

Statute and Common Law

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Introduction

We often speak of two broad sources of law: statute law (the law made by the Commonwealth, State and Territory Parliaments) and common law (for present purposes, the law made by judges in the exercise of both common law and equitable jurisdiction¹). These sources of law do not exist independently of each other. Rather, they are part of one integrated system of laws under the Constitution.² They have been said to have a symbiotic relationship.³ They interact directly and indirectly. We are all familiar with the main modes of interaction. Subject to constitutional constraints, statute law prevails over the common law. Statutes are interpreted in accordance with common law principles of interpretation (as supplemented or modified by interpretation statutes⁴). And the “principle of legality” ensures that statutes do not casually obliterate at least some common law rights.⁵ These basic ideas are often assumed to be sufficient to enable one to get by in practice. However, the safety of that assumption has been challenged.

In 1992, The Honourable Paul Finn drew attention to some complexities in the relationship between statutes and the common law which had been analysed extensively in the United States for almost a century, but had been the subject of little analysis within the Commonwealth.⁶ In 2013, just over 20 years later, Finn observed that the Bar was “slowly awakening” to the matter.⁷

¹ There is, however, a substantial case for separate treatment of the relationship between equity and statute: Leeming, “Equity: Ageless in the ‘Age of Statutes’” (2015) 9 J Eq 108. For such a treatment, see Heydon, “Equity and Statute” in Turner (ed), *Equity and Administration* (2016).

² In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564, it was said that the “Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law in this country and form ‘one system of jurisprudence’”.

³ *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [31]; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [17].

⁴ E.g., the *Acts Interpretation Act* 1901 (Cth) and the *Acts Interpretation Act* 1954 (Qld).

⁵ The dimensions and limitations of the “principle of legality” have been discussed in illuminating fashion in Meagher and Groves (eds), *The Principle of Legality in Australia and New Zealand* (2017).

⁶ Finn, “Statutes and the Common Law” (1992) 22 UWALR 7. Of the English literature, Finn referred to Atiyah, “Common Law and Statute Law” (1985) 48 MLR 1. The English have since made significant contributions including Beatson, “Has the Common Law a Future?” (1997) 56 CLJ 291; Beatson, “The Role of Statute in the Development of Common Law Doctrine” (2001) 117 LQR 247; Burrows, “The Relationship between Common Law and Statute in the Law of Obligations” (2012) 128 LQR 232.

⁷ Finn, “Common Law Divergences” (2013) 37 MULR 509 at 535.

The complexities to which we are evidently awakening include:

- (1) The implications of giving common law concepts statutory force and remedies.
- (2) The capacity of statute law to influence the content and development of the common law in areas beyond the direct operation of the statute.
- (3) The need for, or desirability of, coherence within our one integrated system of laws.

Before examining these matters, it is necessary to say something briefly about the statutory phenomenon, and about the role statute has played historically in the development of judge-made law.

The statutory phenomenon

In 1908, Roscoe Pound observed that it was fashionable in the United States to deride legislation and the capacities of those making it.⁸ Despite this fashion, legislation in the United States grew and grew. In 1982, the distinguished American judge and law professor, Guido Calabresi, published his book *A Common Law for the Age of Statutes*. The first chapter is entitled “Choking on Statutes”.

We in Australia know the feeling.

At the valedictory ceremony to mark his retirement in 2006, The Honourable Bruce McPherson observed that to his mind the most remarkable change in legal practice over the preceding 40 years was the extent to which the common law had been steadily displaced by statute law.⁹ By McPherson’s reckoning, in the period between 1988 and 2006, a period of less than 20 years, the Queensland Parliament had enacted five times more legislation than was enacted in the 135 years from 1828 to 1962.¹⁰ The problem has not since abated.

Anyone who wants to discover the current statute law of Queensland must go to the Queensland legislation website. That website lists more than 500 statutes as “current legislation”. Collectively, they comprise almost 60,000 pages of statute law. However, that is not a comprehensive account of the statute law of Queensland. It includes only reprints authorised by the Queensland Parliamentary Counsel.¹¹ It does not include other statutes which have not been reprinted. Those other statutes must be found in the “Acts as passed” section of the website, which is divided into calendar years going back to 1963. And all of this before we get to subordinate legislation (in Queensland comprising about 30,000 pages), or indeed Commonwealth legislation (with primary legislation comprising over 110,000 pages).

⁸ Pound, “Common Law and Legislation” (1908) *Harvard Law Review* 383 at 383-4.

⁹ Transcript of Proceedings, Supreme Court of Queensland, 22 September 2006, page 14.

¹⁰ Transcript of Proceedings, Supreme Court of Queensland, 22 September 2006, page 15.

¹¹ As contemplated by s10A of the *Legislative Standards Act* 1992 (Qld).

This “legislative hyperactivity” and the consequent difficulty of actually identifying and obtaining a copy of the applicable legislation as in force from time to time have been said to constitute a threat to the rule of law.¹²

Whether or not that is so, the volume and scope of current statute law has certainly reinforced the importance of understanding the complex relationship between statute law and common law.

Statute as catalyst for judge-made law

The relationship between these sources of law has a deep history. Indeed, “much of what is ordinarily regarded as ‘common law’ finds its source in legislative enactment”.¹³ Thus important judge-made institutions or doctrines may be seen as built upon the foundations of, or as reactions to, statute.

It is commonly accepted that the common law offence of conspiracy derived from three statutes enacted in the reign of Edward I in the late 13th and early 14th centuries.¹⁴

The *Statute of Uses* (1535)¹⁵ played a key role in the development of the modern law of trusts.¹⁶ The “use” was a device employed to avoid the payment of feudal dues. For instance, the settlor might convey land to A to the use of B, which would take the benefit of the land outside the feudal system. The *Statute of Uses* struck at this by “executing” the use. That is, it vested the legal title in the *cestui que use*. This then gave rise to the so-called “use upon a use”. For instance, the conveyancers might convey land to A to the use of B to the use of C, arguing that only the first use was caught by the Statute. For a time, the second use was held to be inconsistent with the first and thus void. However, after the demise of feudal dues, the use upon a use came to be recognised as valid. And the second “use” was sometimes described as a “trust”. By the time of Lord Mansfield “[a]n use and a trust may essentially be looked upon as two names for the same thing”.¹⁷

The *Statute of Frauds* (1677)¹⁸ played a key role in the development of the doctrine of part performance. That Statute required that there be a memorandum or note in writing of a contract for the sale of land or an interest therein in order for an action to be brought on the contract. Yet the doctrine of part performance is expressed in three centuries of case law which has the

¹² Heydon, “Equity and Statute” in Turner (ed), *Equity and Administration* (2016), page 211.

¹³ Landis, “Statutes and the Sources of Law” in Pound (ed), *Harvard Legal Essays* (1934) 213 at 214.

¹⁴ Cf. *Peters v The Queen* (1998) 192 CLR 493 at [52]-[53].

¹⁵ 27 Henry VIII c10. The *Statute of Uses* was not repealed in Queensland until the enactment of the *Property Law Act* 1974 (Qld). See ss3 and 7 and Schedule 6 of the *Property Law Act* as passed. Reprints do not contain Schedule 6.

¹⁶ See, e.g., Young, et al, *On Equity* (2009) at 384-385; Emmett, “Early Statutes Shaping the Common Law” in Gleeson, et al (eds), *Historical Foundations of Australian Law*, Vol 1, 115 at 128-129.

¹⁷ *Burgess v Wheate* (1757-59) 1 Eden 177 at 217; 28 ER 652 at 667.

¹⁸ 29 Car. II c3.

effect of allowing specific performance of oral contracts if there have been sufficient acts of part performance.¹⁹

The modern law in these and other areas is best understood with an appreciation of their historical statutory entanglements.

Statute picking up common law

A statute may exclude or confirm the operation of the common law upon a subject, or employ as an integer for its operation a term or expression with content given to it by the common law from time to time.²⁰

Sometimes the statute attempts to articulate the relationship, or at least some aspects of the relationship, between the statute and the common law (for example, by stating that it is²¹ or is not²² a code, or by stating that it does not affect the operation of the general law save to the extent provided therein²³).

Rarely, however, does that answer all of the questions that arise.

Let us start with some basic questions.

The temporal question

When a statute is enacted in terms picking up an aspect of the common law, does it pick up the common law frozen as at the date of enactment, or does it pick up the common law as developed from time to time?

According to the High Court in *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539 at [23], the latter will generally be the correct answer:

“Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.”

Occasionally, however, one may find an indication in the statute that the body of law being picked up or referred to is the body of law as it existed at a fixed point in time.²⁴

¹⁹ *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49 at [19].

²⁰ *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539 at [18].

²¹ E.g., ss2 and 5 of the *Criminal Code Act 1899* (Qld).

²² E.g., s7(3) of the *Civil Liability Act 2003* (Qld).

²³ E.g., s6 of the *Defamation Act 2005* (Qld).

²⁴ For instance, s24 of the *Judiciary Act 1903* (Cth) states that the High Court has “the same power to punish contempts of its power and authority as is possessed at the commencement of this Act by the Supreme Court of Judicature in England”. This necessitates an inquiry as to the power of the Supreme Court of Judicature in England as at 25 August 1903: *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 105-106.

The purpose question

A slightly more difficult question concerns purpose. The common law may have developed in pursuit of a particular purpose, and fashioned limits with that purpose in mind. If the statute that picks up the common law has a different purpose, how is that tension to be resolved?

In *Aid/Watch*, the question arose in the context of taxation statutes that contained exemptions for charitable institutions. The expression “charitable institution” was not defined. The Commissioner revoked earlier endorsements of Aid/Watch as a charitable institution. The Full Federal Court agreed with the Commissioner, saying that Aid/Watch’s political activities invalidated its claim to charitable status. Aid/Watch succeeded in the High Court, emphasising its purpose of generating by lawful means public debate concerning the efficiency of foreign aid directed to the relief of poverty, and asserting that this fell within the fourth head of charitable purposes recognised at general law in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

The High Court was unmoved by the Commissioner’s argument focusing on the undesirability of conferring an immunity from tax, or a state subsidy, upon a body which had “political” purposes.²⁵ The statutes used an expression which had to be understood by reference to the general law of charitable trusts as developed in Australia from time to time.²⁶ Further:

“[W]here, as here, the general law comprises a body of doctrine with its own scope and purpose, the development of that doctrine is not directed or controlled by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute.”²⁷

That is to say, the content of the general law expression was to be discerned from the scope and purpose of the general law, and not from the perceived scope and purpose of the statute in which the expression was employed. Once it was concluded that the objects and activities of Aid/Watch fell within the fourth head in *Pemsel* that was the end of the matter. The taxation consequences could not alter the outcome.

However, different considerations arise in other contexts.

For commercial lawyers, a particularly important context is statutory remedies for breaches of statutory norms that are expressed in terms that reflect their judge-made counterparts.

The point arises sharply in the context of the current analogues of the provision introduced in 1992 as s51AA of the *Trade Practices Act 1974* (Cth).²⁸ That section materially provided:

²⁵ At [21]-[22].

²⁶ At [24].

²⁷ At [23].

²⁸ See, e.g., s20 of the *Australian Consumer Law*, which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth) and s12CA of the *Australian Securities and Investments Commission Act 2001* (Cth).

“A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.”

In *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at [40], Gummow and Hayne JJ stated:

“s51AA does more than re-enact for application in trade and commerce the general law principles concerned. Contravention of s51AA attracts particular remedies under the Act which may not otherwise be available ...”

Their Honours were making the point that, although the statutory expression picks up particular categories of case in which equity manifests its concern with unconscientious or unconscionable conduct, the statute was not otherwise picking up, or confining itself to, the remedies that equity would provide. The statute had its own range of remedies, which may be invoked by private claimants or indeed the regulator.

Thus there are many cases to the effect that the remedial provisions within these statutes (particularly s87 of the former *Trade Practices Act* and its current analogues²⁹) confer a wide discretionary power which is not confined by equitable principles (although those principles may provide guidance in particular cases).³⁰

The point for present purposes is that the courts have generally approached the question of remedy in such cases as driven by the broader policy or purpose of the statute, rather than by the conscience of equity as embodied within the statute.

However, the precise relationship between these remedial provisions and equitable doctrine in any given case remains somewhat unclear. The possibility of cross-fertilisation is capable of causing uncertainty and confusion.

Take the High Court’s decision in *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102. A director signed a guarantee of the company’s indebtedness, having been induced by misrepresentation to believe that it related only to the company’s future indebtedness. It was held that the director was entitled to avoid the guarantee, but only to the extent of the company’s past indebtedness. This has been viewed, and criticised, as a case of “partial rescission” – a creature entirely foreign to equity.³¹ An alternative explanation is that, although the High Court’s reasoning is couched in the language of equity, it was in fact directed implicitly to the application of s87 of the *Trade Practices Act* (that provision having been relied upon before

²⁹ See, e.g., s243 of the *Australian Consumer Law* and s12GM of the *ASIC Act*.

³⁰ See, e.g., *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 at 298-299; *Marks v GIO Australia Holdings Limited* (1998) 196 CLR 494 at [24] and the authorities in footnote 48, [38], [116] and the authorities in footnotes 157 and 158, and [146]-[151]; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [44]; *Tenji v Heneberry & Associates Pty Ltd* (2000) 98 FCR 324 at [19], [29]; *Awad v Twin Creeks Properties Pty Ltd* [2012] NSWCA 200 at [43].

³¹ O’Sullivan, et al, *The Law of Rescission* (2nd ed, 2014) at [13.19]-[13.25], [19.34]-[19.37], [19.39].

the trial judge whose order was not disturbed on appeal).³² In either case, s87 seems to have caused problems. It has either quietly infected equitable doctrine, or been applied and explained in equitable language which leaves us wondering just where equity stands.

A constitutional question?

In *Western Australia v The Commonwealth* (1995) 183 CLR 373, the High Court was concerned with, amongst other things, the constitutional validity of s12 of the *Native Title Act* 1993 (Cth). That section provided:

“Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth”.

The provision was held to be invalid.

Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said:³³

“If the “common law” in s12 is understood to be the body of law which the courts create and define, s12 attempts to confer legislative power upon the judicial branch of government. The attempt must fail either because the Parliament cannot exercise the powers of the courts or because the Courts cannot exercise the powers of the Parliament.”

Later, their Honours added:³⁴

“If one construes s12 as importing the common law as an organic, developing but unwritten body of law, a further objection to validity arises. ... If s12 be construed as an attempt to make the common law a law of the Commonwealth, it is invalid either because it purports to confer legislative power on the courts or because the enactment of the common law relating to native title finds no constitutional support in s51(xxvi) or (xxiv). A “law of the Commonwealth”, as that term is used in the Constitution, cannot be the unwritten law. It is necessarily statute law, for the only power to make Commonwealth law is vested in the Parliament.”³⁵

Encouraged by this reasoning, a challenge was mounted to the validity of s51AA of the *Trade Practices Act* in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) 96 FCR 491. However, the challenge failed. French J explained:³⁶

“It is to be observed that s 51AA does not purport to adopt the unwritten law relating to unconscionable conduct and give to it the force of statute. In form it uses the unwritten law to the extent that it provides for the characterisation of conduct as unconscionable and then prohibits such conduct. In this respect, s 51AA differs from s 12 of the Native Title Act which, exceeding the legislative power of the Commonwealth, took the whole of the common law in respect of native title and

³² Heydon, “Equity and Statute” in Turner (ed), *Equity and Administration* (2016), pages 235-236.

³³ At 485.

³⁴ At 486-487.

³⁵ Similar reasoning was invoked by McHugh J in *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at [36]-[43].

³⁶ At [28].

purported to confer upon it the force of a law of the Commonwealth. The question for this case is whether or not that difference is crucial on the issue of validity.”

In the end, French J held:³⁷

“It cannot be said that there is an express line of logic to be found in the reasoning in the *Native Title Act* case which draws a clear distinction between the considerations which led to the invalidation of s 12 and the position in cases such as the present. But the form of s 12 and the direct operation of external judicial decisions on the content of the law, which is transmuted directly into Commonwealth law, was significantly closer as a matter of degree to authorising judicial legislation than s 51AA.”

Sir Anthony Mason has since explained that the essential problem with s12 of the *Native Title Act* was that it did not merely enact the common law as a law of the Commonwealth; rather it purported to give the common law the force of a law of the Commonwealth so as to engage s109 of the Constitution (and thereby immunise the common law against inconsistent State legislation).³⁸ Sir Anthony added:³⁹

“On reflection, I have difficulty with the notion that making the common law on a particular subject a law of the Commonwealth involves a delegation of legislative power to the courts”.⁴⁰

The decision in *Berbatis*, and Sir Anthony’s subsequent observations, suggest that constitutional challenges to legislation adopting the common law on a particular subject are likely to fail, save perhaps in the most extreme cases (such as the *Native Title Act Case*, where the force of the common law was purportedly elevated directly to the force of statute).

A puzzling question posed by the High Court

The question whether a public authority owes a duty of care in tort is often a puzzling one.⁴¹ However, an especially puzzling dimension of the question arose in *Sydney Water Corporation v Turano* (2009) 239 CLR 51.

In that case, the issue of duty had been litigated in the courts below on the basis that it was to be resolved by the application of common law principles without regard to the impact of the *Civil Liability Act 2002* (NSW).

The High Court queried the correctness of that approach and required the parties to address the following question: whether the existence of a duty of care at common law was a

³⁷ At [43].

³⁸ Mason, “The Interaction of Statute and Common Law” (2016) 90 ALJ 324 at 327.

³⁹ At 328.

⁴⁰ Sir Anthony also drew attention to the passage in *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539 at [18].

⁴¹ Professor Aronsen has described the current state of the common law in this field as “remarkably confused”: “Government Liability in Negligence” (2008) 32 MULR 44 at 46.

hypothetical question in light of s43A of the *Civil Liability Act*, or not one that could properly be decided without regard to the operation of the provision.⁴²

Section 43A materially provided:

- “(1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority’s exercise of, or failure to exercise, a special statutory power conferred on the authority.
- (2) A "special statutory power" is a power:
 - (a) that is conferred by or under a statute, and
 - (b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.
- (3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.”

This section borrows from public law, introducing an analogue of what we know as *Wednesbury*⁴³ unreasonableness.

The High Court ultimately held that the question should not be regarded as hypothetical,⁴⁴ and proceeded to decide the case by application of common law principles without regard to the impact of the *Civil Liability Act*.⁴⁵

However, in doing so, the Court did not decide the difficult, and very large, underlying question. Indeed, the Court explicitly left open the possibility that, in this context, the legal obligation on a defendant to exercise care and skill for the benefit of the plaintiff may no longer be found outside the framework of the *Civil Liability Act*.⁴⁶

What was the High Court driving at?

Given the introduction of the *Wednesbury* test, is there an argument that the statute has removed an essential aspect of the substratum of the common law duty to exercise reasonable care, with the consequence that the common law doctrine has ceased to exist in this field, and any duty must be found within the confines of the Act itself?⁴⁷

⁴² (2009) 239 CLR 51 at [17].

⁴³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 223-234.

⁴⁴ (2009) 239 CLR 51 at [26].

⁴⁵ (2009) 239 CLR 51 at [44] ff.

⁴⁶ (2009) 239 CLR 51 at [22].

⁴⁷ Gummow, *Change and Continuity: Statute, Equity and Federalism* (1999), Lecture One – “The Common Law and Statute”, pages 9-10.

Should the common law be developed by analogy with the statute, so that the common law in this field would reflect the statutory reformulation of the duty?⁴⁸

Until this receives attention in future cases, it is difficult to know.

However, it is convenient at this point to address the somewhat controversial topic of analogical development of the common law by reference to statute.

Analogical development

Analogical reasoning is familiar within the common law.⁴⁹ It accords with the traditional judicial method, with its combined purposes of developing the law, maintaining its continuity and preserving its coherence.⁵⁰ The accepted means of effecting these purposes include (i) extending the application of accepted principles to new cases; (ii) reasoning from the more fundamental of settled principles to new conclusions; and (iii) subsuming unforeseen instances under a new category which, in reason, is not closed against them.⁵¹

The question we are addressing here concerns, amongst other things, the source from which the analogical reasoning may, or perhaps even must, proceed. Can statute provide a fundamental principle from which the common law reaches a new conclusion? Is the process of reasoning from or with common law precedents radically different from, or largely the same as, that of reasoning from or with statutes?⁵²

Pound identified four ways in which the courts might deal with legislation:⁵³

- (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge made rules on the same general subject; and so reason from it by analogy in preference to them.
- (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or coordinate authority in this respect with judge made rules upon the same general subject.

⁴⁸ Gummow, *Change and Continuity: Statute, Equity and Federalism* (1999), Lecture One – “The Common Law and Statute”, pages 11-18.

⁴⁹ See, e.g., *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at [25]. There are of course limits to the proper use of such reasoning: see, e.g., *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 88 ALJR 261 at [79]-[80]. Separately, equity has long had its own doctrine concerning the application of statutory limitation periods by analogy: see, e.g., *Knox v Gye* (1872) LR 5 HL 656 at 674-675.

⁵⁰ Dixon, “Concerning Judicial Method” (1956) 29 ALJ 468 at 472 and 475; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 298.

⁵¹ Dixon, “Concerning Judicial Method” (1956) 29 ALJ 468 at 472 and 475; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 298; *PGA v R* (2012) 245 CLR 355 at [29].

⁵² Compare MacCormick, *Legal Reasoning and Legal Theory* (1978) at page 213.

⁵³ Pound, “Common Law and Legislation” (1908) *Harvard Law Review* 383 at 385.

- (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover.
- (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give it a strict and narrow interpretation holding it down rigidly to those cases which it covers expressly.”

Pound’s thesis was that the courts should ultimately deal with legislation by the first of these methods.⁵⁴ However, either the first or second method would meet the description of a true doctrine of analogy from legislation.

Echoes from history

To some ears, the notion of statutes driving analogical reasoning may contain echoes from history.

Some may think of the *Second Statute of Westminster* (1285)⁵⁵ with its *consimilis casus* clause.⁵⁶ Of this clause, Edward Jenks said:⁵⁷

“Carefully concealed under the guise of an administrative regulation, the statute lays it down, that the chancery officials through whose hands must pass every royal writ, which was then, and still is, the normal beginning of every action in the royal courts, need no longer be guided by a strict adherence to precedent in the issue of these documents. It is sufficient if the remedy sought and the circumstances of the case are like those for which writs had previously been issued. In other words, principle, not precedent, is henceforth to guide the chancellor and his officials in the issue of writs.”

However, this was not so much an identification by statute of a principle from which to reason by analogy, as a statutory command to reason by analogy from existing precedents. Moreover, the clause did not fulfil its promise, as chancery officials and the King’s own judges refused to recognise departures from precedent.⁵⁸ This was not an encouraging start to statute-inspired analogical reasoning.

Considerably more successful was the doctrine of the equity of the statute. As Deane and Gummow JJ observed in *Nelson v Nelson* (1995) 184 CLR 538 at 552-553:

“In earlier times, effect was given to what the courts perceived to be “the equity of the statute”. This doctrine had the support of the common law judges led by Sir

⁵⁴ Pound, “Common Law and Legislation” (1908) *Harvard Law Review* 383 at 386.

⁵⁵ 13 Edw. 1, St 1.

⁵⁶ Cap 24.

⁵⁷ Jenks, “Edward 1, The English Justinian” (1907) 1 *Select Essays in Anglo-American Legal History* 139 at 151.

⁵⁸ Jenks, “Edward 1, The English Justinian” (1907) 1 *Select Essays in Anglo-American Legal History* 139 at 152; *Wright v Cedzich* (1930) 43 CLR 493 at 523 (“a statute passed in the 13th year of Edward I, which has long since ceased to be, if it ever was, an authority to Judges to legislate”).

Edward Coke, who looked back to a time before the rise of the doctrine of parliamentary sovereignty and the subjection to it of the common law. The notion of the equity of the statute operated in two ways. First, the policy of the statute, as so perceived, might operate upon additional facts, matters and circumstances beyond the apparent reach of the terms of the statute. In addition, cases within the terms of the statute but not within its mischief might be placed outside its operation.”

However, the doctrine fell deeply into disfavour in England and the United States in the 19th century,⁵⁹ and the doctrine in its expansive operation can hardly be reconciled with the current Australian approach to statutory interpretation.⁶⁰

Nonetheless, it may be that traces of the doctrine can still be seen in our law.⁶¹ Indeed, Justice Edelman has suggested that the modern doctrine of analogy from legislation might be seen as a progeny of the first limb of the doctrine of the equity of the statute, *viz.* that which saw the equity or the spirit of the statute applied in circumstances beyond its letter.⁶²

How then has the modern doctrine of analogy from legislation fared?

United States

The American experience may be illustrated by reference to two cases decided in June 1970. On 5 June 1970, the Supreme Court of Wisconsin decided *Vincent v Pabst Brewing Company* 47 Wis. 2d 120 (1970). The case raised the question whether a pure comparative negligence rule should be adopted in Wisconsin. That is, should a plaintiff be able to recover against a defendant to the extent of the defendant’s negligence, notwithstanding the plaintiff’s own contributory negligence? The Wisconsin legislature had ameliorated the rule that contributory negligence was a complete defence, but only in cases where the plaintiff’s own responsibility was less than 50%.

Controversially, the Chief Justice of Wisconsin⁶³ would have altered the common law to introduce a pure comparative negligence rule, and in doing so referred to a range of statutory developments in England, Canada and the United States which were said to point to that outcome.⁶⁴

The other judges deferred to the legislature. However, aspects of their opinions were at least as controversial. Wilkie J (with the concurrence of Beilfuss J) stated:⁶⁵

⁵⁹ *Nelson v Nelson* (1995) 184 CLR 538 at 553.

⁶⁰ *Burrage v Queensland* (2015) 236 FCR 160 at [17].

⁶¹ Gummow, *Change and Continuity: Statute, Equity and Federalism* (1999), Lecture One – “The Common Law and Statute”, pages 21-22.

⁶² *Burrage v Queensland* (2015) 236 FCR 160 at [19].

⁶³ In dissent.

⁶⁴ At 132-135.

⁶⁵ At 130.

“I believe there is a need for changing the rule under the Wisconsin comparative negligence system which prohibits a plaintiff from recovering a portion of his damages where his negligence is equal to or greater than the defendant’s who is at least partially responsible for his injuries.

Although, in my opinion, the court has authority to make these changes in the rule, and the legislature has not pre-empted this entire subject, at this time I would defer to the legislature as the proper body to make a complete study of the subject and to adopt changes it concludes appropriate.”

Obviously enough, the decision in *Vincent v Pabst Brewing Company* is an illustration of how it should not be done.

The statutes to which the Chief Justice referred were insufficiently comprehensive to justify any claim as to the existence of an identifiable statutory principle from which to reason. Especially was that so when the Wisconsin legislature had itself addressed the very subject and quite deliberately stopped short of enacting the rule preferred by the Chief Justice.

Further, there can hardly be any justification for the stance adopted by Justices Wilkie and Beilfuss, which amounted to a threat to the local legislature. In effect, they were saying to the legislature, change the law or we will. That, of course, was of little comfort to Mr Vincent, whose appeal was dismissed and who was denied recovery accordingly.

The second case I wish to discuss was less unorthodox.

It is *Moragne v States Marine Lines Inc* 398 US 375 (1970), a case decided by the United States Supreme Court on 15 June 1970. The question was whether the court should recognise a right of recovery for wrongful death in federal diversity jurisdiction. The Court answered the question in the affirmative. In doing so, it refused to follow an old precedent, *The Harrisburg* 119 US 199 (1886), in which the Supreme Court had held that maritime law did not afford such a cause of action.

The historical justifications for the old rule against recovery for wrongful death were said to include the old felony-merger doctrine, under which the common law would not allow civil recovery for an act that constituted both a tort and a felony.⁶⁶ The tort was treated as less important than the offence against the Crown, and was merged into, or pre-empted by, the felony.⁶⁷

The Supreme Court held that these historical justifications were no longer persuasive, having been swept away by legislative developments. Justice Harlan delivered the opinion of the Court, stating:⁶⁸

⁶⁶ At 382.

⁶⁷ At 382.

⁶⁸ At 388-392.

“We need not, however, pronounce a verdict on whether *The Harrisburg*, when decided, was a correct extrapolation of the principles of decisional law then in existence. A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most of the areas where it once held sway, quite evidently prompted by the sense of the rule’s injustice that generated so much criticism of its original promulgation.

... legislatures both here and in England began to evidence unanimous disapproval of the rule against recovery for wrongful death. The first statute partially abrogating the rule was Lord’s Campbell’s Act, 9 & 10 Vict., c93 (1846) ...

In the United States, every State today has enacted a wrongful death statute ... The Congress has created actions for wrongful deaths of railroad employees ... of merchant seaman ... and of persons on the high seas ...

These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law ...

This appreciation of the broader role played by legislation in the development of the law reflects the practices of common-law courts from the most ancient times. As Professor Landis has said, “much of what is ordinarily regarded as ‘common law’ finds its source in legislative enactment.” ... It has always been the duty of the common law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common law principles – many of them deriving from earlier legislative exertions.”

The features of the analogy doctrine enunciated in this passage include:

- (1) It focused on what was perceived to be a “legislative establishment of policy”.
- (2) The modern policy had become part of the law, and was “to be given its appropriate weight” in matters of decisional law.
- (3) The “duty” of the court was “to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common law principles”.

Amongst other things, the relationship between propositions (2) and (3) requires further attention. Giving “appropriate weight” to a perceived policy is one thing. It need not necessarily result in the common law being formulated to reflect that policy. However, what is the content of the “duty” referred to in proposition (3)? Is it a positive duty to interweave

the new legislative policies into the common law? Or is it merely to give those policies “appropriate weight” in deciding whether or not to interweave them into the common law?

United Kingdom

In *Warnink v Townend & Sons (Hull)* [1979] AC 731, the House of Lords adopted what has been described as an “attenuated” version of the doctrine.⁶⁹ In that case, the House of Lords held that the cause of action for passing off should not be confined to cases where the name indicated the product’s origin; rather, it should be extended to cases where the name denoted the particular characteristics of the product by reason of its ingredients. In the course of doing so, Lord Diplock stated:⁷⁰

“Parliament ... beginning in the 19th century has progressively intervened in the interests of consumers to impose on traders a higher standard of commercial candour than the legal maxim *caveat emptor* calls for, by prohibiting under penal sanctions misleading descriptions of the character or quality of the goods; but since the class of persons for whose protection the ... statutes are designed, are not competing traders but those consumers who are likely to be deceived, the Acts themselves do not give rise to any civil action for breach of statutory duty on the part of a competing trader even though he sustains actual damage as a result ... Nevertheless the increasing recognition by parliament of the need for more rigorous standards of commercial honesty is a factor which should not be overlooked by a judge confronted by the choice whether or not to extend by analogy to circumstances in which it has not been applied a principle which has been applied in previous cases where the circumstances although different had some features in common with those of the case which he has set aside. Where over a period of years there can be discerned a steady trend in legislation that reflects the view of successive parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a divergent course.”

The features of the analogy doctrine enunciated in this passage include:

- (1) It recognised explicitly that it applied where the judge was confronted with a “choice”.
- (2) It focused on what was perceived to be a “steady trend in legislation that reflects the view of successive parliaments as to what the public interest demands in a particular field of law”. This was to be discerned “over a period of years”.
- (3) It then looked to “that part of the same field” left to the common law.
- (4) The suggestion then was that, in “that part of the same field”, the common law “ought to” proceed upon “a parallel rather than a divergent course”.

⁶⁹ *Lamb v Cotogno* (1987) 164 CLR 1 at 11.

⁷⁰ At 742-743.

The description of this as an “attenuated” version of the doctrine may thus be readily understood. The language of “duty” is absent. The softer expression “ought to” may be taken to provide encouragement, perhaps even strong encouragement, but of a very general kind in relation to a matter of “choice”.

Australia

In the 1980s, there appeared to be little enthusiasm for the doctrine in Australia.⁷¹

However, things started to gather pace (at least for a time) in the 1990s.

I have already referred to Finn’s paper published in 1992.⁷²

Justice French addressed the topic extra-judicially in 1996.⁷³

Two years later, Justice Finn was a member of the Full Court of the Federal Court in *Adelaide Steamship Co Limited v Spalvins* (1998) 81 FCR 360. The question in that case was whether the common law principles of legal professional privilege should continue to require the application of a sole purpose test (as the High Court had held in *Grant v Downs* (1976) 135 CLR 674) or whether a dominant purpose test should be applied. The argument in favour of the latter course was that the *Evidence Act* 1995 (Cth) had expressly adopted a dominant purpose test in relation to trial questions, and this innovation should be applied by analogy to pre-trial and other ancillary questions. The Full Court, comprising Justices Olney, Kiefel and Finn, accepted the argument. In doing so, their Honours stated:⁷⁴

“In our view such is the significance of the Act’s provisions in this that their advent has created an entirely new setting to which the common law must now adapt itself, and adapt itself in such a way as to ‘include [the Act] as a fundamental part of its fabric’.”

This was an enthusiastic embrace of the full force of the doctrine of analogy. The language was emphatic – “the common law must now adapt itself”.

However, this position did not last. A differently constituted Full Court of the Federal Court, sitting with five members, took a different view in *Esso Australia Resources Limited v Commissioner of Taxation* (1998) 83 FCR 511. And that different view was affirmed by the High Court in *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49.

The essential problems identified by Gleeson CJ, Gaudron and Gummow JJ were:⁷⁵

⁷¹ *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12.

⁷² Finn, “Statutes and the Common Law” (1992) 22 UWALR 7.

⁷³ French, “Statutory Modelling of Torts” in Mullany (ed), *Torts in the Nineties* (1997)

⁷⁴ At 373.

⁷⁵ At [23] and [25].

- (1) The *Evidence Act* did not apply throughout Australia. At the time, statutes in terms of the *Evidence Act* applied only in federal courts, and in courts of New South Wales and the Australian Capital Territory.
- (2) There were differences in legislation concerning the privilege in other parts of Australia.
- (3) The suggested modification invited fragmentation of the common law throughout Australia, which was unacceptable given that there was but one common law of Australia.
- (4) Even the *Evidence Act* itself did not purport to apply the dominant purpose test in all areas in which the privilege may operate.
- (5) Accordingly, there was no consistent pattern of legislative policy to which the common law of Australia could adapt itself.

As to the doctrine itself, their Honours appear to have accepted the possibility of some version of the doctrine applying in Australia, but explicitly refrained from specifying precisely what it involved.⁷⁶

The matter is yet to be resolved definitively by the High Court.

However, the following observations may be made.

- (1) A distinction may be drawn between cases where statutory developments have destroyed the underlying foundations of an old common law rule, and cases where statutory developments are said to provide a positive foundation for a new rule.
- (2) In the former case, if the reason for the old rule disappears, then so too does the rule. In *PGA v R* (2012) 245 CLR 355 at [30], the majority put it this way:

“... where the reason or ‘foundation’ of a rule of the common law depends upon another rule which, by reason of statutory intervention or a shift in the case law, is no longer maintained, the first rule has become no more than a legal fiction and is not to be maintained.”
- (3) In the latter case, considerable caution is required.⁷⁷ The issues which must be confronted include:
 - (a) The need to identify a consistent or uniform pattern of legislative policy.⁷⁸

⁷⁶ At [20]-[28]. See also *Brodie v Singelton Shire Council* (2001) 206 CLR 512 at [132]; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [83]; *Burrabungba v Queensland* (2015) 236 FCR 160 at [19]-[31].

⁷⁷ *Burrabungba v Queensland* (2015) 236 FCR 160 at [21].

⁷⁸ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 40 at [23]. Another point to note here is that the notion that there is one common law within Australia that cannot vary from

- (b) The need to ensure that the policy or norm is capable of being identified clearly, and is not undermined by:
- (i) the relevant legislation involving a positive decision to create a rule of limited application, rather than a norm of general application;⁷⁹
 - (ii) having been discerned from part only of a legislative scheme, without sufficient account being taken of other provisions or qualifications which form part of an interdependent whole.⁸⁰
- (4) In an appropriate case, statute will provide a legitimate source from which to reason to a common law conclusion in areas beyond the direct operation of the statute. However, in the end it is likely to be a matter of choice, ultimately for the High Court.⁸¹

Coherence

In *Miller v Miller* (2011) 242 CLR 446, the High Court considered the civil law obligations as between two people engaged in a joint illegal enterprise involving driving a stolen car. Did the driver of the stolen car owe a duty of care in tort to the passenger after the passenger had asked to be let out of the car? The majority answered this question in the affirmative, with a decisive consideration being that the passenger had withdrawn from the joint illegal enterprise. In the course of their reasons, the majority stated:⁸²

“the central policy consideration at stake is the coherence of the law. The importance of that consideration has been remarked on in decisions of this Court ... It is a consideration that is important at two levels. First, the principles applied in relation to the tort of negligence must be congruent with those applied in other areas of the civil law (most notably contract and trusts).

Second, and more fundamentally, the issue that is presented by observing that a plaintiff was acting illegally when injured as a result of the defendant's negligence is whether there is some relevant intersection between the law that made the plaintiff's conduct unlawful and the legal principles that determine whether the plaintiff should have a cause of action for negligence against the defendant. Ultimately, the question is: would it be incongruous for the law to proscribe the

State to State is being subjected to fresh scrutiny: Mason, “The Interaction of Statute and Common Law” (2016) 90 ALJ 324 at 326-327. See also Finn, “Statutes and the Common Law: The Continuing Story” in Corcoran and Bottomley (eds), *Interpreting Statutes* (2005) at pages 59-60. If the High Court were to retreat from this notion, there would be greater potential for analogical development of the common law within particular States or Territories.

⁷⁹ *Burrage v Queensland* (2015) 236 FCR 160 at [21].

⁸⁰ *Baker v R* (2012) 245 CLR 632 at [115]-[116].

⁸¹ Heydon, “Equity and Statute” in Turner (ed), *Equity and Administration* (2016), pages 231-232. This result would not accord with that preferred by Finn, who would not see it as an application of a true doctrine of analogy: see Finn, “Statutes and the Common Law: The Continuing Story” in Corcoran and Bottomley (eds), *Interpreting Statutes* (2005) at page 62.

⁸² At [15]-[16].

plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course, or as a result, of that unlawful conduct?"

Thus, the “central policy consideration” at stake in the case was “coherence of the law”. The common law of negligence must be “congruent” with other areas of the common law. And “more fundamentally” it must not be “incongruous” with the (statute) law proscribing the plaintiff’s conduct.

This passage has been recognised as directing attention to a policy consideration of fundamental importance across the law. That is, the consideration is engaged not only within the common law, but also when examining the relationship between statute and common law.⁸³

As in *Miller*, the question often arises in the context of whether a duty of care in tort should be found to exist.

It may have played a part in favour of recognition of a duty of care owed by the testatrix’s solicitor to an intended beneficiary in *Hill v Van Erp* (1997) 188 CLR 159.⁸⁴

However, more often, it is a factor telling against recognition of a duty.⁸⁵

For instance, it has been held that a duty would not “ordinarily” be found to exist if it would give rise to “inconsistent” duties or obligations.⁸⁶ So, in *Sullivan v Moody* (2001) 207 CLR 562 it was held that medical practitioners and social workers who had statutory and professional responsibilities in relation to investigating and reporting upon child abuse did not owe a duty of care in tort to those who were suspected of being the causes of harm. Whilst the High Court recognised that people may have multiple duties at least where they were not “irreconcilable”,⁸⁷ in this case the suggested duty was “inconsistent” with their statutory and professional responsibilities.⁸⁸ The interests of the child were “irreconcilable” with those of the suspect, and the defendants’ statutory and professional responsibilities required them to treat the interests of the child as paramount.⁸⁹

⁸³ E.g., Leeming, “Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room” (2013) 36 UNSWLJ 1002 at 1019-1020; Gillooly, “Legal Coherence in the High Court: String Theory for Lawyers” (2013) 87 ALJ 33 at 34; McLeish, “Challenges to the Survival of the Common Law” (2014) 38 MULR 818 at 826-827; Mason, “The Interaction of Statute and Common Law” (2016) 90 ALJ 324 at 336-338.

⁸⁴ Gillooly, “Legal Coherence in the High Court: String Theory for Lawyers” (2013) 87 ALJ 33 at 35-36.

⁸⁵ E.g., *Sullivan v Moody* (2001) 207 CLR 562 at [42], [50], [53]-[62]; *CAL No 14 Pty Ltd v Motor Accident Insurance Board* (2009) 239 CLR 390 at [39]-[42]; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at [17], [29]-[33].

⁸⁶ *Sullivan v Moody* (2001) 207 CLR 562 at [60], [50], [53]-[62]; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at [29].

⁸⁷ At [60].

⁸⁸ At [62].

⁸⁹ At [62].

Sullivan v Moody also drew out another point. It was the need for coherence in the law of torts. The point was that the suggested duty of care would give rise to liability in negligence for publishing statements where the law of defamation would not.⁹⁰

The operation of coherence as a constraint has not been confined to cases concerning the existence or otherwise of a duty of care.

In *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [100], Gummow, Hayne and Kiefel JJ warned against overly broad interpretations of waiver and estoppel, observing that such interpretations may be denied by the need for legal coherence because they may undermine other doctrines (such as the requirement for contractual consideration).

In *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, the High Court considered whether the illegality that rendered loan agreements unenforceable also had the effect that the lender could not recover the amounts advanced as money had and received. In the course of answering that question in the affirmative, French CJ, Crennan and Kiefel JJ emphasised the importance of coherence in the law,⁹¹ holding that to allow recovery would impermissibly permit “stultification of the statutory purpose by the common law”.⁹²

The importance, or centrality, of coherence of the law as a pervading policy consideration has thus been made clear.

However, much remains to be worked out. Sir Anthony Mason has suggested “the doctrine of coherence has a long and, unfortunately, a very complex life ahead of it”.⁹³

The issues here include:

- (1) The extent to which legal coherence can operate as a reason for extending common law principle. This may be an instance of principled gap-filling, designed to enhance the harmonious operation of common law principles, or the harmonious operation of statutory and common law obligations.
- (2) The precise way in which coherence operates as a constraint on the recognition of common law obligations. It would seem that this involves at least the following considerations:
 - (a) Whether the conduct said to be the subject of the obligation is affected directly or indirectly by statute or by other common law principles.
 - (b) Whether recognition of the obligation would be inconsistent with the statute or its purpose, or with other common law or professional obligations.

⁹⁰ At [54].

⁹¹ At [38].

⁹² At [45].

⁹³ Mason, “The Interaction of Statute and Common Law” (2016) 90 ALJ 324 at 339.

- (c) In relation to statute, what degree of inconsistency is required? Does it have to reach the point of being irreconcilable with the statute, or of amounting to stultification of the statutory purpose?
- (d) Similarly, in relation to inconsistent common law or professional obligations, what degree of inconsistency is required? Does it have to reach the point of being irreconcilable?

Conclusion

The interplay between statute and common law has a deep history. Yet the implications within Australia are still being worked out. The desirability of coherence within our one integrated system of laws suggests that, in at least some areas, a version of the doctrine of analogy from legislation will have significant work to do.

One particular area to watch with interest is good faith and fair dealing in contract law. The High Court has not yet fully entered this field.⁹⁴ However, there have been judicial⁹⁵ and extra-judicial⁹⁶ indications that emerging statutory norms may prove influential in the resolution of this issue.

⁹⁴ *Royal Botanic Gardens and Domain Trust v South Sydney Council* (2002) 240 CLR 45 at [40]; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [104]-[107].

⁹⁵ E.g., *Paciocco v ANZ Banking Group Ltd* (2015) 236 FCR 199 at [287]-[306]; *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168 at [56]; *ACCC v Lux Distributors Pty Ltd* [2013] ATPR ¶42-447 at [23].

⁹⁶ E.g., Allsop, “Conscience, Fair Dealing and Commerce – Parliaments and the Courts” in Bonyhady (ed), *Finn’s Law – An Australian Justice* (2016) at pages 121-125.