Doctoring Doctrine: treating the under-informing case

Max Weaver, Visiting Professor, Division of Law, London South Bank University

**Abstract**

Because the common law faces conundrumic demands — to be both in touch with a changing society and predictable — the proper division of law-making labour between judges and legislature is controversial. It is unrealistic to: rely on neat divisions between principle (for judges) and consequentialist policy or pragmatism (for Parliament); or to consider analogical reasoning as blind to policy. *Montgomery*, used as a case study, invokes autonomy as a principle (not derived analogically from previous case law) to justify the informed consent doctrine.

**Key Words**

Autonomy, principle, policy, pragmatism, analogical reasoning, dignity

# Introduction

In 1921, Cardozo J wrote,

‘I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but has had a hand in the making.’[[1]](#footnote-1)

However, some five decades later in September 1971, Lord Reid felt it appropriate to remind the then Society of Public Teachers of Law that the declaratory theory of precedent is a ‘fairy tale’[[2]](#footnote-2) — the only questions about judicial law-making have been ‘how?’ and ‘when?’ do — and should — judges make law. Yet, almost a century after Cardozo wrote, those questions persist.

This paper claims a philosophical privilege — one denied the judges, who have no option but to decide the cases in front of them — to explore (rather than resolve) how judicial law-making copes with the seemingly incompatible demands that the common law: (a) remains appropriate to contemporary mores and conditions; whilst (b) guaranteeing ‘rule of law’ certainty and predictability. The underlying themes are therefore:

1. the proper division of legislative labour — rather than a separation of legislative and adjudicative powers — between legislature and judiciary; and
2. the limits on legitimate judicial legislation.

The democratically elected legislature has raised no comprehensive objection to judge-made law. However, there are partial objections. Whilst gentle incremental massaging of common law rules may be uncontroversially legitimate, judges should not be seen to be ‘out of touch’ with reality and contemporary conditions. Furthermore, they must not ‘go too far’. This ‘constitutional’ conundrum — how to have our cake and eat it — is illustrated by these contrasting quotations from two successive Presidents of the UK Supreme Court.

‘[T]here is no getting away from the fact that there are real risks in developing principles in the field of torts, as they may not infrequently operate to mislead rather than to help… [T]here is a strong argument that, in some areas at least, it may be more helpful to abandon principle and to take a stand on policy…. [P]olicy may often be more reliable [than principle] in the sense that it is less prone to founder on exceptions or turn out to be unsound.’ (Lord Neuberger)[[3]](#footnote-3)

‘Generally speaking, the incremental approach from established principle is to be preferred to imposing the court’s own choices which are clearly based upon practical or policy considerations rather than on principle.’ (Lady Hale)[[4]](#footnote-4)

This paper adopts a sceptical approach to dogmatic doctrinal categorisations and proceeds in the Lockean belief that

[There are] ‘some truths which established prejudice, or the abstractedness of the ideas themselves, might render difficult. Some objects had need be turned on every side….[People] must think and know for themselves…..[P]erhaps we should make greater progress in the discovery of rational and contemplative knowledge, if we *sought* it in the fountain, *in the consideration of things themselves*; and made use rather of our own thoughts than other men's to find it.’[[5]](#footnote-5)

*Montgomery* v. *Lanarkshire Health Board*[[6]](#footnote-6) is taken as a useful case study or ‘thought experiment.’ Briefly, *Montgomery* concerns a failure to disclose a risk — low in terms of probability but high in terms of severity — that Mrs Montgomery’s child might suffer severe brain damage during a ‘normal’ rather than caesarean birth. Though rated only <0.1% in terms of probability,[[7]](#footnote-7) that risk materialised and resulted in cerebral palsy affecting all four limbs and Erb’s Palsy paralysing one arm.[[8]](#footnote-8) The ‘medical malpractice’ claim that the birth was badly managed — when judged by standards of a responsible body of medical opinion (the *Bolam[[9]](#footnote-9)* test) — failed in the lower courts. Despite cardiotocographic signs of foetal distress, the mother’s small stature and diabetic condition and the above average size of the foetus, Dr McLellan judged it reasonable to proceed with a vaginal birth and to rely on recognised non-surgical strategies to manage the risks of shoulder dystocia occurring and harming mother or child.[[10]](#footnote-10) A ‘non-disclosure’ claim — that the mother should have been told of the risk of shoulder dystocia and of harm to her child and been permitted to elect a caesarean section — also failed in the lower courts[[11]](#footnote-11) but succeeded in the Supreme Court. The Supreme Court decided that the test to be applied to non-disclosures should not be the *Bolam* test[[12]](#footnote-12) but one based on the patient’s *right* to decide for herself what risks to take and, consequently, to sufficient information on which to make that decision.

‘The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.’ [[13]](#footnote-13)

By judicial means and without reference to Parliament or the Law Commission, patients’ rights have been expanded and a significant shift — a paradigm shift — in common law principle has occurred and been justified by the invocation of ‘autonomy’ — conceived as the right to take, effectuate and be responsible for deliberate, appropriately informed and self-21deliberated decisions about one’s own affairs.

## The measurement problem

We cannot evaluate this innovation as we might a clinical trial — with precise measurements of patients’ performance abilities before, during and after the administration of a series of injections. In common law law-making, there is always some fluidity. Thus, after a series of cases that fixed ‘deep pocket’ enterprises with responsibility for torts committed by those whom they engaged to facilitate the enterprises or for whom the enterprises provided opportunities — from *Lister* v. *Hesley Hall Ltd*,[[14]](#footnote-14) through *Various Claimants* v. *Catholic Child Welfare Society*,[[15]](#footnote-15) *Woodland* v. *Swimming Teachers Association,*[[16]](#footnote-16) *Mohamud* v. *WM Morrison Supermarkets* plc,[[17]](#footnote-17) *Cox* v. *Ministry of Justice*[[18]](#footnote-18) to *Armes* v. *Nottinghamshire County Council*[[19]](#footnote-19) — we thought we knew the direction of travel and had some sense of the power of the momentum for change. Lord Phillips had announced in the second of these cases that ‘the law of vicarious liability is on the move.’[[20]](#footnote-20) But we now find — with two recent decisions of the Supreme Court, *WM Morrison Supermarkets plc* v. *Various Claimants[[21]](#footnote-21)* and *Barclays Bank* v. *Various Claimants*[[22]](#footnote-22) — that the momentum has dissipated and direction seems to have changed.

We look in vain for metrics of position, speed, amplitude, seriousness that might facilitate reliable prediction of change in the common law. Holmes’s certainty-loving friend — ‘the bad man’ — has some pretty difficult times.[[23]](#footnote-23) Absent workable metrics, we look at modes — incremental, principle-bound, principle-revising — and use them to make (inevitably subjective) assessments and predictions. Thus, when we look at *Montgomery*, we might consider plausible any or all the following, inexact, somewhat contradictory assessments or characterisations of the case and its effects on the state of the common law.

1. A belated consummation as a ‘principle’ of incremental developments *within* the wider common law.[[24]](#footnote-24)
2. A pragmatic alignment of the common law with changed public expectations.
3. An attempt to render medical professionals more accountable.
4. A means of securing compensation for a child seriously incapacitated through no fault of its own.[[25]](#footnote-25)
5. The alignment of the law with a major principle of moral philosophy that is *external* to the law, *viz.* autonomy.
6. A dangerous undermining of professional status.[[26]](#footnote-26)

Bereft of precise measurement tools or litmus tests, we contend with a tangled web of incommensurable arguments of legal validity (or ‘pedigree’), consequences and moral and political philosophy. Nevertheless, this paper argues that, *faute de mieux*, some clarity can be found by exploring the modes of justification and, especially, the nature of legal principle and its relationship to analogical reasoning.

## Etymological clues

One can accept Wittgenstein’s view that

‘[p]hilosophy may in no way interfere with the actual use of language; it can in the end only describe it. For it cannot give it any foundation either. It leaves everything as it is.’[[27]](#footnote-27)

and still find in etymological evidence useful but inconclusive pointers to use-meaning.[[28]](#footnote-28) Here are the roots[[29]](#footnote-29) of some of the words that feature in debates about our conundrum.

**Doctrine**: Latin, *doctrina,* ‘a teaching, body of teachings, learning'.

**Doctor**:’ Latin, 'teacher', an agent nounfrom *docere* 'to show, teach, cause to know'.

**Principle**: Latin, *principium*, 'a beginning, commencement, origin,first part'.

**Policy**: Greek, *politeia,* 'state, administration, government, citizenship'. 'Plan of action, way of management', first recorded ~1400.

**Pragmatic**: Greek, ‘fit for business, active, business-like; systematic’.

There is a discernible difference in the ‘directions of travel’. ‘Doctrine’, ‘doctor ‘and ‘principle’ share a transitive, word-to-world quality. They purport to determine what *ought* to happen. Whereas ‘policy’ and ‘pragmatic’ seem more open to a world-to-word process by which the messy complexities of the world influence emerging plans or notions of ‘what works’. To give an example, if doctrine, doctor or principle hold that all life is sacred, then they absolutely forbid suicide and assisting in suicide. The *inherent* authority of the principle (as distinct from its *consequences* in the world) demands its application. By contrast, policy and pragmatism evoke a consequences-weighing process to determine what might be the right thing to do *all-things-considered*. Their authority is not inherent but derived from their consequences.

In her 2016 lecture to SLS, Lady Hale argued that

‘the judge does not have a ‘do-nothing’ option. He (*sic*) has to decide the case in front of him. So he has to do the best he can [by] deduc[ing] what the common law principles are and appl[ying] them to the situation.’[[30]](#footnote-30)

That implies a distinction between:

1. the *legislative* function of principle deduction — or definition — and adumbration; and
2. the *adjudicative* function of principle application.

That is to separate the two into sequential stages: first (i), then (ii).

The direction of travel of (i) and (ii) is word-to-world. However, in cases that make significant changes in the common law, the two stages are not readily separable. Furthermore, the direction of travel will sometimes be world-to-word. Something has happened on the world that demands a normative response that the established view of the case law does not provide. That view must be reworked — or replaced by something extraneous. Furthermore, the process cannot be reduced to logical deduction. It involves choices — some conscious and some sub-consciously motivated. Cardozo wrote of judges,

‘All their lives, forces which they do not recognise and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of “the total push and pressure of the cosmos,”[[31]](#footnote-31)(James) which, when reasons are nicely balanced, must determine where choice should fall.’[[32]](#footnote-32) (Cardozo, 12)

By framing a question in terms of ‘kind’ rather than ‘degree’, the rhetoric of principle distracts attention from the motivational complexities to which Cardozo refers.[[33]](#footnote-33) Sometimes the rhetoric of principle encourages judges to over-estimate the power that ‘legal principle’ has over them, or enables them to hide behind it.

At the level of justificatory rhetoric, the application of an established common law principle can be rendered tidier, more systematic, by way of *clarification*. Anomalies can be *rectified* by reference to the ‘given’ principle rather than to any consequentialist, world-to-word reasoning. But judges are not insulated from the underlying substantive elements. They will always be aware that one or other of the parties — and others in similar positions — will benefit from the ‘straightforward’ application of a principle or from the *identification* of an *anomaly* and its *rectification*. Inevitably, that will resonate with their sub-conscious minds.

# Casuistry and Principles

Although casuistry carries negative overtones of narrow-minded pernickety-ness, it is used here simply to refer to ‘the [process](https://www.yourdictionary.com/process) of [answering](https://www.yourdictionary.com/answering) [practical](https://www.yourdictionary.com/practical) questions via [interpretation](https://www.yourdictionary.com/interpretation) of [rules](https://www.yourdictionary.com/rules) or [cases](https://www.yourdictionary.com/cases) that [illustrate](https://www.yourdictionary.com/illustrate) such rules, especially in ethics.[[34]](#footnote-34) The emphasis is on ‘case’ in the second limb of that definition — not so much ‘apply to’ (*simpliciter*) as ‘test and derive (or diverge) from’. The common law requirement is to derive principles from the cases — complete with their consequences for the parties. That obligation of precedent is to follow-or-distinguish and, as Simon Lee points out, distinguishing ‘[o]nly allows judges to restrict the impact of earlier cases, not to expand them.’[[35]](#footnote-35) If convenient authority is not within reach of analogical reason, the common law may struggle to innovate.[[36]](#footnote-36)

Despite that limitation, casuistry imports some of the strengths that philosophers seek when using ‘thought experiments’[[37]](#footnote-37) and which Megarry J identified when he said that judicial reasoning is aided by

‘the purifying ordeal of skilled argument on the specific facts of a contested case.Argued law is tough law.’[[38]](#footnote-38)

Although that dictum points us towards the consequentialism of policy, it certainly does not exclude sometimes intricate arguments about common law principles as they might apply to the case in hand — and to other cases, actual or possible, that might be invoked.

The contesting context of a legal dispute can provoke a kind of reasoning that Hanno Sauer dubs ‘Type III’.[[39]](#footnote-39) Type I is the innate or learned intuitive reaction (roughly Daniel Kahneman’s System 1.[[40]](#footnote-40) Type II (roughly Kahneman’s System 2) is effortful reflection that has the potential to overrule a Type I conclusion, but is mostly used to dignify Type I conclusions in the way that a loyal press secretary might seek to justify a Trumpian nocturnal tweet.[[41]](#footnote-41) Sauer’s Type III (which has no clear analogue in Kahneman’s schema) refers to the processes that prompt us to engage in Type II effortful reflection and — rather than continue to indulge our confirmation bias[[42]](#footnote-42) — to start thinking really critically.

The challenge of choosing between opposing parties’ arguments has Type III potential, especially in the appellate courts where the hard work of fact-finding has been done elsewhere. Nonetheless, the earlier Type II justification will often survive. Not every judge would be as frank as Lord Denning MR was in *Lewis* v. *Averay.*

‘As I listened to the argument in this case, *I felt it wrong* that an innocent purchaser (who knew nothing of what passed between the seller and the rogue) should have his title depend on such refinements.’ [[43]](#footnote-43)

But it was that ‘felt wrongness’ that led Lord Denning to re-focus the law on mistake on ‘comparative fault’ rather than ‘mistaken identity’. The party who had purchased the car from the rogue was less at fault than was the original owner who had unreasonably (in his Lordship’s inevitably subjective view) taken a cheque from a rogue, who was masquerading as a TV star. With this paradigm shift, Lord Denning was able to justify treating some precedents differently and to jettison some others that did not fit with his new principle that

‘the fact that one party is mistaken as to the identity of the other does not mean that there is no contract, or that the contract is a nullity and void from the beginning. It only means that the contract is voidable, that is, liable to be set aside at the instance of the mistaken person, so long as he does so before third parties have in good faith acquired rights under it.’

## Cases of first impression

To aid analysis, imagine (albeit effortfully) a one-off case that comes before a judge in a society that has no recognised legislature. Imagine that there are no clear relevant customary expectations and that the case is genuinely one of first impression. Imagine also that the judge was chosen because of a reputation for impartiality, empathy and fair-mindedness that are transferable to novel cases, rather than for his or her charisma. The judge would have to decide the case without appeal to precedent and, presumably, without bias. Rules and analogies would be unavailable and intuitive consequentialist outcome preference would probably rule. Any reasons for the decision that the judge felt obliged to give would necessarily be consequentialist — or what we might now call ‘policy’. Any attempt by the judge to formulate a rule or principle would necessarily be a generalisation from that outcome preference.[[44]](#footnote-44)

## Successive disputes and rule-creating tendencies

More realistically, in a society in which there are recognised rules of adjudication (a class of Hart’s secondary rules) but no similarly recognised (Hartian primary) rules of behaviour,[[45]](#footnote-45) the *khadi* will seek to understand what is going on between the disputants and then make decision that is ‘just’ having regard to the judge’s understanding of social normality.[[46]](#footnote-46) And, when there are repetitious features in a succession of disputes, we can imagine two rule-creating forces[[47]](#footnote-47) at work, neither of which depends on there being a separate legislator.

### Zipf’s law

First and simplest, judges’ recognition of repetitions will tempt thoughts of ‘what I usually do in cases like this’. Even a *khadi* or palm tree judge will sometimes apply Zipf’s law — ‘the principle of least effort’.[[48]](#footnote-48) There can be progression from habit through normality (and *predictive* expectations) to normativity (and *normative* expectations).[[49]](#footnote-49)

### Categorisation

Secondly, we cannot cope without categories. As Barbara Tversky explains,

‘[P]eople like to categorise and even need to categorise; There are simply too many different things in the world.’ [Furthermore] ‘[c]ategories are so much easier than continua. They are so much simpler, there's so much less to be kept in mind. Distinct and different groups rather than many subtle gradations…. [T]hinking about subtle gradation along dimensions is much harder than lumping things into gross categories; there’s so much more that has to be considered and kept in mind.’ [[50]](#footnote-50)

We have neither the time nor the inclination to regularly unpack each category in search of subtle but potentially significant variations. Mostly we operate at a Goldilocks ‘basic level’ — 'dog’ rather than ‘cocker spaniel’ or ‘animal’ — ‘not too abstract, not too concrete’.[[51]](#footnote-51) But there are dangers. Jorge Luis Borges warns that

‘there is no classification of the Universe not being arbitrary and full of conjectures.’[[52]](#footnote-52)

In some instances, ‘what kind of dog (Pekinese or Pit-bull)?’ or ‘is a wolf a kind of dog?’ seem to matter. Sometimes a rule of thumb that reflects a bias[[53]](#footnote-53) or prejudice merits re-examination. The skill lies in judging when to pay attention to such questions. Sauer’s recent work is helpful here.[[54]](#footnote-54) He builds on the social intuitionism of Jonathan Haidt[[55]](#footnote-55) and others, who themselves built on Hume’s distinction between ‘reason’ and the ‘passions’ and Hume’s assertion that

‘Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.’[[56]](#footnote-56)

Or as Tversky puts it,

‘Emotion is part of every perception and every thought, and this cannot be forgotten’[[57]](#footnote-57) (Tversky, 122)

But, in rationalising *ex post* our biases, prejudices and hunches that suggest that to us that X rather than Y should win,[[58]](#footnote-58) we tend to make *categories*, within the limits of which the norm we have now articulated norm generally applies. Thus, we justify the norm to ourselves and often to others.

It follows that there is significant ambiguity in express justifications. It is difficult for the observer — and maybe for judges themselves — to distinguish:

* judicial ratiocination (the forming of judgments by reasoning logically, or analogically); from
* the Type II justifications of Type I intuitions[[59]](#footnote-59) that have come upon the judge whilst looking hard at a case and appreciating the consequences of deciding it one way or the other.

# Analogical reasoning and the formation of principles

Both Zipf’s law and categorisation entail some conception of ‘like cases’. That concept was evident in fourteenth century common law. In 1327, Scrope J noted that,

‘The King has commanded us that we do law and reason according to that which has been done in like case: wherefore consider whether there is any case like to this matter.’[[60]](#footnote-60)

How is it that, given a multitude of instances, ‘argued law is good law’[[61]](#footnote-61) that: (i) gives us some plan-facilitating and dispute-limiting predictability; (ii) spares us the agony of arguing every case as if it were a case of first impression; and (iii) ensures that most legal norms fit well enough with social expectations to function without too much friction and to endure? Can this decent comprehensiveness simply emerge unaided from a series of instances? As Cardozo put it,

‘[S]ome principles of selection there must be to guide [the judge] among all the potential judgments that compete for recognition. In the life of the mind as in life elsewhere, there is a tendency towards the reproduction of kind. Every judgment has a generative power. It begets in its own image.’[[62]](#footnote-62)

Straddling unreflective precedent-following and the sacred givenness of doctrine or principle, we have reasoning by analogy, a distinctive and integral feature of the common law. But how does it work? There are competing explanations.

1. Particularistic: Some, including Bruce Chapman, hold the view that

‘What justifies a particular decision on a given set of facts in adjudication is not some prior and independent normative rule that subsumes the facts (a relation between the general and the particular), but rather just a relation that the given facts bear to the facts of some earlier decision (a relation between two particulars).’[[63]](#footnote-63)

That does not necessitate applying a rule to a particular case. A rule (or principle) might be the product of the process but is not a precondition of the process.[[64]](#footnote-64)

1. Emptiness: Some dismiss analogy as having ‘no definite content or integrity.’[[65]](#footnote-65) To think otherwise is to ‘confuse the heuristics of discovery with the logic of justification’. Thus, instead of analogy there must be some rule or principle by which similarity or difference is identifiable and justifiable. Postema cites Ronald Dworkin’s assertion that ‘analogy is a way of stating a conclusion, not a way of reaching one...[T]heory must do all the real work.’[[66]](#footnote-66) In this model the theory is — in the way that judicial conceptions of the reasonable person are — the adjudicator’s construction.
2. Discovery: Others hold that analogy works by the adjudicator’s ‘discovery’ from a collection of cases (instances or examples) immanent principles or doctrines by which the morally and/or legally material similarities or differences between case A and case B can be identified. On this view, these principles exist prior to the analogical reasoning exercise.
3. Satisficing: In his subtle and convincing account of analogical reasoning, Gerald Postema explains that,

‘[i]f every… judgment [of similarity or difference] presupposed a rule to guide it, we would be caught in an infinite regress…[T]here cannot be a rule, a genuine guide for thought or action, unless at some point there is a nonrulish, albeit normatively responsible, exercise of judgment.’ [[67]](#footnote-67)

He warns that the conclusions of arguments have consequences that must be taken into account in evaluating the arguments. There is an important iterative aspect to the process and ‘Justification cannot with any plausibility be modelled as a strictly top-down matter’*.*[[68]](#footnote-68)

[T]he cases and relations among them exert an influence over the rules or principles that might be articulated to capture their significance, just as attempts to articulate the reasons in play in reasoning from one case to another can influence what we take the relevant similarities to be…[*I]n analogical reasoning in law, there is no absolute priority of cases to general propositions or vice versa.*’ [[69]](#footnote-69)

In Postema’s model, analogical reasoning is a dynamic and complex mode of argumentation.[[70]](#footnote-70) In the legal context, it is necessarily normative[[71]](#footnote-71) but it is notrule-dependent. It is ‘a species of pattern recognition’. Crucially, it is also context-dependent.[[72]](#footnote-72)

‘Analogy formation is not a matter of applying a rule to an instance but rather of fitting something into its place in an intelligible, sense-making context, like fitting a piece into a jigsaw puzzle.’….‘In sum, to grasp something as an example is to locate it in…a network and to appreciate its contribution to the dynamic movement occurring within the network.’…’[T]he context of comparables alerts the judge or lawyer (or student of law) to the pattern of significant facts in the case at hand.’[[73]](#footnote-73)

The pattern recognition process

‘is not linear, but cyclical and dynamic, involving proposals, evaluations, revision, and new proposals leading eventually (often instantaneously, of course) to some degree of equilibrium. *The jigsaw puzzle image, then, is misleading, for the pieces we fit into contexts of meaning are not wholly pre-cut, and neither are the places into which they must fit. Fitting and shaping involve mutual adjustment*.’[[74]](#footnote-74)

Postema’s dynamic and open model accounts for legal change in explanatory terms, but it does not guarantee accurate prediction of when and by how much the common law will change.

‘No formulation of a rule can hope to achieve anything more than a useful approximation, for some stretch of time, of the practical significance of the cases in view. Moreover, a thinker making use of any explicit formulation of a rule to decide a new issue must rely on the mastery of the same inferential network that the rule was meant to make explicit.’[[75]](#footnote-75)

His explanation of the process of analogical reasoning — and its aptitude for ‘reflective assessment’ that will sometimes cause revisions to the rules and principles that emerge from past analogical reasoning — goes long way to explaining and justifying judicial law-making and the concept of ‘legal principle’.

‘Analogical thinking in law is not anti-theoretical, but neither does it regard all case-based argument as reducible to construction and deployment of general justifying principle or theory. Each has a role to play. Each has its own sphere of operation; each depends in part on the other.’[[76]](#footnote-76)

It is difficult to imagine such subtlety in the processes and practices of politically pre-occupied legislatures.

# Intuitions

Cardozo’s final lecture covers both adherence to precedent and subconscious forces. Here’s his bridge between them

‘I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.’[[77]](#footnote-77)

It follows that — rather than marginalise them or pretend that they play no part in legal reasoning — we should pay rigorously critical attention to intuitions.

‘[I]ntuitions cast shade or sunlight over certain regions of intellectual space, inviting us to look further…. It’s a mistake to confuse the nature of a psychological state with the content of a sentence we happen to use in attempting to describe it. This is a familiar point in philosophy of mind…. *Conscious thought interprets the intuition in light of other beliefs* in a way that yields a propositional judgment.’[[78]](#footnote-78)

It also follows that we should be sceptical about Hart’s argument that there are clear central cases.

‘Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or “open texture”.’[[79]](#footnote-79)

That argument tends to push intuitive thinking out of the so-called ‘core’ into the margins or ‘penumbra’. But we should recognise that, as intuitions are often reflected in an apparent ‘core of certainty’, they are also likely play role in the social dynamics that sometimes produce shifts in the scope and/or nature of that ‘core’.

# Principle

Conceptions of ‘principle’ vary, much as do conceptions of ‘self’. Locke held that our capacity to remember ourselves and our actions establishes our continued identity.[[80]](#footnote-80) By contrast, a Theravada Buddhist might hold that there is no self (*anatta*) that possesses those forms, sensations, perceptions, mental formations or consciousness and that our egos are fetters and delusions. [[81]](#footnote-81)

Claims that principles exist independently of the circumstances of their application, evolution and articulation are vulnerable to the criticism that empirical inquiry is often needed to make sense of the principle.[[82]](#footnote-82) When deciding cases, judges are confronted with slices of real-world data that are impossible to ignore. They ‘can’t hive off semantic inquiry from inquiry into the nature of the world.’[[83]](#footnote-83)

In this inevitably fact-laden context, judges can:

1. accept a prior definition of the principle and apply it;
2. modify and apply the previously recognised principle;
3. re-define the principle and apply the re-defined versions; or
4. replace the principle and apply the replacement.

The last of these is unusual, but it is submitted that *Montgomery* is instantiates it.

## Lord Neuberger’s principle scepticism

In his Singapore lecture, Lord Neuberger argued that,

‘the notion that there are clear principles which can be applied with confidence is much more the exception than the rule.’ [[84]](#footnote-84)

Whilst that might exaggerate the uncertainty of the legal context for the day-to-day planning of affairs, allocations of risks via such arrangements as insurance, dispute resolution and litigation, Lord Neuberger analysed several UK tort law cases and concluded that demonstrate ‘a notable degree of disarray and a marked lack of reliable principle’. Furthermore, he provided a comprehensive list of reasons that principle cannot rule the common law roost. He summarised them thus:[[85]](#footnote-85)

1. [W]ell-established principles which, on analysis, are hard to justify, and that makes one wonder about the value of having principles.
2. [C]ases where apparently well-established principles are subsequently disapproved and changed, which many may think is worse than having no principles in the first place.
3. [S]upposedly fundamental principles which then turn out to be subject to significant exceptions, which do not so much prove the rule as call the reliability of the rule into question.
4. [P]rinciples which, while they are expressed as such by the courts, turn out, on analysis, to be so broadly expressed or so coarsely textured that they are, in truth, little, if anything, more than policy dressed up as principle.[[86]](#footnote-86)
5. [C]ases where the courts have grasped the nettle and accept that there is no clear principle and, depending on one’s view, frankly or shamelessly base their decisions on policy.

Lord Neuberger’s principle scepticism resonates with Postema’s explanation of the analogical reasoning from whence common law principles are supposed to emerge.

## The Separation of Powers

Turning now to the more constitutional aspect, we must address the argument — from democracy and the separation of powers — that the common law should take precautions to ensure that it does not give birth to new doctrines. Instead, it should just make sure that those doctrines to which it had given birth by the time that Parliament had become a fully-fledged democratic legislature are fed and watered and nurtured.

In the English Civil Wars (1642-1651) and Glorious Revolution (1688), it was not the separation of legislative and adjudicative powers but the balance of power between monarch and parliament that was at issue. By contrast, in the French Revolution (1789) — four decades after Montesquieu articulated the theory of the separation of separation of powers[[87]](#footnote-87) — judges and monarch alike were targets. Consequently, English law never underwent any formal separation that — in the manner of the civil law tradition — purported to confine the judiciary to adjudication. The civilian tradition counts legal certainty ‘a kind of supreme value, and unquestioned dogma, a fundamental goal’ and holds that ‘to give discretionary power to the judge threatens the certainty of the law.’[[88]](#footnote-88) By contrast,

‘In the common law the judge can exercise discretion, but he also must bear the major operational responsibility for certainty and stability in the law.’[[89]](#footnote-89)

Although Montesquieu greatly admired the English model, the primary English concept was not the separation of powers but parliamentary sovereignty — the ‘theory of [which] was pragmatic dogma lying beyond proof’.[[90]](#footnote-90) Indeed ‘[t]he most telling image of the eighteenth-century constitution is one of balance rather than separation.’[[91]](#footnote-91)

Nevertheless, as the now-sovereign Parliament’s political power and output of legislation increased, an accommodation, some ‘division of labour’ — as distinct from a principled separation of powers — was inevitable. Given the extent of the common law and the absence of a comprehensive quasi-Napoleonic code, it is idle to deny that common law judges make law or to argue that judges should now stop doing so and leave any rule-changing to a heavily politicised parliament that is only spasmodically interested in the state of the rule book.

The issue is not ‘whether?’ but ‘when?’ and ‘how?’ judicial law -making is legitimate. Whilst no-one suggests that judges can now abolish the consideration requirement in contract, there are arguments about the appropriateness or legitimacy of some the reliance--based interventions that nowadays offset the requirement that consideration must move from the promisee. That classical conception of consideration fitted so well with the dominant possessive individualism and emphasis on ‘freely’ bargained exchange of the nineteenth century (during which the first textbooks emerged). Although it clearly has the status of a ‘legal principle’, it too easy to forget that the classical nineteenth century exchange conception now entrenched in the common law of contract superseded a very different conception of consideration as ‘a compendious word simply indicating whether there are good reasons for enforcing a promise.’[[92]](#footnote-92) Milsom generalises the point,

‘[W]ith this subject as with many others we have tried to be too precise, to trace the later meaning back to some single source; and…*supposing that even in the later law the word had a meaning in the sense of representing an idea*.’[[93]](#footnote-93)

Leaving aside the interpretation of statutes and judicial review of executive action we can ask how far the judicial law-making role is constrained by constitutional principle?

Several kinds of argument are in play.

1. *An argument from democracy that constrains law-making by unelected judges*.

This deserves respect, but cannot be used as trump card to reject any judicial law-making that happens to meet with disapproval

1. *An argument from authorship, viz. that analogical reasoning from judicially authored decisions is acceptable*.

This too deserves respect but is not a trump card for judges. Their innovations can be backed by analogies, but they have consequences in the world that are relevant to the merit of the rule change.

1. *A second argument from authorship, viz. that the patterns of judicial decisions reveal ‘common law’ principles — conceptual entities, discoverable by judges (and perhaps by venerable writers of treatises) and therefore gently redefinable*.

Judges’ valuable expertise can be harnessed by the search for and refinement of common law principles. But that process does not drive the judge. Rather, the judge drives the process and principle-changes beget rule-changes that have consequences that demand evaluation as such.

1. *That grand word-to-world statements of principle should be no more than rhetorical dignifications of ‘common law’ principles and should not be ‘extraneous’ to the common law*.

Judicial law-making is best grounded in judicial experience. Attention to cases and consequences will bring into play constraining counterpoints and other principles such as beneficence. Judicial ideologues might too easily neglect the discipline of argued law. For example, Charles Foster points to the tendency for autonomy to be regarded as a trumping principle,[[94]](#footnote-94) a position that Beauchamp and Childress are determined to disavow,[[95]](#footnote-95) but which might appear to be exemplified in *Montgomery*.

1. *An argument from institutional incompetence, as explored by Lady Hale in her Oxford lecture to the Society*.[[96]](#footnote-96)

Although not a comprehensive objection, this has great force. Judges are not well-placed to assess a case in a wide context informed by empirical data about actual, probable and possible consequences. They do not have the expertise to assess such data and must rely on experts whose status as such they cannot really test. Neither are judges well-placed to propose, evaluate or implement systemic or institutional change outwith the legal system. Nevertheless, their decisions do affect practices. For, example, the decision in *Spring* v. *Guardian Assurance plc*[[97]](#footnote-97) to make referees responsible to the recipients for carelessly inaccurate employment references has changed the way in which references given. Some referees will now give no more than objective information such as date of joining, number of days sick, etc.

# Assessing *Montgomery*

The foregoing exploration suggests that:

1. stark contrasts between principle (for judges to adjust) and pragmatism (for politicians to judge) are descriptively and normatively inappropriate, and
2. the inevitable tensions between change and predictability are manageable.

Although judges sometimes make changes that are unwelcome to some or many or have under-appreciated potentially negative consequences, it is unrealistic and undesirable to freeze the common law. It has always been ‘a work in progress’ and its working methods have great strengths. Recall that ‘argued law is tough law’.[[98]](#footnote-98) There is nothing wrong with rich ideas such as autonomy, beneficence, professionalism featuring in the arguments, provided that the rhetoric of principle does not exempt them — with the attendant consequences of letting them hold sway — from rigorous examination.

## Grand Style: principle-based

Karl Llewellyn thought judges should not be hide-bound by the Formal Style, in which,

‘Authority was authority; logic was logic; certainty with certainty; heart had no place in legal work; esthetics drove in the direction of cold clarity.’[[99]](#footnote-99)

Especially in the appellate courts, he valued a ‘Grand Style or the Manner of Reason’ in which

‘Every current decision is to be tested against life-wisdom, and the phrasing of the authorities which build our guiding structure of rules is to be tested and is at need to be vigorously recast in the new light of what each new case may suggest either about life-wisdom, or about a cleaner and more usable structure of doctrine.’[[100]](#footnote-100)

## How ‘grand’ then is *Montgomery*?

We might say that, having taken account of social changes (better educated patients, information and more freely available),[[101]](#footnote-101) the Supreme Court — operating in Llewellyn’s ‘Grand Style’ — set a new doctrine or principle. That principle was not discovered in — or derived from — prior cases by analogical reasoning. The predominant mode of justification is not consequentialist. Rather autonomy was recognised as a ‘good’ in and of itself. After *Montgomery*, autonomy trumps beneficent professionalism in the matter of risk information, save for the ‘therapeutic exception’. Interestingly — although argued principle might be tough principle — autonomy’s priority over other principles — such as beneficence, paternalism, utility, non-malfeasance — was simply assumed.[[102]](#footnote-102)

## An incrementalist perspective

In the judgments there are four explicit uses of ‘autonomy’ or ‘autonomous’ (three by Lady Hale and one by Lords Kerr and Reed). Lords Kerr and Reed refer twice to ‘deciding for herself’ and once to ‘self-determination. If fewer than 20% of the 117 paragraphs deal directly with the autonomy principle, it seems likely that there is another, less principle-oriented strand in the reasoning. That is to be found in a careful examination of authorities from other common law jurisdictions[[103]](#footnote-103) and from England[[104]](#footnote-104) since *Sidaway*. However, these authorities are used to add weight to the conclusion that there should be a doctrine of informed consent rather than as analogues from which such a doctrine can be constructed. They include *Pearce*, in which Lord Woolf MR said,

‘[I]f there is a significant risk which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of a doctor to inform the patient of that significant risk, if the information is needed so that the patient can determine for him or herself as to what course he or she should adopt.’[[105]](#footnote-105)

Lords Kerr and Reed concluded that.

‘although *Sidaway’s* case remains binding, lower courts have tacitly ceased to apply the *Bolam* test in relation to the advice given by doctors to their patients, and have effectively adopted the approach of Lord Scarman.’[[106]](#footnote-106)

If incremental progression depends upon analogical reasoning, *Montgomery* cannot be regarded as ‘incremental’. It is perhaps better regarded as the consummation of past developments, of which *Chester* v. *Afshar**[[107]](#footnote-107)* might be the most significant in terms of the emotional cost of finding for the patient.[[108]](#footnote-108) Or as ‘going with the flow’.

## Limitations

However, autonomy has not swept all before it. Its practical consequence will be that, in some settings, more professional time will be spent in explaining risks to patients, some of whom are amongst those who are inclined to agree to whatever the professional recommends. Or consent forms will be more carefully designed, completed and filed. To that extent, *Montgomery’s* significance might be more symbolic than practical. Although ‘symbols can nag and prod and disturb and ultimately bring about some change’,[[109]](#footnote-109) significant limitations on the scope of autonomy as authentic self-determination remain. Here are four of them.

1. Doctors are only required to raise ‘material’ risks with patients and the definition of materiality is objective. The concept of the reasonable patient — a judicial construct whose expectations will be divined by judges — is built in.
2. There is a ‘therapeutic exception’ that can replace autonomy with professional beneficence, the exercise of which must be objectively reasonable in a court’s judgment. A doctor is not required to make disclosures to her patient

‘if, in the reasonable exercise of medical judgment, she considers that it would be detrimental to the health of her patient to do so.’[[110]](#footnote-110)

1. By retaining the negligence categorisation, there is no legal recognition of under-informing as wrong in and of itself and hence no sound basis for a vindicatory remedy for under-informing that offends or outrages dignity but causes no loss.[[111]](#footnote-111)

## Consequentialist justification

It is also worth noting that there will be situations in which professional respect for autonomy can benefit patients therapeutically.[[112]](#footnote-112) Whilst the deprivation of such benefits might be difficult to detect and measure in an individual particular case and treat as ‘loss’ for the purposes of the negligence tort, the notion of potential therapeutic benefit provides some consequentialist support for the autonomy principle. Of course, there might also be cases where the burden of autonomy has adverse health consequences, but my researches have not so far extended to them.

## Alignment with professional practice

It is a mistake to think of *Montgomery* as a major trauma for the medical professions. Certainly, British Medical Association advice in 1988 (sixteen years after *Canterbury* v. *Spence*) rehearsed the *Bolam* test. Nevertheless, it added, a reminder that,

‘a doctor's legal obligations are much less than his moral obligations. The legal minimum is not necessarily ethical. ‘[[113]](#footnote-113)

The General Medical Council’ 1998 guidance, issued just before the events in *Montgomery* in 1999, advised doctors that they

‘must respect patients' autonomy — their right to decide whether or not to undergo any medical intervention even where a refusal may result in harm to themselves or in their own death. Patients must be given sufficient information, in a way that they can understand, to enable them to exercise their right to make informed decisions about their care.’

Subsequent Department of Health and GMC guidelines responded to *Chester v. Afshar* as the leading authority.[[114]](#footnote-114) By 2008 the GMC advocated a ‘partnership model’, in which, doctors explain the potential benefits, risks, burdens and side effects of each treatment option and

‘[t]he patient weighs up the potential benefits, risks and burdens of the various options as well as any non-clinical issues that are relevant to them. The patient decides whether to accept any of the options and, if so, which one.”[[115]](#footnote-115)

This model was cited in *Montgomery*[[116]](#footnote-116) but the circumstances of the case suggest that their observance was not universal. Furthermore, GMC commissioned research in 2017 found that

‘[d]octors were familiar with the broad principles of consent and shared decision making and demonstrated a willingness to adhere to them, to varying degrees…[But] [t]he need to individualise the conversation was less top of mind; and across the groups awareness of the *Montgomery* ruling was low.’[[117]](#footnote-117)

An earlier study found that in 12 large maternity units in Wales in 1997-1998, approximately half the participants perceived that they had exercised informed choice overall in maternity care.[[118]](#footnote-118) However, some of those participants favoured a non-participatory style. There will be a proportion of patients who prefer to trust their professional’s judgment,[[119]](#footnote-119) but that does not mean that the opportunity for self-determination is not valuable.

‘[B]enefit and risk are subjective and vary according to patients’ values and beliefs. A patient’s view of acceptable risk or worthwhile benefit may differ from that of other patients, caregivers, or guideline authors….Since “reasonable risk” and “expected benefit” are subjective, a clinician’s belief about what constitutes “neglect” is an opinion based on the clinician’s rather than the patient’s values.’[[120]](#footnote-120) (Kotaska, 195)

Of course, the perceived medicalisation of the management of births can affect the attitudes of patients and of professionals. Similarly, local hospital policy can bias the information that the professionals provide. Full information might be provided about some methods of pain management but not others.[[121]](#footnote-121)

## Doctrinal elegance and stability after *Montgomery*

Whether viewed as a ‘grand style’ decision or as something more mundane, *Montgomery* stands as a marker for informed consent and for the exclusion of that issue from the *Bolam* regime (as moderated by *Bolitho*)[[122]](#footnote-122) that governs surgical and therapeutic malpractice claims. It marks out a new area in which autonomy — conceived as self-determination — is to be the dominant principle. However, the resulting doctrinal map is complex.

In all the informed consent cases considered, the claim is framed in negligence. Of course, any objection that deliberate conduct should not sound in negligence can be met by recognising that negligence sets objective standards and that ‘I was not negligent, I intended’ is hardly a good defence. However, the effect of that categorisation is that patients have no recourse against their medics unless the patients have suffered loss. By contrast, in the dignitary torts of assault, battery and false imprisonment, damage is not of the essence. Nominal damages (or vindicatory damages, were they to be recognised)[[123]](#footnote-123) can be awarded to mark affronts to dignity or perhaps outrage. But that vindicatory marking is precluded by the categorisation of under-informing as negligence, although it could be circumvented were the strategy of awarding a ‘conventional sum’ adopted in *Rees* v. *Darlington*[[124]](#footnote-124) more generally utilised.

Battery claims are baldly ‘deplored’ unless the patient has not been told about the general nature of the procedure to be conducted.[[125]](#footnote-125) Probably out of inter-professional respect, courts are reluctant to follow the simple logic that an insufficiently informed consent should not provide a defence to the intentional tort of battery and so they limit the scope of that argument by distinguishing attendant risk from the general nature of the procedure, and only requiring that the doctor inform the patient of the latter. This seems arbitrary. If Daredevil tempts Cautious to take a ride in Daredevil’s car and *deliberately* does not reveal that it has no brakes, is Cautious to be denied compensation because Cautious consented to ‘a ride in the vehicle’?

Furthermore, deliberately withholding information is not mere carelessness. The tort of deceit deals with deliberately misleading information, but damage is of the essence and usually arises by way of deceiver’s advantage. It would be an adventurous analogy to argue from deceit to the under-informing case.

Although the dignitary torts of battery, assault and false imprisonment are actionable *per se*, their protection of dignitary interests is limited by the requirement that claimants prove defendants’ intentional, force-dynamic actions[[126]](#footnote-126) against them.[[127]](#footnote-127) Furthermore, liability for the intentional infliction of emotional harm depends upon proving both an intention to cause serious distress (probably impossible in the *Montgomery* kind of scenario) and a resulting recognised psychiatric condition, rather than (righteous) indignity and/or legitimate outrage.[[128]](#footnote-128)

## A more radical approach

The doctrinal inelegances and lacunae just noted arise because the established tort law doctrines are founded on conceptions of wrongful conduct. An effective way of recognising patient outrage or indignity suffered by way of professional highhandedness, requires more radical solutions that are founded on the recognition and protection of interests — rather than ‘duties not to wrong’ — in the dignity of choice. The recognised right would generate the duties, whereas presently the doctrinal categories in which the driving duties fall hamstring the resultant right. Marjorie Shultz’s has proposed that the law should recognise and adequately protect patient choice by starting from patients’ ‘right to choose’ rather than from an amalgam of wrongs imperfectly adapted to the task

‘Giving patients control over medical choices would delimit doctors' authority and their responsibility. At the same time, such control implies that new obligations would be placed on doctors to facilitate and defer to patients' choices. To effectuate such a relationship, the direct creation of an independent interest in medical choice would be preferable to the indirect vindication now derived through protection of other, related interests.’ .[[129]](#footnote-129)

Similarly, Stephen Sugarman and Caitlin Boucher propose ‘focusing on wrongfulness rather than whether a defendant’s conduct was intentional or negligent’ by means of

‘a unifying principle: tortfeasors should be liable when they wrongfully harm another person’s dignity in a highly offensive way and cause more than trivial emotional injury. This standard targets socially unacceptable conduct that is more than just slightly unacceptable and has real consequences.’[[130]](#footnote-130)

If ‘under-informing’ could be counted as a ‘dignitary harm’ — or as ‘deliberate conduct that society finds sufficiently unacceptable that a tort remedy should be made available to the victims’[[131]](#footnote-131) it would then be for the courts to weigh — case-by-case — the significance of a doctor’s intention or negligence and of the patient’s reactions and experiences without having to shoe-horn such considerations into the present doctrinal categories. That would be welcome recognition that such wrongfulness as there might be in under-informing lies in its denial of patients’ autonomy.

# Conclusion

Largely through analogical reasoning — ‘[m]astering the lawless science of our law, [t]hat codeless myriad of precedent, / [t]hat wilderness of single instances[[132]](#footnote-132) — the common law generates rules, principles and doctrines from myriad instances and precedents. Consequently, it is reasonably stable and predictable. But it cannot — and probably should not — be certain. There is flexibility through the reworking of analogies and the (occasionally radical) revision of principles and doctrines.[[133]](#footnote-133) Analogical reasoning does not exclude consequentialism or the influence of intuitions: it cannot — and should not[[134]](#footnote-134) — be ‘policy proof’. Social changes and the appreciation of external consequential factors influence the way the processes work. Occasionally, as *Montgomery* instantiates, externally formed doctrines or principles are imported into the common law.

[11995 words]

1. Cardozo, B. N., *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) 10-11; although perhaps suffering from ‘appellate-courtitis’: see Lee, S., *Judging Judges* 1989 revised end. (London: Faber & Faber, 1988) 7. [↑](#footnote-ref-1)
2. ‘The Judge as Law-Maker’ (1972) 12 JSPTL 22. [↑](#footnote-ref-2)
3. ‘Some Thoughts on Principles Governing the Law of Torts’, <https://www.supremecourt.uk/docs/speech-160819-03.pdf>[.](https://www.supremecourt.uk/docs/speech-160819-03.pdf%20%2819) (19 August 2016) paras. 40-41. [↑](#footnote-ref-3)
4. ‘Principle and Pragmatism in Developing Private Law’, <https://www.supremecourt.uk/docs/speech-190307.pdf>, (7 March 2019) 13. [↑](#footnote-ref-4)
5. Locke, J., *An Essay Concerning Humane Understanding* (London: Kindle edition, based on 2nd edition, 1690), locs. 90 & 1172. [↑](#footnote-ref-5)
6. [2015] UKSC 11 (hereinafter ‘*Montgomery*’). [↑](#footnote-ref-6)
7. Note the comment in *Montgomery* [89] that, ‘the assessment of whether a risk is material cannot be reduced to percentages. The significance of a given risk is likely to reflect a variety of factors besides its magnitude: for example, the nature of the risk, the effect which its occurrence would have upon the life of the patient, the importance to the patient of the benefits sought to be achieved by the treatment, the alternatives available, and the risks involved in those alternatives. The assessment is therefore fact-sensitive, and sensitive also to the characteristics of the patient.’ Whilst, this sense of context is very welcome, the cited paragraph obscures the discrete dimensions of probability and severity of consequences. Moreover, shorthand references to risks in terms only of percentage of probability abound in the case law. [↑](#footnote-ref-7)
8. *Montgomery* [22]. Royal College of Obstetricians and Gynaecologists, Greentop Guideline 42: Shoulder Dystocia, 2012, <https://www.rcog.org.uk/globalassets/documents/guidelines/gtg_42.pdf> para. 4.1, states that ‘Infants of diabetic mothers have a two- to four-fold increased risk of shoulder dystocia compared with infants of the same birth weight born to non-diabetic mothers.’ That paragraph also draws attention to the increased risk of shoulder dystocia in diabetic mothers, which further increases when the foetus is larger than average, citing Aker, Sachs, & Friedmann, 1985 and Cheng & Lao, 2014. [↑](#footnote-ref-8)
9. *Bolam* v. *Friern Hospital Management Committee* [1957] 1 WLR 582. [↑](#footnote-ref-9)
10. Including the McRoberts and several other manoeuvres: see section 6, RCOG Guide, site note 8; Khan, L., Shoulder Dystocia. <https://teachmeobgyn.com/labour/emergencies/shoulder-dystocia/> (2019); and *Montgomery* [10]. [↑](#footnote-ref-10)
11. In a way, unsurprisingly, given Lord Diplock’s strong affirmation of the *Bolam* test’s applicability to non-disclosure claims in *Sidaway* v*. Board of Governors of the Bethlem Royal Hospital* [1985] AC 871, 895: ‘To decide what risks the existence of which a patient should be voluntarily warned and the terms in which such warning, if any, should be given, having regard to the effect that the warning may have, is as much an exercise of professional skill and judgment as any other part of the doctor's comprehensive duty of care to the individual patient, and expert medical evidence on this matter should be treated in just the same way. The *Bolam* test should be applied.’ However, there is a chain of cases since *Sidaway* that are more sympathetic to a duty to inform, including: *Pearce v United Bristol Healthcare NHS Trust* (1998) 48 BMLR 118 (CA); and *Chester* v. *Afshar* [[2005] 1 AC 134](https://0-www-lexisnexis-com.lispac.lsbu.ac.uk/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T29299717292&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T29299717294&backKey=20_T29299717295&csi=279841&docNo=5). See also the approach taken by Lord Scarman in *Sidaway* (888-890) where he clearly favoured ‘the patient's "right of self-determination" and the "prudent patient" test’ (although, for want of supporting evidence for the informed consent claim, he agreed that the claim failed). He said that ‘In a medical negligence case where the issue is as to the advice and information given to the patient as to the treatment proposed, the available options, and the risk, the court is *concerned primarily with a patient's right*’ (emphasis added). [↑](#footnote-ref-11)
12. In ‘Patient no Longer? What Next in Healthcare Law’ (2017) 70(1) Current Legal Problems 73, 91, Jonathan Montgomery comments that ‘There is no clear explanation of why judges think communication skills are not to be judged by the standards of the profession.’Others argue that informing consent is a communicative process in which patients frequently do not wish to engage; *e.g*. Ginsberg, M. D., ‘Beyond Canterbury: Can Medicine and Law Agree about Informed Consent? And Does It Matter?’ (2017) 45 Journal of Law, Medicine & Ethics106-111.

 For a *Bolam*-esque critique of *Montgomery*, see Montgomery, J. & Montgomery, E., ‘*Montgomery* on informed consent: an inexpert decision?’ (2016) Journal of Medical Ethics, 42(2), 89-94. The authors argue that the clinical guidelines RCOG Breentop Guideline 42, para 5.1.2, does not indicate that—even given the estimated birthweight of the foetus and Mrs Montgomery’s small stature—it was appropriate to raise the possibility of a Caesarean with the patient. They argue further that this is a matter of clinical judgment. Dr McLellan clearly considered the issues and made an allowance for them by lowering the birthweight threshold from 4.5 kg in the Guidelines to 4 kg. However, the actual birthweight was 4.2 kg, *i.e.* above her adjusted threshold. Arguably, the estimate of birthweight was a failure of clinical judgment. [↑](#footnote-ref-12)
13. *Montgomery* [87]. [↑](#footnote-ref-13)
14. [2002] 1 AC 215. [↑](#footnote-ref-14)
15. [2012] UKSC 56. [↑](#footnote-ref-15)
16. [2013] UKSC 66. [↑](#footnote-ref-16)
17. [2016] UKSC 11. [↑](#footnote-ref-17)
18. [2016] UKSC 10. [↑](#footnote-ref-18)
19. [2017] UKSC 60. [↑](#footnote-ref-19)
20. [2012] UKSC 56 [19]. [↑](#footnote-ref-20)
21. [2020] UKSC 12. [↑](#footnote-ref-21)
22. [2020] UKSC 13. [↑](#footnote-ref-22)
23. See Holmes, O. W. J., ‘The Path of the Law’ (1897) 10 Harvard Law Review, 45, 460-461. [↑](#footnote-ref-23)
24. See: re UK: note 11 above; re Canada, *Reibl* v. *Hughes* [1980] 2 SCR 880, (l980), 114 DLR (3d) 1. <https://www.canlii.org/en/ca/scc/doc/1980/1980canlii23/1980canlii23.html>, Robertson, G., ‘Informed Consent Ten Years Later: the Impact of *Reibl* v. *Hughes*’ (1991) 70(3) Canadian Bar Review 423-447; re USA, *Canterbury* v. *Spence* 464 F.2d 772 (D.C. Cir. 1972), Ginsberg, note 12; re Australia, *Rogers* v. *Whitaker* (1992) 175 CLR 479, Skene, L., & Smallwood, R..’ Informed consent: lessons from Australia’ doi:10.1136/bmj.324.7328.39. (2002) 324 (7328) *British Medical Journal,* 39-41. [↑](#footnote-ref-24)
25. This patient-consequentialism contrasts with professional/system consequentialism, I the use of Quality Adjusted Life Years (QUALYs) to ration scarce NHS resources, NICE, 2013. <https://www.nice.org.uk/Media/Default/guidance/LGB10-Briefing-20150126.pdf> [↑](#footnote-ref-25)
26. Montgomery, J and Montgomery, E, ‘*Montgomery* on informed consent: an inexpert decision?’ (2016) 42(2) Journal of Medical Ethics 89-94. *Cf.* Dr McLellan testimony that, had she raised the possibility of a caesarean section, ‘then yes, [Mrs Montgomery] would have no doubt requested [one], as would any diabetic today.’ See *Montgomery* [19]. If literally ‘any diabetic’ would have made such a request, the argument for legitimate concealment of the risk requires some weighty support that can only be found in principles of professional beneficence or in cost-benefit consequentialism. [↑](#footnote-ref-26)
27. Wittgenstein, L., *Philosophical Investigations* (2nd edn.) (Cambridge: Blackwell, 1958) §124. [↑](#footnote-ref-27)
28. Etymology is no more, and no less, than ‘the study of the origin of words and the way in which their meanings have changed throughout history’ (Oxford Online Dictionary). [↑](#footnote-ref-28)
29. Etymological evidence derived from <https://www.etymonline.com/> [↑](#footnote-ref-29)
30. Lady Hale, B., 7 September 2016. Legislation or judicial law reform: where should judges fear to tread? <https://www.supremecourt.uk/docs/speech-160907.pdf>, 15. [↑](#footnote-ref-30)
31. James, W., 1907. "The Present Dilemma in Philosophy". Lecture I in *Pragmatism: A new name for some old ways of thinking* (New York: Longman Green and Co (New York: Longman Green, 1907) 1 – 16, 1 [↑](#footnote-ref-31)
32. Note 1 above, 12. [↑](#footnote-ref-32)
33. See Perelman, C. & Olbrechts-Tycea, l., *The New Rhetoric* (Notre Dame: University of Notre Dame Press, 1969) 345-348. [↑](#footnote-ref-33)
34. <https://www.yourdictionary.com/casuistry> [↑](#footnote-ref-34)
35. Note 1, 17. [↑](#footnote-ref-35)
36. Civil law systems are restricted by the terms of their codes. [↑](#footnote-ref-36)
37. ‘The art of casuistry, shorn of its laxest associations, is beginning to flourish again today within the fields of professional, particularly medical, ethics.’ Brodie, A., 2005. ‘Casuistry’ in T. Honderich, ed. *Oxford Companion to Philosophy* (2nd edn) (Oxford: OUP, 2005) 129-130 [↑](#footnote-ref-37)
38. *Cordell* v. *Second Clanfield Properties Ltd* [1969] 2 Ch. 9, 16-17. Megarry J continued, ‘This is as true today as it was in 1409 when Hankford J. said: “Just as it is said ‘A man will not know of what metal a bell is made if it has not been well beaten (rung).” [Good disputation involves exposing] views to the testing and refining process of argument. Today, as of old, by good disputing shall the law be well known.’ [↑](#footnote-ref-38)
39. Sauer, H., *Moral Thinking, Fast and Slow* (New York: Routledge, 2019) loc. 871ff. [↑](#footnote-ref-39)
40. Kahneman, D., *Thinking, Fast and Slow* (London: Penguin, 2012). [↑](#footnote-ref-40)
41. Haidt, J., *The Righteous Mind: Why Good People are Divided by Politics and Religion* (London: Penguin, 2013) 91-97. [↑](#footnote-ref-41)
42. Note 40, 80-81. [↑](#footnote-ref-42)
43. [1972] 1 QB 198, 207, emphasis added. [↑](#footnote-ref-43)
44. *Cf*. ‘[N]o case can have meaning by itself. Standing alone it gives you no guidance…as to how far it carries, as to how much of its language will hold water later. What counts, what gives you leads, what give you sureness…is the background of the other cases in relation to which you must read the one. They color the language, the technical terms, used in the opinion. But above all they give you the wherewithal to find which of the facts are significant, and in what aspect they are significant, and how far the rules laid down are to be trusted.’ (Llewellyn, K., *The Bramble Bush: on Our Law and Its Study* (Dobbs Ferry: Oceana, 1960) 48, cited in Postema, G. J., ‘*A Similibus ad Similia*: Analogical Thinking in Law’ in D. E. Edlin, ed. *Common Law Theory* (Cambridge: Cambridge University Press, 2007) 122. [↑](#footnote-ref-44)
45. Hart holds that primary rules — ‘in fact always’ — precede secondary rules. He contemplates societies that ‘live by…primary rules alone’ but not societies that have only secondary rules of adjudication: see (Hart, H., *The Concept of Law* (3rd edn) (Oxford: OUP, 2012) 81 & 91. That does not sit well with some of the anthropological data. See (e.g.) Simon Roberts’s contention that to focus on ‘law’ rather than on ‘disputes’ ‘involves giving emphasis to distinctions which can have no meaning in [some] societies….[and] could therefore only prove artificially constricting and at the same time encourage us to see other people’s control institutions in the potentially distorting light of our own’: See Roberts, S., *Order and Dispute* (Harmondsworth: Penguin, 1979) 28-29. Hart might regard all the societies that concern Roberts as pre-legal or lacking a ‘legal system’. See also Snyder, F. G., ‘Anthropology, Dispute Processes and Law: a Critical Introduction’ (1981) 8(2) British Journal of Law and Society 141-180. [↑](#footnote-ref-45)
46. Chowdhury, T., 2016. *Toward a Concrete Temporality of Adjudication: Law's Subject and Event,* Manchester University thesis, https://www.research.manchester.ac.uk/portal/files/54585790/FULL\_TEXT.PDF

 See also Lawrence Rosen’s observations on Moroccan *qadi* justice: ‘Rather than being aimed simply at the invocation of state or religious power, rather than being devoted mainly to the creation of a logically consistent body of legal doctrine, the aim of the qadi is to put people back in the position of being able to negotiate their own permissible relationships without predetermining just what the outcome of those negotiations ought to be.’ See: Rosen, L., *The Anthropology of Justice: Law as Culture in Islamic Society* 2002 edn. (Cambridge: CUP, 1989) 17. [↑](#footnote-ref-46)
47. An adjudicator’s recognition of norms of folk morality is not strictly relevant here. Those norms pre-exist the dispute being adjudicated. [↑](#footnote-ref-47)
48. Zipf, G. K., *Human Behavior and the Principle of Least Effort*. (Cambridge MA: Addison-Wesley, 1949) [↑](#footnote-ref-48)
49. This process runs counter to Hume’s law that one cannot get an ‘ought’ from and ‘is’. That might be momentarily logical, but experience tells us otherwise. Consider arguments that utilise such notions as ‘what the reasonable person would do’ or ‘a reasonable expectation of privacy’. England expects every man to do his duty’ is *predictive* when choosing whether or not to send the task force, but *normative* when utered by the commander on the eve of battle. On Hume’s Law, see, Cohon, R., 2018. ‘Hume's Moral Philosophy’ <https://plato.stanford.edu/archives/fall2018/entries/hume-moral/> section 5. [↑](#footnote-ref-49)
50. Tversky, B., *Mind in Motion; how action shapes thought* (New York: Hachette, Basic Books, 2019) 43-44. [↑](#footnote-ref-50)
51. Ibid, 36-39. [↑](#footnote-ref-51)
52. Borges, J. L., ‘John Wilkins' Analytical Language’ in *The Total Library: Non-Fiction 1922-1986* (London: Penguin, 2001) 229-232, 231. [↑](#footnote-ref-52)
53. Wikipedia lists: ~128 decision-making, belief and behavioural biases; ~30 social biases ;and ~45 memory errors and biases <https://en.wikipedia.org/wiki/List_of_cognitive_biases> (accessed 29 June 2020). (Kahneman, pp. 79-96), 79-96. [↑](#footnote-ref-53)
54. See text between notes 38 and 43. [↑](#footnote-ref-54)
55. Note 41 [↑](#footnote-ref-55)
56. Hume, D. (ed Selby-Bigge), *A Treatise of Human Nature* (1739). (Oxford: OUP Clarendon, 1975, 415. Note the ‘is’ and the ‘ought’. [↑](#footnote-ref-56)
57. Note 50, 122 [↑](#footnote-ref-57)
58. See Hutcheson, J. C., ‘The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision’ (1929) 14 Cornell Law Review, 274-288. [↑](#footnote-ref-58)
59. Cardozo’s use of ‘principle’ to embrace the subconscious is perhaps unusual: note 1, 11-12. [↑](#footnote-ref-59)
60. Year Book I Edward III 24, Mich. pi. 21, <https://www.bu.edu/phpbin/lawyearbooks/display.php?id=5984>. (My thanks to Hamish Dempster for alerting me to this via his manuscript, ‘The Limits of Common Law Reasoning’). However, note that, in C14th, access to documents resembling modern case reports would have been very unlikely: see Thomas, S. S., (1997) *Lex Scripta et Lex non Scripta: Tensions Between Law and Language in Late Fourteenth-Century England and its Literature*.
<https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=7460&context=gradschool_disstheses> 11-15. [↑](#footnote-ref-60)
61. See text at note 38. [↑](#footnote-ref-61)
62. Note 1, 21. [↑](#footnote-ref-62)
63. Chapman, B., ‘The Rational and the Reasonable: Social Choice Theory and Adjudication’ (1994) 61 University of Chicago Law Review 41-122, 66, cited in Postema, note 44, 106. [↑](#footnote-ref-63)
64. Postema, note 44, 106. [↑](#footnote-ref-64)
65. Posner R, *The Problems of Jurisprudence* (Harvard University Press, 1990), 86., cited by Postema note 44, 103. [↑](#footnote-ref-65)
66. Dworkin, R., ‘In Praise of Theory’ (1997) Arizona State Law Journal 353. [↑](#footnote-ref-66)
67. Postema, note 44, 114. For an interesting and broadly similar account, see Paulo, N., ‘Casuistry as common law morality’ (2015) 36 Theoretical Medicine and Bioethics, 373–389. [↑](#footnote-ref-67)
68. Postema, note 44, 115, emphasis added. [↑](#footnote-ref-68)
69. Ibid, 115, emphasis added. [↑](#footnote-ref-69)
70. Ibid, 117. [↑](#footnote-ref-70)
71. Ibid, 119. [↑](#footnote-ref-71)
72. On context, Postema, (ibid, 117-118) cites Amos Tversky’s ‘Features of Similarity’ (1977) 84 Psychological Review 327, in which ‘[s]ubjects, asked which country is most similar to Austria, were presented with two groups: (1) Sweden, Hungary, Poland, and (2) Sweden, Hungary, Norway. Presented with group (1), people tended to choose Sweden, but from group (2) they chose Hungary. It is fair to conclude that there a strong “context effect” on the formation of analogies.’ Postema’s thesis goes further; he maintains that ‘*context is essential to the formation of analogies*.’ (fn. 53, 118, emphasis added). [↑](#footnote-ref-72)
73. Postema, note 44 117, 120 & 122. [↑](#footnote-ref-73)
74. Ibid, 118, emphasis added. There are interesting comparisons to be made with ‘fuzzy logic’. [↑](#footnote-ref-74)
75. Ibid, 121. [↑](#footnote-ref-75)
76. Ibid, 44 133 [↑](#footnote-ref-76)
77. Cardozo, note 1, 167. [↑](#footnote-ref-77)
78. McGahhey, M. & Van Leeuwen, N., *Third-Person Self-Knowledge, Self-Interpretation, and Narrative* (Cham: Springer, 2018) 95, 74, 94, emphasis added. [↑](#footnote-ref-78)
79. Hart, note 45, 123. [↑](#footnote-ref-79)
80. ‘For as far as any intelligent being can repeat the idea of any past action with the same consciousness it had of it at first, and with the same consciousness it has of any present action; so far it is the same personal self.’ (Locke, note 5, loc. 4660) [↑](#footnote-ref-80)
81. O'Brien, B., 2018. The Buddhist Teachings of Self and No-Self, <https://www.learnreligions.com/what-is-the-self-450193> [↑](#footnote-ref-81)
82. Schroeter, L., ‘The Limits of Conceptual Analysis’. (2004) 85 Pacific Philosophical Quarterly 425–453, 426. [↑](#footnote-ref-82)
83. Ibid, 442. [↑](#footnote-ref-83)
84. Whether the principles are articulated by judges or by legal philosophers — or tort law theorists, see Lord Neuberger, note 3, para. 12. [↑](#footnote-ref-84)
85. Ibid, para 13, paragraphing added. [↑](#footnote-ref-85)
86. Instances of ‘the Dworkinian fault of concealing implicit policy options in an explicit discussion of principle’ (Lee, note 1, 161). [↑](#footnote-ref-86)
87. ‘Nor is there liberty if the power of judging is not separate from legislative power and executive power. If it were joined legislative power, the power over the life and liberty of the citizens would be arbitrary; for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor….All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.’ (de Montesquieu, C. L. d. S., *The Spirit of the Laws (1748)* (Cambridge: CUP, 1989) 157. [↑](#footnote-ref-87)
88. Merryman, J. H., *The Civil Law Tradition*. (Stanford: Stanford University Press, 1969) 50 & 52. [↑](#footnote-ref-88)
89. Ibid, 54. [↑](#footnote-ref-89)
90. Cornish, W. et al., *Law and Society in England 1750-1950* (2nd edn) (Oxford: Hart, 2019) 12. [↑](#footnote-ref-90)
91. Ibid, 14 [↑](#footnote-ref-91)
92. Atiyah, P. S., *Essays on Contract* (Oxford: OUP Clarendon, 1988, corrected edn.) 185. See also Milsom, S., *Historical Foundations of Common Law* (2nd edn) (London: Butterworths. 1981) 360: ‘[Consideration] has always been just the label on a package containing many of the separate rules about the liabilities that may arise in the context of a transaction’. [↑](#footnote-ref-92)
93. Ibid, 358, emphasis added. [↑](#footnote-ref-93)
94. Foster, C., *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law* (Oxford: Hart, 2009) [↑](#footnote-ref-94)
95. ‘The principle of respect for autonomy does not by itself determine what, on balance, a person ought to be free to do or what counts as a valid justification for constraining autonomy…[I]t is a mistake in biomedical ethics to assign priority a priori to any basic principle over other basic principles — as if morality is hierarchically structured or as if we must value one moral norm over another *without consideration of particular circumstances*.’ (Beauchamp, T. L. & Childress, J. F., *Principles of Biomedical Ethics* (New York: OUP, 2019) ix, emphasis added) [↑](#footnote-ref-95)
96. Note 30. [↑](#footnote-ref-96)
97. [1995] 2 A.C. 296. [↑](#footnote-ref-97)
98. See note 38. [↑](#footnote-ref-98)
99. Llewellyn, K. N., *Jurisprudence* (Chicago: Chicago University Press 1962) 183. [↑](#footnote-ref-99)
100. Ibid, 217. [↑](#footnote-ref-100)
101. *Montgomery* [76]. [↑](#footnote-ref-101)
102. *Cf.* Foster, note 94 and Beauchamp & Childress, note 95. [↑](#footnote-ref-102)
103. See note 24. [↑](#footnote-ref-103)
104. See note 11. [↑](#footnote-ref-104)
105. *Pearce* v*. United Bristol Healthcare NHS Trust* [1999] PIQR P 53 [21]. [↑](#footnote-ref-105)
106. *Montgomery* [63]. [↑](#footnote-ref-106)
107. [2005] 1 AC 134. Despite *Montgomery*, the illogicality of the remedy awarded in *Chester* remains. It marks the wrongfulness of the defendant surgeon’s failure to adequately warn of an inherent risk in a surgical procedure by awarding damages for the adverse consequences of an operation that she would, on the balance of probabilities eventually have undergone. [↑](#footnote-ref-107)
108. For an insight into Lord Steyn’s prevarication, see Paterson, A., *Final Judgment; the Last Law Lords and the Supreme Court*. (Oxford: Hart, 2013) 188-189 and, for the strength of Lords Mance’s and Bingham’s feelings, see Paterson, fn 209: ‘I think you dissent if you are really cross about the way in which the majority has decided it.’ *per* Lord Mance. [↑](#footnote-ref-108)
109. Katz, J, *The Silent World of Doctor and Patient*, (Baltimore: John Hopkins University Press, 2002) 60, cited by Robertson, note 24, 440. [↑](#footnote-ref-109)
110. *Montgomery* [85]. [↑](#footnote-ref-110)
111. The basis used in *Chester* is unsound: see note 107. [↑](#footnote-ref-111)
112. Berentson, J., Scott, K. M. & Jose, P. E., ‘Do self‐efficacy beliefs predict the primiparous labour and birth experience? A longitudinal study’ (2009) 27(4) Journal of Reproductive and Infant Psychology 357-373 [↑](#footnote-ref-112)
113. British Medical Association, *Philosophy and Practice of Medical Ethics* (London: BMA, 1988). [↑](#footnote-ref-113)
114. [20015] UKSC 11 [69] ‘Significantly, the guidance issued by the Department of Health and the General Medical Council has treated *Chester* v. *Afshar* as the leading authority.’ (*per* Lords Kerr and Reed). [↑](#footnote-ref-114)
115. General Medical Council, 2008. Consent: patients and doctors making decisions together. (London: GMC) para. 5. These guidelines are, in mid-2020, undergoing a review prompted by ‘[d]octors [who] are telling [GMC] that increasing pressures and demands on their practice can make it difficult to seek and record a patient’s consent in line with our guidance and the law.’ See General Medical Council, Reviewing our Consent guidance, <https://www.gmc-uk.org/about/get-involved/consultations/review-of-our-consent-guidance>. See also Spatz, E., Krumholz, H. M. & Moulton, B. W., ‘The New Era of Informed Consent: Getting to a Reasonable-Patient Standard Through Shared Decision Making’ (2016) 315(19) Journal of the American Medical Association 2063-2064. [↑](#footnote-ref-115)
116. *Montgomery* [78]. [↑](#footnote-ref-116)
117. Community Research, 2017. Doctors' Attitudes to Consent and Shared Decision. <https://www.gmc-uk.org/-/media/documents/doctors-attitudes-to-consent-and-shared-decision-making-final-research-report_pdf-72137875.pdf>, para. 1.2. See also an older study: Skene L, Smallwood R. ‘’Informed consent: lessons from Australia’ (2002) 324 (7328) British Medical Journal 39-41. [↑](#footnote-ref-117)
118. O’Cathain, A. et al., ‘Women's perceptions of informed choice in maternity care’ (2002) 18(2) Midwifery 136-144. [↑](#footnote-ref-118)
119. On patients’ attitudes, see the non-quantitive study for GMC. Ipsos Mori, 2018. Attitudes towards Consent and Decision-Making.
<https://www.gmc-uk.org/-/media/gmc-site-images/about/attitudes-towards-consent-and-decision-making.pdf?la=en&hash=41B151991F8E61424CE95A8887AADC97CD9761D3> . [↑](#footnote-ref-119)
120. Kotaska, A., ‘Informed consent and refusal in obstetrics: a practical ethical guide’ (2017) 44 Birth 195-199, 195. [↑](#footnote-ref-120)
121. Newnham, E., McKellar, L. & Pincombe, J., '”It's your body but...”: Findings from a hospital ethnography’ (2017) 55 Midwifery 53-59. [↑](#footnote-ref-121)
122. *Bolitho* v. *City and Hackney Health Authority* [1998] AC 232. [↑](#footnote-ref-122)
123. *Regina (Lumba)* v. *Secretary of State for the Home Department* [2011] UKSC 12, [100]–[101] per Lord Dyson, but *cf*. Lady Hale [213]-[217]. *Cf.* *Lloyd* v. *Google llc*, [2019] EWCA Civ 1599 [45] *per* Vos C. ‘[T]he key to these claims is the characterisation of the class members' loss as the loss of control or loss of autonomy over their personal data.’ However, the claim was not common law based. But, if a right to control information, why not a right to acquire it? [↑](#footnote-ref-123)
124. [2004] 1 AC 309. [↑](#footnote-ref-124)
125. See: *Hills* v. *Potter* [1984] 1 WLR 641, 653; Lord Scarman in *Sidaway* [1985] A.C. 871, 883; Laskin CJC in *Reibl* v. *Hughes*, note 24, 890-891 (SCR ), 10 (DLR); cited by Robertson, note 24, fn. 11. [↑](#footnote-ref-125)
126. Although the complaint is about consequences, it is the act causing them that must be intentional. [↑](#footnote-ref-126)
127. In *Wainwright* v. *Home Office* [2004] 2 AC 406, Mrs Wainwright’s battery failed because, although her dignity was affronted and guidelines were breached, she was not touched. By contrast, her son was touched, and his battery claim succeeded. [↑](#footnote-ref-127)
128. *Rhodes* v*. OPO* [2015] UKSC 32.  [↑](#footnote-ref-128)
129. Shultz, M. M., 1985. ‘From Informed Consent to Patient Choice: A New Protected Interest’ (1985) 95 Yale L.J. 219-299, 276. [↑](#footnote-ref-129)
130. Sugarman, S. D. & Boucher, C., 2019. ‘Re-Imagining the Dignitary Torts’
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450107> 2. [↑](#footnote-ref-130)
131. Sugarman, S. D., ‘Restating the Tort of Battery’ (2017) 10(2) Journal of Tort Law 37. See also 37-38. [↑](#footnote-ref-131)
132. Alfred, Lord Tennyson, ‘Aylmer’s Fields’ in *Enoch Arden* (London: Moxon, 1891). [↑](#footnote-ref-132)
133. *E.g.* the introduction in *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465 of reasonable reliance-based liability for careless misstatements (even if the loss caused is purely economic). Invocation of the fiduciary principle in *Nocton* v. *Lord Ashburton* [1914] AC 932 provided a comfort blanket. [↑](#footnote-ref-133)
134. Sir Rupert Cross thought analogical reasoning sometimes leads to ‘conceptualism’ that ‘unduly restrict[s]’ judicial consideration of ‘the social consequences’ of follow-or-distinguish decisions: see Cross, R. *Precedent in English Law* (Oxford: OUP Clarendon, 1961) [↑](#footnote-ref-134)