to do with morality and a legal conception of liability. On this ground, Lord Atkin can present a pioneering interpretation of the liability for

negligence (i.e. the “neighbour principle”<sup>3</sup>) as an implementation of a legal definition of negligence.

However the validity of the distinction between the field of law and the field of ethics would be hard to demonstrate, especially in this case. Indeed, based on the remarks quoted above, it can be claimed that the judge’s decision was in fact guided by an ethical feeling. In order to solve this paradox, I would therefore argue that the dissociation entails a “fiction”. Following Perelman (1976, pp. 63-65), I do not use the term “fiction” as a misrepresentation of reality but as a manifestation of the dilemma faced by the judge: he does not have the ability to modify the law and, at the same time, he feels that strictly following it would lead him to take an unjust decision.

The operation of dissociation in this case could also be understood using the concept of discursive evidence, that is, a justification relying on the speaker’s rhetorical skills. Nevertheless, from a normative perspective (i.e. a research of criteria to assess the validity of arguments), discursive evidence might be perceived as a weak justification. This is notably the opinion of Rettig (1990, p. 67): “discursive forms of evidence are less stable and less credible than either scientific or legal constructions”. But, in our case, discursive evidence has to be related with the need to solve the following problem: the judge’s decision has to be justified while the principles on which it is based cannot be wholly expressed. Following Danblon (2012b), I would argue that such a paradox reveals an inversion of the traditional perspective on rationality (i.e. a conception of rationality according to which *effability*<sup>4</sup> is a criterion of validity). Now, the point is not that Atkin’s justification is ineffable: the point is rather that it would be useless to express it. Indeed, notions such as “the spirit of the law” or “the principles of common law” would appear as empty concepts if they were just mentioned and not experienced. I would therefore argue that the actual criterion of the rationality of Atkin’s decision is his ability to dissociate between the letter and the spirit of

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3 Later in his judgement, Lord Atkin gives a legal definition of liability by distinguishing it from the Christian duty to love your neighbour “The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer’s question ‘Who is my neighbour?’ receives a restricted reply.”

4 According to this concept, any rational idea must be “effable” (i.e. expressible) in at least one proposition in natural language. See Dominicy (1990, pp. 751-753).

the law. In this sense, the use of the dissociation of notions appears to be a relevant way to “justify” a decision relying on ethical evidence.

### 3.2 *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>5</sup>: apparent logic/ deep logic

The second case of dissociation I shall now study concerns the notion of logic in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. In this case, the Appellants, advertising agents, questioned the Respondents, merchant bankers, about the creditworthiness of another firm (Easipower Limited) they wanted to do business with. The bankers assured the Appellants of Easipower’s creditworthiness. Relying on this information, the Appellants started doing business with Easipower but this firm went bankrupt. The problem the judges had to answer was whether the bank could be held responsible for the financial loss related to the information they had given.

I shall here focus on one of the arguments for dismissing the appeal put forward by Mr Foster, counsel for the Respondents, and its refutation by Lord Delvin. According to Mr Foster, a plaintiff cannot recover from financial loss caused by a negligent misstatement unless he can show that the maker of the statement was under a special duty to him to be careful. This special duty should, according to Mr Foster, fall under one of three categories: it must be contractual; it must be fiduciary; or it must arise from a relationship of proximity and the financial loss must flow from physical damage done to the person or the property of the plaintiff. Lord Delvin, in his judgment, rejects the idea that there should be an exhaustive list of situations offering a ground for legal action. His point relies on the dissociation between an “apparent logic” that may lead to an exhaustive definition of the causes for action and a “deep logic”, understood as the foundation of the system of common law.

I shall explain why I think that the law, if settled as Mr. Foster says it is, would be defective. As well as being defective in the sense that it would leave a man without a remedy where he ought to have one and where it is well within the scope of the law to give him one, it would also be profoundly illogical. The common

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<sup>5</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] UKHL 4: <http://www.bailii.org/uk/cases/UKHL/1963/4.html>

law is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not got logic at the root of it.

In the first part of his statement, Lord Devlin accuses Mr. Foster of practicing illogical reasoning. His accusation is supported by a dissociation of the notion of logic. This notion is separated into apparent logic (logic “on the surface”) and deep logic (the logic at the roots of the system). This dissociation relies on an underlying opposition between the expert, who strictly follows the letter of precedents, and the wise man, who can understand the spirit of the common law.

It is, however, impossible to demonstrate that there is a deep logic at the root of the system. The idea is therefore stated with the use of dissociation that creates discursive evidence. As discussed above, I would not define this notion as a mean to persuade in the absence of a more valid argument. I would rather argue that the persuasiveness of dissociation could be studied as an indication of the complementarity between rationality and rhetoric, which is required by the practice of common law. Indeed, it can be argued that the need to dissociate between an apparent logic and a deep logic originates in the feeling by the judge that a fair decision should depart from a narrow interpretation of the law.

In other words, the use of dissociation may be seen as a way for the judge to turn an ethical feeling into a legal justification. This is, in my view, particularly clear in the following extract: “As well as being defective in the sense that it would leave a man without a remedy where he ought to have one and where it is well within the scope of the law to give him one, it would also be profoundly illogical”. By dissociating between an apparent and a deep logic the judge can interpret the law as if its fairness was a condition of its legal validity.

The two cases of dissociations we have studied have in common that they are not merely used to identify the more precise meaning of a notion. Indeed, the use of dissociations seems to be related to a need to justify an interpretation that is based on what could be called the spirit of the common law as opposed to narrower interpretations of

precedents. But since the spirit of the law is a confused notion<sup>6</sup> (i.e. a context-dependent notion that changes depending on socio-historical developments), the rhetorical efficiency of the justification becomes a criterion of its relevance. With this in mind, I would like to conclude on the question of the rationality of common law judgement.

#### 4 Conclusion

The question of the rationality of common law decision has been at the heart of a debate between great theorists and practitioners of common law such as Thomas Hobbes, Edward Coke and Matthew Hale.

As explained by Harold Berman (1994) in his comprehensive article on the origins of historical jurisprudence, this debate has to be related to the paradoxical identity of common law that can be summed up as an unbroken continuity despite change. Indeed, the problem is to justify the adaptation of common law to continuously changing historical and social contexts while the solution of new cases is supposed to be found in more or less remote precedents. Thomas Hobbes gave a radical answer to this theoretical problem stating that justice does not originate in reason but in the will of the sovereign. For their part, Edward Coke and, later, Matthew Hale, addressed the issue of the identity of common law by questioning the notion of reason. Hale, in his *Reflections on Hobbes' Dialogue of the Law*, distinguishes between two sides of this notion: on the one side, the faculty of reason, which refers to an ability, common to all men, to connect cause and effect, to understand phenomena and, on the other side, artificial reason, which is the result of the application of the faculty of reason to a particular domain. This artificial reason can be trained and improved by habituating, exercising and accustoming to a particular practice<sup>7</sup>. In making such a distinction, Hale can justify his claim that common law judgements may be grounded on rationality (and, therefore, not the

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6 See Perelman (1980). The Use and Abuse of Confused Notions in *Justice, Law and Argument*.

7 "And upon all this that have been said it appears that men are not born common lawyers, neither can the bare exercise of the faculty of reason give a man a sufficient knowledge of it, but it must be gained by the habituating and accustoming and exercising that faculty by reading, study and observation to give a man a complete knowledge thereof", Matthew Hall, quoted by Berman (1994).

product of the sole will of the judge) while not being fully understood by common man.

This also explains, from my point of view, that such judgements must be presented using rhetorical resources to be seen as acceptable. This is the necessary complementarity I wanted to show between rationality and rhetorical resources required by the practice of law.

## References

- Aristotle: Barnes, J. (ed.), (1984). *The Complete Works of Aristotle: the Revised Oxford Translation*, Princeton, Princeton University Press.
- Berman, H. J. (1994). The Origins of Historical Jurisprudence, *The Yale Law Journal*, 103(7), 1651-1738.
- Danblon, E. (2012a, to be published). *L'homme rhétorique*, Paris, Cerf.
- Danblon, E. (2012b, forthcoming). Rhétorique et persuasion. Réflexions sur la raison pratique, in Roque, G. (ed.).
- Danblon, E. (2002). *Rhétorique et rationalité*, Bruxelles, Editions de l'Université de Bruxelles.
- Dominicy, M. (1990). Effabilité, in Sylvain Auroux (ed.), *Encyclopédie philosophique universelle*, vol. 2: *les notions philosophiques (751-753)*, Paris : PUF.
- Kennedy, G.A. (1999). *Comparative Rhetoric. An Historical and Cross-Cultural Introduction*, Oxford, Oxford University Press.
- Kock, C. (2009). Choice is Not True or False: The Domain of Rhetorical Argumentation, *Argumentation*, 23, 61-80.
- Legrand, P. & Samuel, G. (2008). *Introduction au Common Law*, Paris, La Découverte.
- Perelman, C. & Olbrechts-Tyteca, L. (1969[1958]). *The New Rhetoric*, J. Wilkinson & P. Weaver (trans.), London, University of Notre Dame.
- Perelman, C. (1980). *Justice, Law and Argument: Essays on Moral and Legal Reasoning*, London, D.Reidel Publishing company.
- Perelman, C. (1976). *Logique juridique*, Paris, Dalloz.
- Rettig, S. (1990). On Discursive Evidence. *Annals of the New York Academy of Sciences*, vol. 606: *The Language Scientist As Expert in Legal Setting*, 65-71.
- Schiappa, E. (1993). Arguing About Definitions, *Argumentation*, 7,

403-417.

- Smith, J. C. & Burns, P., (1983). Donoghue v. Stevenson: The Not so Golden Anniversary, *The Modern Law Review*, 46(2), 147-163.
- Stevens, R. (1964). Hedley Byrne v. Heller: Judicial Creativity and Doctrinal Possibility, *The Modern Law Review*, 27(2), 121-166.
- Symons, C.R. (1971). The Duty of Care in Negligence: Recently Expressed Policy Elements, *The Modern Law Review*, 34, 394-409.
- Tindale, C. (2006). Constrained Maneuvering: Rhetoric as a Rational Enterprise, *Argumentation*, 22, 447-466.
- Toulmin, S. (1964). *The Use of Argument*, Cambridge, Cambridge University Press.
- van Rees, A. (2009). *Dissociation in Argumentative Discussions: A Pragma-Dialectical Perspective*, Springer, Argumentation Library, vol. 13.
- Weaver, M. (1985). Is a General Theory of Adjudication Possible? The Example of the Principe/Policy Distinction, *The Modern Law Review*, 48, 613-643.

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