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*Refutation in Common Law Judgments:
The Use and Abuse of the Argument from the Absurd*

La retorica è un elemento importante dell'argomentazione legale. È noto infatti che varie strutture argomentative svolgono chiare e precise funzioni nel dibattito legale. Nell'articolo si discute l'importanza dell'argomentazione *ad absurdum* e ne vengono proposte diverse spiegazioni possibili. La struttura retorica di questa forma di argomentazione si distingue sia dalla dimostrazione logica *reductio* da cui deriva, sia dalle semplici indicazioni di incoerenza legale. La sua forza retorica è illustrata con esempi tratti da diversi momenti temporali. Benché convincente sul piano informale, questo tipo di argomentazione non costituisce una prova logica; tuttavia, in alcuni casi è stata utilizzata per addivenire a sentenze che oggi risultano riprovevoli.

According to received wisdom, judges are supposed to be independent and impartial. Although their fully written judgments are often idiosyncratic, at least in the English tradition, all judges are expected to evaluate sympathetically the various arguments presented by the lawyers for the two parties, before giving a considered decision justified as far as possible by purely legal considerations.

Nevertheless, various rhetorical arguments have been internalised as part of the legal process. The argument from authority may be said to be fundamental to the entire common law system, based as it is on case law and *stare decisis*. The argument from ignorance (*ad ignorantiam*) is formalised in the rules concerning the presumption of innocence and the burden of proof. The rules governing the admissibility of evidence are ultimately derived from the *ad personam* argument, frequently resorted to by lawyers arguing over the validity of testimony.

Furthermore, even a cursory inspection of the most celebrated cases is enough to show the important role of rhetoric in legal judgments. This may be contrary to initial expectations, but it should not be surprising. Although judges are not expected to attempt to convince a jury, nor (in principle) to address the general public, they do give arguments to sup-

port their decisions, partly in order to convince the other judges sitting with them on the bench, and, more importantly, in order to convince the judges in superior courts, who may hear the case on appeal. In these circumstances, judges are likely to make use of all the arguments they have at their disposal, to justify their point of view.

The argument from the absurd (*ad absurdam*) seems particularly important in legal judgments. It is therefore important to distinguish on the one hand between the logical and rhetorical forms of arguments from the absurd; and on the other between genuine (legal) incoherence and rhetorical absurdity.

1. *The logical reductio*

The logical *reductio ad absurdam* is a classic form of proof by refutation. In order to demonstrate the truth of a theorem it is sufficient to show that any alternative supposition would lead inevitably to a contradiction or similar logical impossibility. Suitable illustrative examples may be found in Smullyan (1978), summarised as follows:

Problem: There are two people, A and B, each of which is either a Knight (who always tells the truth) or a Knave (who always lies). A makes the following statement: "At least one of us is a Knave." What are A and B?
Solution: Suppose A were a Knave. Then the statement 'At least one of us is a Knave' would be false (since Knaves make false statements); hence they would both be Knights. Thus, if A were a Knave he would also have to be a Knight, which is impossible. Therefore A is not a Knave - he is a Knight. Therefore his statement must be true, so at least one of them is a Knave. Since A is a Knight, then B must be the Knave.

The same principle may also serve in more complex cases:

Problem: In the same circumstances as above, A says: "Either I am a Knave or B is a Knight." What are A and B? *Solution:* A's statement is of the disjunctive type. Suppose he is a Knave. Then his statement would be false, so it would neither be true that A is a Knave, nor that B is a Knight. So if A were a Knave then it would follow that he is not a Knave, which would be a contradiction. Therefore A must be a Knight. If A is a Knight then his statement must be true, so at least one of the

possibilities holds, viz. (1) A is a Knave and/or (2) B is a Knight. Since possibility (1) is false (as we know that A is a Knight), then possibility (2) must be correct, i.e. B is a Knight.

In other, less ideal situations, the argument may still be convincing, although it is unlikely to constitute a genuine proof. Sherlock Holmes showed serious misunderstanding on several occasions in claiming that his method for infallible detection was based on the elimination of the impossible:

How often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth¹.

and:

It is an old maxim of mine that when you have excluded the impossible, whatever remains, however improbable, must be the truth².

Unfortunately, if the impossible is excluded, what is left is the possible, thus not necessarily the truth. As the notions of truth and possibility are not equivalent, it must be admitted that this method will only work in specific, logically defined circumstances, notably where there is only a single remaining possibility to be tested.

2. *Reductio in the law*

The true, logical *reductio* is only occasionally found appropriate in legal argument. A classic example is the celebrated case of *Salomon v Salomon & Co Ltd* 1897, in which Lord Halsbury refuted the opposing interpretation by pointing out, inter alia, that: “Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon. If it was not, there was no person and no thing to be an agent at all, and it is impossible to say at the same time that there is a company and there is not.”

The justification given for the well-known decision taken in *Pinnel’s Case* (1602) also depends to a certain extent on the concept of logical

¹ *The Sign of the Four* (“Holmes gives a demonstration”).

² *The Adventures of Sherlock Holmes* (“The Adventure of the Beryl Coronet”).

impossibility. In that case, the judges accepted that there may be some advantage to a creditor who accepts a lesser sum in payment of a debt, if the money is paid at his request before the due date, or in another place, or if the part payment is accompanied by “An object of any value” (the examples given are a “horse, hawk or robe”). Such advantage may constitute good consideration for the promise of a creditor to accept part payment. In the absence of fraud or duress, he would then be bound by his promise. But, according to Coke, where the money is paid on or after the due date: “It appears to the judges that by no possibility a lesser sum can be satisfaction to the plaintiff for a greater sum.” Thus, a lesser sum cannot constitute good consideration for the promise of forbearance, and the creditor cannot therefore be legally obliged to keep his word, even where the doctrine appears to lead to injustice. Unfortunately, this logical reasoning takes no account of commercial reality. In the real, as opposed to the judicial world, if a company is about to go bankrupt, then part payment may be of benefit to the creditor, because otherwise he risks getting nothing. It seems unfortunate to many that the law can take no account of this.

The notorious postal rule was established in the same way by a pseudo-logical *reductio* argument. According to this rule, a binding contract comes into existence at the moment the letter of acceptance is posted, even if the letter never arrives at its destination. The alternative possibility, that the contract should come into existence when the notification of acceptance is effectively communicated, was rejected in *Adams v Lindsell* 1818 as (pseudo-) logically impossible:

If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received their answer and assented to it. And so it might go on *ad infinitum*.

To refute this argument, it should have been enough to show that the progression *ad infinitum* was not in fact inevitable, and could be avoided by the application of simple rules based on common sense. The judgment was, however, accepted uncritically by the majority, and, at least until the advent of instantaneous communications, the resulting problems were a lucrative source of income for English lawyers.

3. *Legal absurdity*

Concerning the interpretation of Statutes, Lord Wensleydale, in *Grey v Pearson* 1857, laid down the ‘golden rule’, as follows:

In construing statutes, the grammatical and ordinary sense of the words is to be adhered to [...]. If this approach proves unsatisfactory as leading to some absurdity, or some repugnancy, or inconsistency with the rest of the statute then the grammatical and ordinary sense of words may be modified so as to avoid that absurdity and inconsistency, but not further.

Thus, where a statute is ambiguous, incoherent interpretations may be rejected. However, where the statute is not ambiguous, the apparent absurdity imposed by Parliament must be accepted.

In the common law, as in the construction of statutes, absurdity in itself does not seem to be considered a valid argument against established authority. Judges have great respect for precedent, and although they frequently complain about the incoherence of legal rules, they rarely present that incoherence as a justification for change.

A celebrated example may be found in *Foakes v Beer* 1884, a case which concerned the application of the doctrine laid down in Pinnel’s case. The Earl of Selbourne, Lord Chancellor, said that:

The doctrine itself, as laid down by Sir Edward Coke, may have been criticised as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right, if you were now to reverse as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.

He admitted that:

It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be generally binding, though not under seal; nor should I be unwilling to see equal force

given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinement which practically alters the sense of the word, to treat such a release or acquittance as supported by any new consideration.

Thus, the fact that, in the opinion of the Lord Chancellor himself, the law was unsatisfactory could not be taken as a justification for change. The rule, as reaffirmed in *Foakes*, is still part of the law today.

Concerning the postal rule, it was said in *Household Fire Insurance v Grant* 1879, that although “The rule is clearly based on convenience rather than principle, [it] is now so well established that it is beyond challenge.”

Similar examples of apparent absurdity in the law may be multiplied almost *ad infinitum*. In contract law, the legal distinction between the offer and the “invitation to treat”, many judges have seen as unreasonable the at first sight startling rule that, although goods may be displayed with price labels in shop windows, or indeed in supermarkets, they need still not be considered as being “offered for sale” in the contractual sense. Thus, in *Fisher v Bell* 1960, Lord Parker CJ said:

The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale. I confess that I think that most lay people and indeed I myself when I first read the papers, would be inclined to the view that if a knife was displayed in a window like that with a price attached to it was not offered for sale was just nonsense. In ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country³.

In the same way, the common law rules concerning damages have been seen as overly complex.

In *Cassel v Broome* 1972, a libel case, Lord Reid said:

The fact that it is impracticable to do full justice appears to me to afford another illustration of how anomalous and indefensible is the whole doctrine of punitive damages. But as I have said before we must accept it and make the best we can of it.

³ These remarks were quoted as binding authority in *Partridge v Crittenden* 1968.

More recently, in *Saunders v Anglia Building Society* 1970, the same judge, Lord Reid, said:

The plea non est factum is in sense illogical when applied to a case where the man in fact signed the deed. But it is none the worse for that if applied in a reasonable way⁴.

In *Thornton v Shoe Lane Parking* 1971, Lord Denning described the basic theory of elementary contract law as “a fiction”:

[These cases] were based on the theory that the customer, on being handed the ticket, could refuse it and decline to enter into a contract on those terms. He could ask for his money back. That theory was, of course, a fiction. No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.

And in *Airedale NHS Trust v Bland* 1993, Lord Browne-Wilkinson went so far as to describe what was “undoubtedly the law” as “irrational”:

Finally, the conclusion I have reached will appear to some to be almost irrational. How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food, but lawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them? I find it difficult to find a moral answer to that question. But it is undoubtedly the law and nothing I have said casts doubt on the proposition that the doing of a positive act with the intention of ending life is and remains murder.

This was the case of a 17-year-old football supporter who had been reduced to a permanent vegetative state in the Hillsborough disaster, and who had no hope of recovery. The question to be answered was whether he should continue to be kept alive artificially. The decision could not be made on the grounds of authority, as there was no relevant authority. Convoluted legal reasoning was used primarily to avoid the impression that judges had simply used common sense to impose their personal

⁴ He was referring to the Latin name, which is in fact a misnomer, as the problem only arises where the deed is indeed signed, but without true understanding.

opinion. Unfortunately, this involved accepting the startling proposition that it was in the patient's "best interests" to die⁵.

It is clear that legal absurdities are not usually presented as arguments for change. They are considered as factual in nature, and are mentioned not in order to refute valid legal authority, but simply in order to indicate the unsatisfactory nature of the law. Where the judge does seem to consider the legal absurdity as an argument against established law, he can expect to be overruled. Thus, in *Beswick v Beswick* 1967, Lord Denning criticized the rule of privity of contract, according to which no third person can sue, or be sued, on a contract to which he is not a party. He forcefully presented the resulting injustice as an argument for change:

If the decision of the Vice Chancellor truly represents the law of England, it would be deplorable. It would mean that the nephew could keep the business to himself and at the same time repudiate his promise to pay the widow. Nothing could be more unjust.

However, in this case Lord Denning was attacking the law as established by binding precedent, rather than an alternative legal theory. The absurdity he pointed out was not conditional but real. Not surprisingly, he was overruled on this point in the Lords⁶. Lord Hodson said:

One cannot deny that the view of Lord Denning, expressed so forcibly [...] is of great weight, notwithstanding it runs counter to the opinion of all the other judges who have been faced by the task of interpreting this remarkable section.

4. *The ad absurdam argument*

The rhetorical argument from the absurd presents an opposing viewpoint not as logically impossible but rather as incoherent and unaccept-

⁵ In Lord Mustill's dissenting judgment it was considered more reasonable to say: "He has no interests at all".

⁶ After a long period of consultation, Parliament has since intervened to change the law in this respect, through the Contracts (Rights of Third Parties) Act 1999. Lord Denning's argument has thus been accepted posthumously. In *Lloyds Bank v Bundy* 1975, he had already used similar arguments, based on apparent legal injustice, in an attempt to introduce into English contract law a new rule based on "inequality of bargaining power". But on this point he again found himself in a minority.

able. It is often found convincing in everyday conversation. The current debate on the reform of university teaching may serve as a convenient example. Given that most proposed reforms seem to involve vast increases in evaluation and assessment, it is common for the opponents of reform to argue informally that the inevitable result would be that the students would end up spending more time in examinations than in lessons. This consequence is not logically impossible, although traditionalists would probably find it undesirable. The refutation of such a counter-argument to reform must involve either a denial that the consequences presented as absurd follow inevitably from the original proposition, or a denial of their absurdity. (In the language teaching field, such a denial may conceivably involve the claim that the students' time would be more profitably spent taking suitable language tests, than in listening to classroom lectures.)

In legal argumentation, the *ad absurdum* argument is similarly used to attack unwelcome interpretations by exaggerating their faults to the extent of making them appear ridiculous. It is used not in order to force a change in established law, but to refute possible opposing interpretations which are not usually imposed by legal precedent. In such cases, the approaches which are attacked are purely theoretical, in the sense that they have not been established by authority as part of the law; and the absurdity involved is not real but conditional, in that that it is presented as a consequence of a particular, unacceptable, interpretation. Such an interpretation of the law is thus presented as unacceptable because it would give rise to absurdity.

In one of the cases most familiar to students of the English law, *Carlill v Carbolic Smoke Ball Co* 1893, Bowen, L.J. decided an important point concerning communication of acceptance with the words:

It seems to me that from the point of view of common sense no other idea could be entertained. [...] Are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal?

Of course, this absurdity is exaggerated, and cannot be considered as an inevitable consequence of the alternative approach. In the first place, the case was not concerned with lost dogs, and secondly, those “whose business it is to find lost dogs” are not expected to enter into contracts with individual members of the public. Their activities will therefore re-

main unaffected by any decisions concerning the finer points of contract law. Yet although Lord Bowen's argument had little logical validity, his conclusion (that in particular circumstances performance may be equivalent to valid communication) was welcome. Numerous similar examples may be given.

In *Parker v South Eastern Railway Co* 1877, Lord Mellish justified his decision concerning the communication of exclusion clauses on the grounds that:

It is [...] quite possible to suppose that a person who is neither a man of business nor a lawyer might, on some particular occasion, ship goods without the least knowledge of what a bill of lading was, but in my opinion, such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading was. [...] I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness.

It would indeed be an absurd consequence if, in the eyes of the law, exceptional stupidity should confer an advantage in business dealings. Similarly, in *Thornton v Shoe Lane Parking* 1971 Lord Denning imagined a party to a contract attempting to re-negotiate the terms by swearing at an automatic ticket machine:

None of those cases has any application to a ticket which is issued by an automatic machine. The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it; but it will remain unmoved. He is committed beyond recall.

The power of the rhetorical version of the argument is shown by the fact that it has allowed courts to reach what now appear to be opposite conclusions concerning statutory torts. In *Atkinson v Newcastle Waterworks* 1874-8, the defendant company supplied water to the city of Newcastle. They were required by statute to keep their pipes at a certain pressure, breach of this duty being punishable by a £10 fine. The plaintiff's premises caught fire, which could not be put out because of insufficient water pressure, and his premises were therefore completely de-

stroyed. It was held by Lord Cairns that the unfortunate Atkinson had no action in damages for breach of statutory duty:

The proposition a priori appears to be somewhat startling (*sic*) that a company supplying a town with water - although they are willing to be put under obligation to keep up the pressure, and to be subject to penalties if they fail to do so - should further be willing to assume [...] liability to individual actions by any householder who could make out a case. In the one case they are merely under liability to penalties if they neglect to perform their duty, in the other case they are practically insurers, so far as water can produce safety from damage by fire.

However, shortly afterwards, in another statutory tort case, *Groves v Lord Wimborne* 1895-9, Lord Smith held, in spite of the authority from the earlier case, that the plaintiff did have an action in damages for breach of statutory duty, again because he found that the alternative would be absurd. In this case the plaintiff employee was injured as a result of a lack of fencing in the defendant's factory. The defendants were subject to a fine of £100 for breach of statutory duty, part of which would be payable to the plaintiff at the discretion of the Secretary of State. Lord Smith said:

I feel no doubt that the Act was passed for the benefit of workmen in factories, by compelling the masters to do certain things for their protection. I do not think that ss. 81, 82 and 86 can be interpreted so as to take away from an injured workman the remedy which otherwise he would have under the statutes against his master. [...] I cannot think that such an enactment was intended to deprive the workman of his right of action.

Absurdity is also an important element in arguments over the construction of Statutes. Recently, in *Regina v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet* 1999, Lord Browne-Wilkinson said:

An essential feature of the international crime of torture was that it had to be committed "by or with the acquiescence of a public official or other person acting in an official capacity". As a result all defendants in torture cases would be state officials. If the implementation of a torture regime was a public function giving rise to immunity *rationae materiae*, that produced bizarre results.
[...]

Under the [1984] Convention, the international crime of torture could only be committed by an official or someone in an official capacity. They would all be entitled to immunity [...]. It would follow that there would be no case outside Chile in which a successful prosecution for torture could be brought [...]. Therefore, the whole elaborate structure of universal jurisdiction over torture committed by officials was rendered abortive and one of the main objectives of the Torture Convention, to provide a system under which there was no safe haven for torturers, would have been frustrated⁷.

It may be noted that the argument from the absurd is also common in American law, as seen for example in *Charles River Bridge v Warren Bridge*, Supreme Court, 1837 (where a decision was clearly reached for reasons of policy rather than by strict application of the law). Chief Justice Taney said:

If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with numerous turnpike companies, and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep and calling upon the court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals upon lines of travel which had before been occupied by turnpike corporations will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of these improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilised world.

The Supreme Court thus considered that the literal interpretation of the contractual agreement would lead to an intolerable situation in which enterprise would be thwarted, and Americans would be unable to

⁷ His analysis of the Extradition Act 1989 and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishments 1984, recalls the “mischief rule”.

take advantage of the technological developments. This was an important departure from the established doctrine according to which freedom of contract was thought to be constitutionally protected.

The argument from the absurd is usually used to defend the majority view. Clearly, when delivered by the senior judge, whose pronouncements have the force of law, the argument is all the more likely to be found convincing. However, it is occasionally attempted by the losing side. An example may be found in *Foakes*. In his concurring judgment⁸, Lord Blackburn criticized the notion of consideration as laid down in Pinnel's case, presenting this doctrine as absurd, notably because it allowed an outstanding debt to be settled by a "peppercorn", but not by payment in money of any lesser sum. Three years earlier, in *Couldery v Bartrum* 1881, Sir George Jessel had spoken in the same vein of "canary-birds, tom-tits, or rubbish of that kind" as constituting legally sufficient consideration. Neither argument was accepted by the majority.

In *Plessy v Ferguson*, the celebrated civil rights case, heard by the US Supreme Court in 1896, the opinion of the court, as delivered by Justice Brown, included a classic refutation of a counter-argument from the absurd. This took the form of a slippery slope argument, according to which the notorious "separate but equal" doctrine, although not necessarily absurd in itself, would inevitably lead to unacceptable consequences. This argument was refuted by the majority as being in no way inevitable, and easily avoided.

It is supposed that the same argument that will justify the state legislature in requiring railways to provide separate accommodation for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street and white people upon the other, or requiring white men's houses to be painted white and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only

⁸ The judgment in *Foakes* was unanimous, but Lord Blackburn was clearly unhappy at what he recognised to be the state of the law.

to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class⁹.

It is of course easier to reject this type of argument when it is presented not by the presiding judge, but by a mere barrister, presenting his client's point of view. In *Crown v Penguin Books Ltd* 1960, a Jury was asked to decide whether the publishers of D.H. Lawrence's novel *Lady Chatterley's Lover* were guilty of an offence under the Obscene Publications Act 1959. In his address to the Jury, Mr Griffith-Jones, for the Prosecution, presented what seems to have been intended as an argument from the absurd:

One of the ways in which you can test this book [...] is to ask yourselves the question, when you have read it through, would you approve of your young son, or young daughters – because girls can read as well as boys – reading this book? Is it a book that you would leave lying around in your own house? Is it a book that you would ever wish your wife and your servants to read?

The argument failed to convince, and Mr Griffith-Jones' admittedly somewhat personal idea of what was absurd was convincingly rejected by the jury.

5. *Fallacious absurdity*

The argument from the absurd was classed by Aristotle, not among the logical but among the "extra-technical proofs". Following Perelman (1958), this form of argument is now usually presented as "paralogical". It must be admitted that it appeals to intuitive agreement, rather than to objective fact, as to what should be considered absurd. However, although, it affords nothing approaching proof, it is undeniably persuasive, partly because of the natural (though illogical) tendency to take the falsity of one proposition as the demonstration of another. For this reason, many authors continue to class it as a fallacy (Hamblin 1970).

⁹ The "separate but equal" doctrine was not overruled until *Brown v Board of Education of Topeka* 1954.

Where the absurdity is not firmly established, the argument may be, and has been, used as a basis for unfortunate and regrettable decisions.

A particularly unjust result was reached in *Priestley v Fowler* 1837, which gave rise to the so-called “fellow-servant rule”. The facts were that the plaintiff Priestley was a servant (employee) of the defendant in his trade of butcher. He had been required to take certain goods of the defendant for delivery, in a horse-drawn van which belonged to the defendant and which was driven by another of the defendant’s servants. Because of the excessive load, the van overturned, throwing the plaintiff to the ground with such force that his thigh was fractured. Priestley obtained a verdict for £100 at the Assizes, but then lost in a motion in arrest of judgment. Lord Abinger, who heard the case on appeal, apparently considered as absurd the very idea of an employer’s liability to his employees, at least in those cases where injury was caused by a fellow employee. He gave an impressively rhetorical speech to this effect, saying:

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to the servant, he is responsible for the negligence of his coach-maker, or his harness-maker or his coachman [...]. The master would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer for sending him a crazy bedstead [...]; for the negligence of the cook, in not properly cleaning the copper vessel used in the kitchen; of the butcher, in supplying the household with meat of a quality injurious to the health; of the builder for a defect in the foundation of the house [...]. The inconvenience, not to say the absurdity of these consequences affords a sufficient argument against the application of this principle to the present case¹⁰.

In this case, the alternative view was thus presented, literally, as absurd. However, it is interesting to note that subsequent arguments

¹⁰ The plaintiff employee lost the case, even though it was undisputed that he had indeed broken his leg in an accident while about his master’s business. As he was unable to pay the costs of his unsuccessful action, he was sent straight from the court to a debtors’ prison. The judge may have been thinking of his own extensive household in Scotland.

against the fellow-servant doctrine were also based on rhetorical absurdity. In *Clarke v Holmes* 1862, for example, Byles J said: “If a master’s personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others, the less he will be liable.” However, as has been seen, such objections have little force against the binding authority of established precedent. The rule established by the *Priestley* decision was not finally abolished until the Law Reform (Personal Injuries) Act 1948¹¹.

A more recent, and therefore more notorious example is to be found in the “Birmingham Six” case, remembered today as a spectacular miscarriage of justice. Following the explosion of a terrorist bomb in 1963, six Irishmen were convicted in 1964. They appealed unsuccessfully the following year, on the grounds that their “confessions” had been obtained by beatings; a civil appeal against the West Midlands police force was rejected in 1980. In that case, *McIlkenny v Chief Constable of West Midlands*, Lord Denning said:

If the men were to win, that would mean that the Attorney General would have either to recommend that they be pardoned or he would have to remit the case to the Court of Appeal under s 10 of the Criminal Appeals Act 1968. That is such an appalling vista that every sensible person in the land would say that: it cannot be right that this action should go any further (*sic*).

The 81-year-old Lord Denning thus decided the case on the basis that he could not envisage a world in which the police could not be trusted implicitly. This idealistic supposition was later shown to be false, and the men were finally freed in 1991.

6. Conclusion

The above examples are taken from celebrated cases which are familiar to all students of the law, and which are readily available, not just in the *All England Law Reports*, but in most commercial collections of leading cases. They are sufficient evidence of the prevalence of rhetorical

¹¹ It had been abolished much earlier in the US by Federal statute in 1908.

argumentative structures in legal judgments in diverse areas of the law, from the time of Edward Coke to the present day, in spite of the supposedly disinterested nature of such discourse. Examples from the United States show that the same is true of other common law countries. It appears to be the case that such rhetorical structures are more common in legal judgments than in academic articles, whether in the legal field or otherwise. This does not mean that academics systematically refrain from expressing a point of view, or from attempting to convince others of the validity of their approach. Nor does it mean that judges fail to make adequate use of rational, rather than rhetorical argument. One possible explanation is that academics, including law professors, can and should remain above the fray, exposing various points of view and attributing ideas to others; whereas the judge is obliged to come down in the end on one side or the other. His first obligation is therefore to convince himself. This implies a decisive rejection of any alternative views.

More surprisingly, on the level of discourse analysis, experience of materials preparation for pedagogical purposes, for general English as well as for legal English, shows that rhetorical argumentative structures are more common in legal judgments than in journalistic texts devoted to contemporary debates, even where these are presented in a decidedly polemic manner. Again, in most cases, the journalist is not expected to argue for one side or the other, but rather to show the area of disagreement by presenting the opposing points of view. His presentation is also likely to be more implicit and less analytic in style than is common in legal judgments, where the rhetorical devices are more apparent and easier to isolate.

A further question arises as to why the argument from the absurd, as opposed to other argumentative forms, should be so common in legal judgments. Two explanations may be suggested: first, the absurd may be defined very widely, as in Perelman (1958), to include not just what is in opposition to logic or experience, but also what is laughable, including unacceptable ideas in general. Such a definition will naturally include a multitude of different approaches to the debate or discussion in hand.

Perelman adds that the provisional assumption of the proposition to be refuted may even be expressed through irony, but this is rare in legal judgments. Denning (1984: 189) points out that *R v Thomas Hall* 1845 is perhaps unique in containing clear evidence of sustained irony. In this

case, a hawker was charged with bigamy. His defence was that his wife had left him and gone to live with another man, so he should be entitled to take another. Addressing the prisoner after the guilty verdict, Mr J. Maule said:

I will tell you what you ought to have done; and if you say you did not know, I must tell you that the law conclusively presumes that you did. You ought to have instructed your attorney to bring an action against the seducer of your wife for damages. That would have cost you about £100. When you had recovered damages against him, you should have employed a proctor and instituted a suit in the Ecclesiastical courts for a divorce a mensa et thoro; that would have cost you £200 or £300 more. When you had obtained a divorce a mensa et thoro you had only to obtain a private Act of Parliament for a divorce a vinculo matrimonii. The Bill might possibly have been opposed in all its stages in both Houses of Parliament and altogether these proceedings would have cost you about £1,000. You will probably tell me that you have not a thousand farthings of your own in the world. But that makes no difference. Sitting here as an English judge, it is my duty to tell you that this is not a country where there is one law for the rich, and another for the poor. You will be imprisoned for one day¹².

In this case the judge's apparently dutiful restatement of the law is made to appear unreasonable to the point of absurdity, and thus as a contribution to an ongoing debate. It is probably no coincidence that the Matrimonial Act 1857 was passed only a few years later, allowing divorce by the Courts so as to permit remarriage.

However, even without such an all-embracing definition of the notion of absurdity, it is clear that the various paralogical arguments have much in common. They cannot be defined hermetically, in isolation from each other. In particular, it seems that various forms of informal refutation may themselves be derived from the argument from the absurd, which may thus be considered as basic. The straw man argument, for example, is based on the attribution of unacceptable arguments to the opponent in order to make his point of view appear absurd. In the same way, in one of its forms, the *ad personam* argument presents the opponent as inconsistent so that his arguments will therefore appear un-

¹² *The Times* of 3/4/1845 reports the sentence as 4 months' hard labour.

worthy of attention. And, as explained above, the slippery slope argument is based on the premiss that the opposing proposition will lead inexorably to some form of unacceptable absurdity.

The second explanation derives from the nature and origin of the *ad absurdum* argument itself. Because of its roots in logic, it may be thought that this form of argument can allow the judge to preserve at least the appearance of abstract, technical reasoning, even where his mind is already made up and his argument in fact fallacious. From this standpoint, it is at least plausible to assume that it is precisely because the argument from the absurd gives the impression of an impartial and therefore rational refutation that it has been found so convincing in legal debate.

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