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Teaching Civil Obligations (or What I Learned about Law, Legal Thinking and Teaching)

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"It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."
−Mark Twain

Introduction

In most of my decades-long teaching and professorial career, I primarily taught Torts, but never Contracts. However, last year, I agreed to teach jointly a postgraduate class of 35 students on "Civil Obligations." It was a decision that conformed to one of the more unsettling tropes of my life—"act in haste, repent at leisure." My role in this arrangement was, after a general opening about the nature of civil obligations and the interface of Contract and Tort, to assume responsibility for the Contracts component of the course. This presented itself as a considerable task, but I thought that it would be a new and refreshing challenge. And I was right. In preparing for and teaching contract law, I learned (and unlearned) more about law, legal thinking and teaching than I had originally bargained for or reasonably expected.

In this essay, I reflect on that experience and offer some insights that I came to realize (and perhaps re-realize) through teaching the course: it gave me a chance to explore and question some of the settled ideas that I had about law, legal thinking and teaching. Of course, this meant that I had to be more open to different viewpoints than I usually am or, at least, more than many would think I am capable of. After all, my stances on law, legal thinking and teaching have accumulated over almost 40 years and, as a result, have become (too?) entrenched. I have clear opinions on various matters that have become fixed and unquestioned in my jurisprudential

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worldview. But a significant part of those views was my commitment to the idea that there is no solid ground on which to stand; everything is always shifting and changing. So, with that sobering thought in mind, I went about the demanding undertaking of trying to put up for scrutiny and critique many of the ingrained shibboleths that have informed my work. In short, I followed the advice of Star Wars' wise *Yoda*—sometimes "you must unlearn what you have learned."

In that critical spirit, I intended to stir up some ground that I had left undisturbed for a long time. I do not pretend that I managed to do this completely or successfully. Nevertheless, the effort was worth it. At a bare minimum, this experience made me unlearn some of my long-held ideas about law, legal thinking and teaching. In the process, I modified those thoughts so that they rang a little truer and were not merely a repetitious recital of unexamined and complacent ideas. Accordingly, after talking about the challenges of teaching new courses, I will move on to deal with the role of economic morality in contracts law, the relationship between contracts and tort law, and the political dynamics of contract law's development. Throughout the essay, my ambition is to ask many (and attempt to answer some) of the underlying questions that frame law, legal thinking and teaching.

I. *Starting anew again*

In the first place, agreeing to teach Contracts reminded me of the challenge that younger colleagues face in working up a course and teaching it. Those are fraught times in almost all professors' careers. New courses involve skating on thin ice and, if truth be told, a number of slip-and-slide tumbles. In that sense, teaching a new course was a humbling process. I travelled back in time to my own early teaching days and felt again some of the angst that most teachers go through as they ready themselves to face their students; an unwelcome experience of the imposter syndrome resulted. There are few places to hide at the front of a class as your knowledge and learning is put to the test. Perhaps, more accurately, it where there is nowhere to hide when the gaps and evasions in your knowledge are exposed for all to see; you are naked out there.

As well as boning up on the substance and subtleties of the topic in hand, there is the considerable burden of working out what kind of teacher you want to be or, at least, want to try to be. When I began teaching, I knew that there had to be a better way to instruct than the "dictation sessions" I had been brought up on. I wanted students to think that there might be some reason to come to class and not simply crib in notes from somebody else. Indeed, when I attended the Inns of Court School of Law in the mid-

1970s, this style of teaching was given a tragi-comic twist. The teacher (a celebrated Oxford Don) announced that he could not be at class the following week, but that the class would continue nonetheless. A little puzzled by this, we arrived late that day and had to sit in a spill-over room where there was normally a TV with a live-action video on screen of the teacher in the main classroom. However, that week, the teacher had sent in an audio-spool, which was being played by a tape-recorder placed on the desk at the front of the room. In our spill-over room, we sat through a class of watching a video of that tape-player and hearing it through the speakers. This now hard-to-believe scenario spoke volumes about the state-of-the-art approach and underlying pedagogical thinking of English law teachers.[1]

After a couple of years teaching in England, I came to Osgoode. I knew what I did not want to be, but had not settled on what I did want to be; I had little sense of the pedagogic possibilities. Early in my first semester, I was walking down the corridor and heard a voice booming out from a classroom. I peered in and saw Harry Glasbeek who was pacing up and down the aisles, sometimes speaking *sotto voce* and other times bellowing to the class. This was and remains an epiphanic moment for me. After attending a couple of Harry's lectures, I realized that, if I could not quite be Harry, I could at least be whomever I wanted to be. He had opened my eyes and mind to the possibilities that teaching offered. And it was not simply his style, but also his content that inspired me. Students may or may not have liked what Harry did or said, but they could not ignore him; he engaged the students and confronted them. There were no fences to sit on in Harry's class; he challenged students to question themselves and their deepest understanding about what law is and what it could be. He was a *bravura* performer.

Most importantly, my recent experience reminded me that teaching is as much about learning as it is about sharing one's learning with others. Indeed, there are few better ways to learn about a subject than doing the work required to be able to get up in front of a class and teach it. For that reason, even the most experienced of professors should make the occasional decision to teach a course that they have never taught or even studied before. It offers the opportunity to challenge oneself and to be more sympathetic to the plight of less seasoned colleagues. The benefits of doing

1. This was not the only eccentric teacher or colleague I had—the almost fall out the window one; the world's largest collector of plastic bags; the one who knowingly taught law that had been replaced by a new legislative scheme; the one who lived and slept undiscovered at the law school for a long period; and the one who complained that the students interfered with us doing our job properly, to name but a few.

so far outweigh the costs of taking on new courses. Also, I realized that, over the years, I had developed a wide range of strategies—part lecture, part Socratic engagement, part stand-up comedy, and part confrontation—to cover up and present a front of calm and covered composure to the sceptical class. Indeed, I also understood better the notion that, as you get older, the class is more willing to give you the benefit of the doubt by assuming that you are wiser than you are.

In agreeing to teach a new course, my basic gamble was that what I lacked in substantive knowledge about the law of contracts would be more than offset by what I knew about law and teaching generally. There was some validity to this conceit. In reading and scrutinizing cases that I had never read before, I was able to rely on a strong sense of what kinds of arguments and reasoning were relied on by judges; I had developed a critical facility for reading and understanding cases. However, I knew that the common complaint about my teaching was that I tended to want the students to run before they could walk: I moved too quickly to a critical reaction to cases and principles before I had sufficiently laid out the basic take-aways from judgments and explained the rules to be gleaned from them. So this seemed a good occasion to try to remedy that. I would do a little more lecturing than I usually did and try to hold down on the editorial posture.

Rather than use a casebook for the course, I opted to designate a text book—John McCamus's *The Law of Contracts*—as the main source material.[2] As it was a postgraduate-level seminar, I expected everyone to read the relevant chapters before class. That way, students would have a solid and reliable account of what the law was, especially if my own knowledge was not as deep as it could be. While not a short book at over 1000 pages, the text did present itself as a somewhat succinct introduction for law students. It would be fair to say that McCamus took a reasonably traditional approach to his expository task. He framed discussion around leading cases and laid out a general framework for understanding those cases. In this regard, it was standard fare, albeit executed with genuine elegance, scholarly clarity and incisive analysis. However, in equal measure, McCamus's book highlighted the weaknesses and strengths of contract doctrine as well as a formalistic approach to it; he was alert to the work-in-progress character of the law and its various shadings and

2. John D McCamus, *The Law of Contracts,* 2nd ed (Toronto, ON: Irwin Law, 2012). I should declare that I consider John to be a long-time colleague and friend. He was my first Dean and has always been unfailingly supportive of me and my critical work (even when he thought I was flat wrong or wrong-headed).

missteps. This made my own self-imposed unlearning enterprise both a little easier and a little harder.

It was easier in that I did not have to offer my own reading of the cases and defend them as reasonable and part of the received professional wisdom; McCamus's text did an excellent job of this. It anchored the course and meant that I did not have to spend too much time laying out or defending my "descriptive" reading of cases and the application of general principles. Instead, I could spend my time offering more critical contexts and frameworks within which to read the cases, appreciate the standard renditions of them, and apply them to new situations. I could largely escape the frequent claim from students that my reading of the cases was already skewed and simply a set-up for my own political views about law and life.

But McCamus's straight-up presentation also made my teaching a little more difficult. In spite of McCamus's efforts to map out a clear path through the doctrinal forest, he struggled to do that successfully. This was not because of any failing on his part. It was because, although cases are the only guide available, they offer indeterminate and occasionally conflicting guidance. Some strike out on a clear road, others get diverted down alleys and cul-de-sacs, some trail off into nowhere, and still others go round in circles. In his efforts to be clear and instructive, McCamus captures these false starts and wrong turnings. Indeed, it is hard not to leave his formidable exegesis with the impression that the law of contracts is less a helpful map for the confused and more a mystery tour in which no one knows where they are going and what is around the next bend. While it might be going too far to say that McCamus's text reflects the truth of Tennyson's well-known depiction of the "lawless science of our law,/ That codeless myriad of precedent,/ That wilderness of single instances,"[3] it leaves the reader with a definite sense of unease about the determinacy of contract's legal doctrine. His book is as much about a lingering faith in the common law and its propensity to get it right, whatever its occasional appearance, as being more in the business of hope than conviction.

All this made my unlearning task more difficult. My anticipation had been that McCamus's text would work as a fixed point against which I could offer my own views and create a kind of critical tension between his text and me. As I have stated, that proved not to be the case. His own analysis was too soft and mushy to work as any kind of solid template. Of course, in a different way, this was all music to my critical ears. Even the traditional approach à *la* McCamus was far less certain and determinate in

3. Lord Tennyson, *Aylmer's Field* (1793).

its doctrinal renderings than I had previously assumed. While this scotched my plan to set up a traditional yin to my more oppositional yang, it did pave the way for me to get across my own take on law and contract law. In teaching the class, therefore, I felt a certain need to recalibrate, if not abandon, the essentials of my critical law-is-politics approach to law, legal thinking and teaching.[4]

In contrast to what some think, I am not of the view that legal doctrine is chaos all the time nor that there are no good judicial decisions. My approach recognizes a mix of determinacy and indeterminacy. To use a Hartian metaphor, there is at any moment a core of determinacy and a penumbra of indeterminacy.[5] This is not a novel or eye-opening conclusion. But what gives it a more unsettling and radical edge is that the relation between the core and penumbra is itself always fragile, contingent and on the move. Today's core of determinacy is tomorrow's penumbra of indeterminacy and vice-versa. It is not simply that there is always the real possibility that there is a *Donoghue*-like revolution around the next corner, but that any part of the legal doctrine is vulnerable to being destabilized and thereby re-configured at any time. Indeed, the law is never simply there, but requires creative interpretation and re-interpretation: it must be appreciated that law's normal condition is a state of constant about-to-be, not already-is. In this way, the interpretation of legal doctrine can be understood as both constrained and unconstrained in equal measure. In short, as McCamus's text unintentionally shows, there is nothing given or fixed about legal doctrine; it is in a constant state of flux whose next shift is as unpredictable as the English weather.

A similar story can be told about individual cases. No case can be declared to be right or wrong on the basis of law's internal logic or any related formal standard. In this sense, the law is whatever a judge says it is as long as that ruling is adopted by other judges; there is no right or wrong that stands apart from its substantive merits or appeal at that particular time and in that context. It follows that labelling a decision as right or wrong is simply another way of saying that its substantive merit or tilt appeals to the commentator's own philosophical, political or social commitments. Perhaps more generously, the decision will be right if it does not clash or deviate from those commitments too significantly. Rightness or wrongness is an external, not an internal marker; it entails a

4. The most concise and, dare I say, balanced statement of my account of law and judicial decision-making can be found in Allan C Hutchinson, *Toward an Informal Account of Legal Interpretation* (New York: Cambridge University Press, 2016).

5. HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593 at 607-615.

selective evaluation that will vary from one commentator to another and from one context to another. So, stating that a specific decision is right is another way of saying that you prefer the directional potential of the case over other possible political directions. Teaching Contract law made me re-learn that anew.

II. *A matter of course*

So much of contemporary jurisprudential thinking has been side-tracked by abstract and esoteric concerns. It remains transfixed by the positivist/naturalist debate over whether law has a necessary moral element such that it ceases to be law if it drifts too far away from that informing moral content. This positivist/naturalist divide has done more harm than good in legal education; it has syphoned off talent and effort (including too much of my own) in a largely academic navel-gazing enterprise. Rather than criticize or defend that speculative proposition, it might be better to examine the actual moral content of the law and to debate its merits and worth. So, rather than remain aloof from law's actual history and social performance, it will look at how and why law has the moral content that it has at particular times and in specific legal processes. This is no small task. Nevertheless, its confrontation will offer considerable insight into the more general relationship between law and morality in both practical and theoretical terms.

My self-imposed brief in the new course was to pursue this jurisprudential angle. The course began by exploring the different ideas about what an obligation is and what it entails. The class debated what moral or social obligations people might have and what that tells us about ourselves as a society. Obviously, there were many different views about what these obligations were, the force they had over individuals, and the consequences of neglecting or breaking them. This led neatly into a discussion about what differentiates legal and moral obligations. The beauty of this question in a Contracts course is that it "obliges" the class to appreciate that law is not always or primarily about institutionalized or formal sanctions: the Austinian idea of "law as coercion" had little relevance. By and large, contract law relies upon people's willingness to act in line with moral and social expectations rather than the looming presence of legally-enforced consequences. Not only are most contracts kept as a matter of moral conscience, but also, nothing normally happens by way of legal sanction if people break contracts, especially if those contracts are of an inter-personal as opposed to commercial nature.

I directed the class's attention to why some moral or social obligations are and are not converted into legal obligations. This kind of inquiry is

distinct from the positivist/naturalist one because it requires students to look at historically-specific situations. A focal point for discussions around this issue was Lord Atkin's prefatory statement in *Donoghue* that "acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief." He proceeds to observe that "in this way rules of law arise which limit the range of complaints and the extent of their remedy."[6] Not surprisingly, Atkin does not help that more general inquiry by bothering to explain how that crucial process occurs or should occur. He satisfies himself with simply concluding that a general moral duty to love one's neighbour translates into a legal duty not to harm one's neighbour. The acceptance of this principle by the legal community and its continuing importance to tort law confirms that Atkin had a genuine sense of not only what counted as a good moral compass, but also the readiness of the legal community to embrace such a principle in the early 1930s.[7]

It is too much to ask or expect that there is an established or even acknowledged common law method for deciding when and how to turn moral obligations into legal ones. To do so would suggest that the operation and development of the common law is more measured and mechanical than it is. However, it remains productive to inquire into whether there are any trends to the law's practice of crystalizing moral obligations into legal rules or principles and incorporating them into its doctrinal fabric. In contracts law, this occurrence is frequent and undeniable. Indeed, contracts law is one of the primary areas that has made a habit of reflecting and taking on-board commercial and customary practices. However, it is not at all easy or obvious to generalize about when and why that is done or ignored. In this regard (and many others), the common law remains a somewhat mysterious process that is celebrated and criticized in almost equal measure. As well, this sense of mystery seems to be embraced rather dispelled.

That said, two examples give a good sense of the connection between contract law and changing moral and commercial values. Since the mid-1960s, courts have taken more seriously the challenge to go beyond the formal façade of contracts made and look at their substantive fairness. Courts have been prepared to step in where stronger parties have taken advantage of weaker parties to implement terms and conditions that favour them. Even if there is an appearance of voluntary consent by a traditional

6. *Donoghue v Stevenson*, [1932] AC 562 at 580, 1932 SLT 317 [*Donoghue*].
7. See Allan C Hutchinson, *Is Eating People Wrong?: Great Legal Cases and how they Shaped the World* (New York: Cambridge University Press, 2011) at 115-141.

analysis, there has been an increased willingness to explore the difficult terrain between unconscionable actions and "bad bargains." Indeed, this tension is an underlying theme of modern contract law—how and where to draw the line between contracts that are based on inequitable behaviour (and, therefore, voidable) and those that are simply a poor choice by the disadvantaged party (and are, therefore, enforceable). This is especially pertinent in regard to exclusion clauses in a world of standard-form contracts.[8]

Another recent intervention is in the area of "good faith"—to what extent must contracting parties adhere, if at all, to standards of decency and honesty in performing their contracts? Although Canadian courts have hinted at that for some time, a move towards introducing such a standard occurred only a few years ago in *Bhasin*. In a move reminiscent of Atkin in Donoghue, the Supreme Court's Tom Cromwell (a former law professor) looked deep into the recent past of contract law and glimpsed a principle, not a rule or implied term, that "underpins and is manifested in more specific legal doctrines and may be given different weight in different situations."[9] He defended such an innovation on the basis that it would "put in place a duty that is just, that accords with the reasonable expectations of commercial parties, and that is sufficiently precise that it will enhance rather than detract from commercial certainty."[10] Although there is still much to be worked out about the scope and implications of such a duty, so that it does not "veer into a form of *ad hoc* judicial moralism or 'palm tree' justice,"[11] it offers evidence of how the courts are prepared to look beyond the established and formalistic law of contracts and take a less *laissez-faire* stance. That said, there is no indication from the Court about exactly when and where it might be prepared to incorporate changing social values and commercial norms into contract law.

In more generalized jurisprudential terms, these developments offer strong, if inconclusive evidence of the doctrinal process through which legal doctrine does not develop in line with some internal coherence of contract law or contract theorizing, but evolves with the pushes and pulls of external economic, social and political factors. Never too far ahead and never too far behind conventional wisdom, the law follows a path that seeks to balance the perceived need to retain some semblance of doctrinal integrity with the undeniable imperative to respond to social demands

8. See eg *Hunter Engineering Co v Syncrude Canada Ltd*, [1989] 1 SCR 426, 57 DLR (4th) 321.
9. *Bhasin v Hrynew*, 2014 SCC 71 at para 64.
10. *Ibid* at para 34.
11. *Ibid* at para 70.

and moral expectations. The post-pandemic situation will surely place considerable pressure on courts to reconsider the merit of accepted legal doctrines and rules. Again, while there is no discernible pattern to this interactive process, it behooves jurists to spend more time trying to fathom the interactional dynamics of law and morality than wasting valuable intellectual resources in the vain pursuit of identifying the inescapable minimum of moral content, if any, for something to vouchsafe the validity of law.[12]

III. *A change of expectations*

The challenge throughout the course was how to talk about civil obligations without simply dividing it up between the familiar categories of contracts and torts. The power of this bifurcation cannot be overestimated; it forces interactions into dichotomous categories, it influences the working assumptions in play in each, and it skews analysis by supposing that each operates in isolation from the other. This division of civil obligations has a deep and confining hold on the legal intellect and imagination: it is extremely difficult to tackle civil obligations through a lens that is not already filtered and distorted by those traditional and competing prisms of legal thought.[13]

Perhaps the most startling insight that comes from studying contract and tort law in tandem is that contracts are as likely to diminish people's interests and expectations as they are to enhance them. By this, I mean that contrary to the assumptions of most contract cases and scholarly commentary, parties who enter into contracts are already embedded within an existing context of legal entitlements and duties. To begin with, few parties actually negotiate contracts. Outside of commercial settings, contracting is a "like-it-or-lump-it" affair; a party either signs on to a standard form contract or has to walk away. That contract will be lopsided in its reach and effects; ordinary people's interests are placed as a distinct second to those of corporate merchants or producers. Most contracts today include an array of terms and conditions (eg liability waivers, compulsory arbitration, and liability caps) that work against ordinary people. As such, the age of contracts as a *laissez-faire* domain, if it ever existed, is now the stuff of historical nostalgia.[14]

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12. See discussion at 5-6, *above*.
13. For a standard analysis of similarities and differences between contract and tort, see Ken Oliphant & Vanessa Wilcox, "England and Wales" in Miquel Martin-Casals, ed, *The Borderlines of Tort Law: Interactions With Contract Law* (Intersentia Publishers, 2019).
14. See Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979).

Notwithstanding this, it is simply incorrect to assume, as most judges and commentators in contract law do, that contract-makers come to the table as strangers and only take on mutual legal duties and responsibilities to each other on the coming into existence of a contractual arrangement. Since at least 1932, this has not been the case: *Donoghue* rejected such a state of affairs. Up until then, most people's and organizations' claims depended on there being a contract between the harmed party and the harming party. As the dissenting Lord Buckmaster bluntly phrased it in *Donoghue*, "there can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute."[15] However, Atkin (and his majority colleagues) put an end to this. It was no longer the case that manufactures owed no duties to consumers or that those consumers were unprotected without having a contract with the manufacturer or supplier. Henceforth, for manufacturers to owe duties, and for consumers to be protected, no contract was needed. The fact that people and organizations interacted within the expanding and encompassing social context of neighbour-like relations was sufficient to impose duties and to confer protections.

When people and organizations stand on the edge of initiating contractual agreements, they already possess a collection of inchoate rights and obligations that will affect and substantiate any interaction that they plan or that happens. So when a present-day Mrs. Donoghue prepares to obtain or consume a ginger beer (or a product, service, etc), she can do so confident in the knowledge that she already has some basic protections in place. Conversely, the Stevensons of the world know that when they provide someone with a ginger beer (or a product, service, etc), they already owe considerable duties to that person whether or not a contract exists. Crucially, whether or not value is received or given for the ginger beer (or a product, service, etc), those tort rights and obligations between the Donoghues and the Stevensons are already structuring their relationship and interactions. Accordingly, the formation of a contact between two parties does not fill a previously empty legal void with a freshly created set of rights and obligations. The resulting contract and its embodied terms and conditions of performance work within and against the framework of existing tort rights and obligations. In short, contracts vary as much as initiate parties' duties and entitlements.

In other words, people and organizations go about their business with a dormant set of tort rights and obligations in their back pocket. When those people and organizations come together and interact, they can activate

15. *Donoghue*, *supra* note 6 at 577.

these rights and rely on them to shape and structure their interactions. Those existing rights are floating in readiness around the contractual encounter and are waiting to be brought into action or kept out. If Mrs. Donoghue now walked into an updated Wellmeadow Café and bought or was gifted a ginger beer, she would be reasonably well protected against there being a dead snail in her bottle. Moreover, any contract that she entered into with either Thomas Minchella, the Café's owner, or Stevenson would not necessarily grant her more or better rights. In such a scenario, the effect of a contract between the parties will be to vary their existing legal obligations and rights in torts either by reducing them or building on them. They reduce them by, for instance, limiting damages claimable; they build on them by, for instance, introducing higher standards of care. But whatever they do, and whether they do it deliberately or through ignorance, the contracting parties work against a backdrop of potential tort rights and liabilities.

None of this means that contracts necessarily or always limit the rights of parties to them. Of course, Mrs. Donoghue or her friend have no right to demand that someone give them a ginger beer (or a product, service, etc). There is no general duty under the common law to act for the benefit of another in tort; there might be some special duty owed to provide a drink if there was a pre-existing relationship between the two parties that placed a paternalistic or supervisory duty on one to provide the necessities of life to the other.[16] But this general lack of duty is the case because there is no relationship that has yet arisen. Once the parties begin the process of inquiring about supplying or receiving a ginger beer, the situation changes. Whether by gift or contract, obligations begin to arise as in any other circumstances. However, the central point remains valid—contracts do not create duties and entitlements where none existed before; they vary an already in-place and developed set of mutual rights and duties.

The perversity of all this is that people might be better off without contracts. If Mrs. Donoghue's friend had now entered the Wellmeadow Café, she would already have a set of tort rights against Minchella and Stevenson and they would have obligations to her about the quality of any ginger beer that she might be given or consume. Of course, to obtain the ginger beer in the first place, the friend would have had to enter into a contract and pay for the ginger beer. Whether she bought the ginger beer and entered a contract with Minchella (or even Stevenson) would not in itself have wiped out, sidelined or rendered nugatory those rights and

16. In Canadian law, there are a growing number of exceptions to this general principle. See *Childs v Desormeaux*, 2006 SCC 18.

expectations. As was decided by the Supreme Court of Canada in *Checo*, a party may sue in contract or tort and choose whichever is the more advantageous course to take; the plaintiff can avoid certain limitations (eg, a lower standard, cap on damages or limitation period) in the contract, "except where the contract indicates that the parties intended to limit or negative the right to sue in tort."[17] Mindful that many standard-form contracts reduce or cap legal liability, the friend might well be giving up more than she is gaining by entering such a contract. Indeed, she might be worse off than Mrs. Donoghue when it comes to recovering a range and amount of damages.

One significant drawback of making a tort claim is whether it is possible to sue for the discounted value of the ginger beer—could Mrs. Donoghue (as opposed to her contracting friend) recover the difference between the price paid for the ginger beer and, now as its owner, its reduced worth in its contaminated state? The big difference is that tort offers no relief or compensation when a product is simply shoddy in design and manufacture; there is no right to get any money back. However, that might not be the case if there are secondary losses associated with the shoddiness of the product. In *Junior Books*, the House of Lords allowed a factory to sue a flooring sub-contractor for a defective floor, even though the floor was not a danger to anyone; it simply prevented the factory from running its sophisticated machinery on it. The House of Lords soon backed off this in *D & F Estates Ltd* as being a doctrinal overreach and held that the case did not establish any general principle of recovery.[18] However, Canadian courts have allowed recovery in such circumstances where the defective product presented a physical danger to others if it was not repaired.[19]

All in all, the Civil Obligations seminar allowed me to consolidate and clarify ideas about the relationship of contract and tort law. As long as these courses are taught separately, little attention will be given (and has been given) to that crucial dynamic. Each will be presumed to operate in its own universe with only nodding and occasional reference being made to the other. This is not only unfortunate, but also will lead to a large gap in understanding people's more general rights and obligations. In particular, a major feature of the law's development and handling of civil obligations

17. *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 26, 99 DLR (4th) 577, Justices La Forest and McLachlin. See also *Henderson v Merrett Syndicates Ltd*, [1995] 2 AC 145, [1994] 3 WLR 761; *Deloitte & Touche v Livent Inc*, 2017 SCC 63.
18. See *Junior Book Ltd v Veitchi Co Ltd, [1983] 1 AC 520, [1982] 3 WLR 477; D & F Estates Ltd v Church Commissioners for England,* [1989] AC 177; [1988] WLR 368.
19. See eg *Winnipeg Condominium Corporation No 36 v Bird Construction Co,* [1995] 1 SCR 85, 121 DLR (4th) 193.

will be overlooked. In short, there has been a complete turn-around since *Donoghue*—before 1932, contract law was the governing and default regime for civil obligations; since 1932, tort law is now the primary source for civil obligations that can be varied by contracts.

IV. *Making it work*

If your entry into the world of contract law was through law school (as it is for almost all lawyers), you would take for granted that its legal doctrine was a prized product of the common law. Generated and shaped over many years and through many cases, these rules and principles are often passed off as a harmonious whole that reflect and instantiate, if not an underlying theory, at least a coherent framework of values and ideas. Such norms and prescriptions are generally understood to be derived from and driven by a need to facilitate trade and commerce: they are not intended to present a partial and particular ideology that comprises various contested social and economic strands. However, although it should not, it will likely come as a surprise to many that these claims are, at best, disputable, if not downright wrong. Not only is the legal doctrine of contract law based upon a general set of definite political assumptions and commitments, but they are also of marginal relevance as compared with the legislative regimes (and their different social and political underpinnings) that govern large segments of contractual arrangements.

First, an even cursory examination of the development of contract law over the past few years reveals that it chops and changes. It certainly defies any scholarly claim that it articulates and refines some internal logic or sense of doctrinal integrity.[20] So, any effort to understand contract (or tort) rules as being a set of norms that arise entirely as a result of intellectual concerns and considerations is a non-starter. If there is any pattern or trend to legal doctrine (and that is a large "if"), then it will have to be found outside the law and in the wiles and workings of the economic arena. For example, *Hadley v Baxendale's* formulation of the rules and remoteness of damage has a more compelling, if not always liked, explanation when it is situated in the social context of mid-19th Century England; it was considered important to limit the liability of the fledgling transport industry as the economy became more national and, therefore, in need of a more viable and extensive network of transportation.[21] There are few textbooks or commentaries that incorporate this elementary insight into

20. See discussion at 4-5, *above*.
21. See Richard Danzig, "Hadley v. Baxendale: A Study in the Industrialization of the Law" (1975) 4:2 J Leg Stud 249.

an explanation for legal doctrine; it is considered more as an "isn't-it-interesting" aside.

Second, the political orientation of contract law has resulted in much of what was traditionally considered to be in the domain of contract law being taken out of the controlling and responsible hands of judges and the common law process. Instead, disenchanted by the political leanings of judges and lawyers, legislators have fashioned alternative governing regimes that are more in line with modern political sensibilities; these include labour and employment, insurance, insolvency, marriage and divorce, and sale of goods. This state of affairs is the direct outcome of the common law's persistence in embodying (at the same time as it is denying that it is beholden to) a more individualistic and *laissez-faire* ideology. Moreover, the shift from the common law to legislated regulation has been so pervasive that the pedagogic representation of the common law as being at the heart of the overall scheme for regulating contractual and contract-like behaviour is no longer accurate or defensible. There are few areas of the private law of contract that have not been superseded by more publicly-inclined systems of organization and norm-making. As such, the overwhelming existence and operation of statutory schemes stand as official monuments to the marginal and largely rejected merit of the common law of contract. Teaching this seminar re-taught me that neglecting such an appreciation is close to willful and perpetuates a troubling ideology, if only by default.

A revealing example of how this occurs is the infamous case of *Christie.* Fred Christie was a *Canadiens'* hockey fan and a season-ticket holder at the Montreal Forum. When he tried to order a beer at the Forum's bar in the late 1930s, the bartender refused to serve him: the assistant manager explained that the establishment "extended no courtesy to negroes." Humiliated and angry, Christie brought an action against the Forum. The case went all the way to the Supreme Court of Canada. By a four to one majority, the Court held that Christie's claim for discrimination failed. For the majority, Justice Thibaudeau Rinfret asserted that freedom of contract was the order of the day: "any merchant is free to deal as he may choose with any individual member of the public" and that "it is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either."[22] There could be no greater affirmation of the law of contracts' basic and dominant commitment—a person's freedom of contract. For the common law, this freedom trumps all other values; the private right of individuals to contract when, how and with whom they choose is more

22. *Christie v The York Corporation*, [1940] SCR 139 at 142, [1940] 1 DLR 81.

important than any public commitment to disallowing racial discrimination or similar actions. Courts persist in treating social legislation as something that has to be read in strict terms so that it does not trespass too much and too destructively into the common law. Despite denials to the contrary, this involves taking a political stand, both substantively and institutionally, on a grand and undeniable scale.

The dissent in *Christie* by Justice Henry Davis offers confirmation of the common law's general view of the relationship between the common law and legislation both institutionally and politically. He maintained that, whatever the general rule of commerce might be, there was an exception if the government, as in this situation, had given "the licensee…what is in the nature of a quasi monopolistic right which involves a corresponding duty to sell to the public."[23] However, as the Quebec government had not included any legislative power to discriminate, Davis concluded that the bar could not refuse to serve all customers as long as they could pay for a drink. In this way, Davis runs a contrary line to that of his judicial colleagues and the common law mind-set generally. For him, legislation was not something to be marginalized and relegated to a distinctly second-place position in calibrating people's civil obligations. He would see less changes to the majority's approach today than he might have surmised.

This recalcitrance of today's judges to abandon the 19th Century rules and rationales of contract law is still on display. Each alteration to settled doctrine is done with a tentative and almost begrudging reluctance. The doctrine of consideration is a classic example of how the common law works or, perhaps from a certain viewpoint, how it does not work. The general explanation for this doctrinal turn of events is that it is now much too late in the day for the common law to do away with consideration in contract law and that any substantial transformation will need to be done by way of legislative reform. This is both baffling and typical. When it suits the courts, they are more than willing to abandon root-and-branch all manner of rules and principles. The most famous illustration of this is, of course, *Donoghue's* introduction of the tort of negligence and the imposition of civil liability in the absence of contractual relations. On other occasions, the courts have lamented the state of legal doctrine, but claimed to be unable to do anything about it.

Whatever the original rationale for the consideration requirement, the courts have spent more than half a century whittling away at its provisions and requirements.[24] While consideration is still considered a

23. *Ibid* at 150.
24. For a general survey of consideration, see McCamus, *supra* note 2 at 215-280. For an interesting

sine qua non of contract validity, the courts have bent over backwards to find consideration in all manner of far-from-obvious circumstances and settings: more weight has been placed on the "intention to create legal relations."[25] So, the present situation is that an agreement must have consideration if it is to be granted a legal status, but almost any combination of benefit and detriment between promisor and promisee, no matter how contrived or counter-intuitive, will be sufficient. On the basis of transparency and candour alone, courts should be spared from having to make "fictional attempts to find consideration."[26] Instead, a more honest and transparent handling of consideration as an essential feature of contract law is demanded.

As well as the doctrine of consideration, a stand-out example of the Canadian courts' self-imposed incapacity to reform long-established legal doctrine is the appalling state of the rules that govern the assessment of damages in personal injury cases. Despite being highly critical of those rules, the Supreme Court continues to hide behind the canard that "there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform."[27] Mindful that judges can and do make bold moves that force or pre-empt legislators' intervention (with *Donoghue* again being the prime example), this selective judicial timidity does no favours to the already-dubious integrity of the common law process; incremental change is still law-making and law-changing, especially when it eviscerates the very doctrine that it is claiming to be refining. Further, the kind of doctrinal shell-game involved in the modern doctrinal shaping of contractual consideration severely dents the legitimacy of the common law as a mode of legal decision-making.

Conclusion

So my decision to teach the Civil Obligations class was not another instance of poor judgment, at least from my own perspective; the students may have come to a different conclusion. Considering the relatively short duration of the course, there was much that I learned, unlearned and re-learned about law, legal thinking, and teaching. In retrospect, it was a better decision and experience than I could have expected. It forced me to recognize

take on the history and rationale of consideration, see Bruce MacDougall, "Consideration and Estoppel: Problem and Panacea" (1992) 15:2 Dal LJ 265.

25. See *Williams v Roffey Bros & Nicholls (Contractors) Ltd*, [1991] 1 QB 1, [1990] 2 WLR 1153.
26. *Greater Fredericton Airport Authority Inc v NAV Canada*, 2008 NBCA 28 at para 29, Robertson JA.
27. See eg *Watkins v Olafson,* [1989] 2 SCR 750 at 760-761, 61 DLR (4th) 577, McLachlin J.

the challenges that less experienced colleagues face in their early days of law teaching. Perhaps more significantly, in re-thinking and re-visiting some deeper issues on the jurisprudential agenda, I challenged my own long-unexamined assumptions about law's development and its claims to moral approval. Finally, teaching Civil Obligations opened me up to the powerful, if under-appreciated effect that legal classification has upon lawyers' and law professors' understanding of discrete legal principles and doctrines; there is a tendency to work in isolated disciplinary silos and intellectual strait-jackets.