DEFENDING LOGIC FROM A BUM RAP: PRAGMATISM AND THEORY IN ENGLISH LAW

By P.S. Atiyah

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Dale Gibson*

A few years ago the following comment was scrawled on a wall at the University of Manitoba, not long before examination time:

THEORY IS BUNK!

Under it someone responded:

AN INTERESTING HYPOTHESIS.

Professor Atiyah's sparkling critique of the pragmatic tradition in English law — its virtues and its sins — makes the same point, among many others. He notes:

> [T]here can be no practice without theory, and ... the pragmatist who says theory just does not matter is himself acting on an implicit theory of his own. Law may be in some respects a highly practical subject, but it is quite impossible that it could exist at all without theory. Law is a *purposeful* enterprise. We live by law in modern society for *reasons*, because we have intelligible and discoverable human goals. The whole concept of the rule of law requires not just that we have rules ... but also that these rules should be based on purposes and reasons which are open to public debate. ... [1]

Because the pragmatism of English lawyers and judges is so often expressed as a preference for "commonsense" solutions over those that would be dictated by "strict logic", Professor Atiyah starts by examining the role logic plays in legal decision-making. He begins, not surprisingly, with the most troublesome aphorism ever uttered by Mr. Justice Oliver Wendell Holmes: "[t]he life of the law has not been logic; it has been experience."[2]

Atiyah demonstrates that all intelligent legal argument and decision-making (including that of Mr. Justice Holmes) employs logic.

> [J]udges do habitually use the methods of deductive logic in the process of legal reasoning. They do try to identify rules of law applicable to the case in hand, they do try to find the facts of the case in hand, and they do then subsume the facts under the law they have found to arrive at their conclusions. This is a

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* Professor, Faculty of Law, University of Manitoba.

1. P.S. Atiyah, *Pragmatism and Theory in English Law* (1987 Hamlyn Lectures), (London: Stevens, 1987) at 143 f. [hereinafter *Defending Logic*].

2. Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown and Company, 1963) at 5.

perfectly regular and everyday use of the processes of deductive logic.[3]

Disagreements over legal conclusions rarely involve this deductive *process* (though Atiyah does offer some illustrations of logical "howlers" committed by judges).[4] Rather, they usually concern the validity of the *premises* (i.e., assumptions) from which the deductions proceed. "Once the premises have been finally determined or agreed, the conclusions do follow inexorably..."[5]

Atiyah illustrates the importance of premises by reference to a case he considers an example of pure pragmatism, namely, *Best* v. *Samuel Fox and Co., Ltd.*[6] In this case the House of Lords denied a right of action to a wife for loss of her husband's consortium, due an injury caused by the negligence of the defendant, while acknowledging that husbands in the same situation have such a right of action regarding the negligent injury of their wives. The court regarded the husband's cause of action as a legal anomaly which should be abolished legislatively, but which was too well established in case law to be abolished judicially. However, because there were no instances in the previous case law of *wives* suing, the Court regarded itself as free to reject this plaintiff's claim.

Although this decision is often damned as "illogical," it can be demonstrated to be either logical or illogical, depending upon one's choice of premises. If the judges' major premise was that "anomalous causes of action should not be extended," and their minor premise was that "the action for loss of consortium is an anomalous cause of action," then their conclusion can be seen as a product of pure deductive reasoning. The same would be true if their premises had been: (a) that Parliament should be made aware of the need for reform in this area, and; (b) that a denial of this claim will bring the matter to Parliament's attention. If, on the other hand, the judges had begun with the major premise that "legal principles should apply uniformly to everyone unless there is a functionally relevant basis for distinction," then they would have arrived at a different result.

This is what Holmes meant by saying that experience has been the life of the law; its content has been determined by the assumptions from which legal reasoning proceeds, rather than by the purely automatic reasoning process itself. He emphasized this point in his equally famous (but less frequently misunderstood) comment about the importance of what has sometimes been called the "inarticulate major premise".[7] There is no reason for logic and commonsense to be at odds. If the premises are sound, logical deduction will produce commonsense solutions.

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3. *Defending Logic*, supra, note 1 at 14.

4. *Ibid.* at 15-16.

5. *Ibid.* at 15.

6. (1952), [1952] A.C. 716 (H.L.).

7. *Supra*, note 2 at 32. Although the term "inarticulate major premise" does not appear in *The Common Law*, Holmes' discussion of "the unconscious result of instinctive preferences and inarticulate convictions" seems to have been the actual source of this famous notion.

Debates in the legal arena between proponents of pragmatism and advocates of "strict logic" are seldom about the nature of the reasoning process. What they usually involve are arguments concerning the extent to which the legal system itself — the body of legal principles — should exhibit consistency or "internal logic." Atiyah observes:

> [W]hen judges and lawyers talk of logic, and especially when they reject logical reasoning, they are often not using the word in the strict sense of syllogistic logic. ... English lawyers often speak of a proposition as logical when they simply mean that it makes sense, or that it is consistent with other propositions, and equally they say something is illogical when they reject arguments of consistency or analogy in favour of different arguments.[8]

Consistency, or "treating likes alike", is a fundamental desideratum of every legal system. It serves the goals of both fairness and expediency. The central theme of Professor Atiyah's lectures is his criticism of the English legal system for under-emphasising the importance of internal consistency. Although he describes this tendency as "unprincipled," rather than "illogical," consistency can be viewed as a function of logic. If a = x, and b = a, then logic requires that b also = x. If men are entitled to sue for loss of spousal consortium, and women are equal to men in all respects relevant to that question, logic equally demands that women are entitled to sue for loss of spousal consortium. But whether it is seen as a function of logic (as I believe it to be) or merely the product of a pragmatically determined policy premise (as Professor Atiyah seems to regard it) there can be no denying that consistency is a highly prized attribute of all legal systems. Professor Atiyah's indictment of English judges for paying too little heed to this attribute is persuasive.

The *Best* case, referred to above, provides an illustration of this unfortunate tendency on the part of some courts. Atiyah offers many more examples, and students of the Canadian legal system would have little difficulty compiling a collection of similar horrors perpetrated by judges in this country. Judges are not the only culprits, of course. A statute passed by the Legislature of Manitoba in 1976, would be a serious contender in any competition to determine the all-time most flagrant abandonment of legal principle by Canadian law-makers. Because the neighbours of a noisome hog farm were successful in an action for nuisance after Manitoba's Minister of the Environment had approved its operation, the Minister caused the Legislature to enact a statute abolishing the law of nuisance with respect to any odour resulting from a business that does not violate any statute or regulation.[9] This mutilation of the law of nuisance (made, by the way, without consultation with the Law Reform Commission) applies, inexplicably, only to "businesses," only to "odours," and whether or not there are any statutes or regulations in existence concerning business odours. (There were in fact none affecting hog farms

8. *Defending Logic*, *supra*, note 1 at 16.

9. *The Nuisance Act*, C.C.S.M. c. N120.

at the time the statute was passed). The "pragmatism" that encourages or tolerates this kind of legislative rapine has much to answer for.

The pragmatic tradition is not entirely evil. Professor Atiyah devotes an entire lecture to the strengths of the tradition — primarily, its willingness to abandon or modify principles that would lead to unsatisfactory results. This is an important attribute. It has enabled the common law to remain relatively up-to-date over the centuries. Yet this feature of the common law has not been universally recognised or approved. It is paradoxical that a legal system which sneers at consistency and principle as often as ours does is occasionally hampered by the courts' refusal to modify or reject out-dated principles, such as the more extreme versions of *stare decisis* or parliamentary supremacy. Generally, however, over time the inconvenience of out-moded principles tends to be recognised, and pragmatic courts eventually do make necessary modifications, either by outright rejection of a theory (as in the case of the House of Lords' announcement, in 1966, that it did have the power to overrule its own past decisions) or by distinguishing the fact situations immediately before them from ones that have gone before.

The problems of pragmatism arise not from these careful pruning exercises, but from pretending to "distinguish" an uncomfortable precedent where no rational basis of distinction exists. Again, the *Best* case provides an illustration. Rather than rejecting outright the notion of liability for negligent impairment of spousal consortium, as the judges apparently wanted to do, or applying the principle fairly (i.e., consistently) while awaiting legislative abolition, the court instead imposed an altogether artificial and unfair distinction based on gender. Atiyah has this to say about the consequences of inappropriate distinguishing:

> When a doctrine of the law has hardened and ossified over the years both our judges and our legislature often prefer to outflank it by developing new doctrines and techniques rather than openly modifying or rebuilding the old. This leads to the piling of new layers of law on the old, and a constant growth in complexity.[10]

As the dead wood accumulates, it makes it increasingly difficult to obtain an overview of the subject, and thus to determine the existence of inconsistencies and inequities.

The next time a lawyer, attempting to persuade a court to adopt a principled or consistent position on a point of law, is met by the Holmesian adage about logic and experience, the following response is recommended:

1. Point out that Holmes was not denigrating the process of logical deduction; he was merely pointing out that the substance of legal conclusions will depend upon the assumptions or premises that experience shows to be appropriate for the society in question.

10. *Defending Logic, supra*, note 1 at 123–124.

2. State your premises clearly and demonstrate that they lead logically to the conclusion for which you are contending.

3. Challenge your opponent to reveal his or her premises as forthrightly as you have, quoting Professor Atiyah's perceptive comment:

> [T]he pure pragmatist who professes to scorn all theory is himself usually proceeding on the basis of some theory, seeking (albeit perhaps unconsciously) some rationale objective; and his pragmatism may simply amount to an unwillingness to discuss his objective, to examine his premises, to open himself to accountability.[11]

11. *Ibid.* at 147–8.