

Chapter 1

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1.1 The entangled interaction of statute law and judge-made law

Five years ago, I wrote:¹

It makes sense to refer, as Professor Atiyah did, to a “kind of legal partnership” between statute law and common law.² More recently, Gleeson CJ wrote that:

Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship.³

Symbiosis describes the interaction between two dissimilar organisms living in close physical association. Pamela O’Connor, and Lyria Bennett Moses and Brendan Edgeworth have borrowed the Canadian term “bijuralism”, which “refers to the two different sources of legal norms that provide the sum of rules constituting the system as a whole.”⁴ Writing with particular focus on the operation of the Torrens system, Bennett Moses and Edgeworth add that it has been “a substantial task, for the judiciary to fit these two systems into a coherent and interlocking whole.”⁵

In the last five years, I have participated in more than 600 appeals, many brought from judgments after trials in the Supreme and District Courts of New South Wales involving allegations of negligence. Some alleged novel

1 M Leeming, “Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room” (2013) 36(3) *UNSWLJ* 1002 at 1014.
2 P Atiyah, “Common Law and Statute Law” (1985) 48 *MLR* 1 at 6.
3 *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29 at [31].
4 L Moses and B Edgeworth, “Taking it Personally: Ebb and Flow in the Torrens System’s In Personam Exception to Indefeasibility” (2013) 35 *Syd Law Rev* 107 at 111; P O’Connor, “Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems” (2009) 13 *Edin L Rev* 194.
5 Moses and Edgeworth, above n 4, at 111.

duties of care,⁶ some raised novel aspects of provisions of the *Civil Liability Act 2002* (NSW),⁷ some involved liability imposed by statutes which displaced that Act,⁸ but the large majority involved the ordinary working out of that Act and earlier legislation and earlier case law. This work is inevitably informed by that experience. I have come to see that the civil liability legislation is an often under-appreciated source of the law which is applied in litigation, and also that this is but a relatively recent aspect of the richness and depth of the interaction and indeed *entanglement* of legislation and judge-made law, which is the outcome of the task of fitting the two into a “coherent and interlocking whole”. Statutory innovation and intrusion in the law of negligence has occurred for decades and, in some areas, for centuries.

The interaction between legislation and judge-made law⁹ is interesting and important. One reason why it is less well understood than it should be was captured by Kirby J: “Lawyers love the common law, they hate statutes”.¹⁰ It is common to contrast judge-made law and statute, notwithstanding Windeyer J’s warning that “it is misleading to speak glibly of the common law in order to compare and contrast it with a statute”.¹¹ And while most reasons for judgment are scarcely arresting narratives, they are incomparably less unreadable than the majority of statutes, which often seem to be drafted with a view to defeating a ready grasp of their effect, and almost invariably lack any sense of narrative. It is natural to read a judgment so as to identify and understand

6 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 469; [2013] NSWCA 317; *Dansar Pty Ltd v Byron Shire Council* (2014) 89 NSWLR 1; [2014] NSWCA 364; *Perera v Genworth Financial Mortgage Insurance Pty Ltd* (2017) 94 NSWLR 83; [2017] NSWCA 19.

7 *Paul v Cooke* (2013) 85 NSWLR 167; [2013] NSWCA 311 (inherent risk); *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514; [2013] NSWCA 382 (public authority defences); *Uniting Church in Australia Property Trust (NSW) v Miller*; *Miller v Lithgow City Council* (2015) 91 NSWLR 752; [2015] NSWCA 320 (risk of harm); *Bankstown City Council v Zraika*; *Roads and Maritime Services v Zraika* (2016) 94 NSWLR 159; [2016] NSWCA 51 (public authority defences); *Croucher v Cachia* (2016) 95 NSWLR 117; [2016] NSWCA 132 (self defence); *New South Wales v Briggs* (2016) 96 NSWLR 467; [2016] NSWCA 344 (psychiatric injury); *Goode v Angland* [2017] NSWCA 311 (dangerous recreational activity).

8 *Simon v Condran* (2013) 85 NSWLR 768; [2013] NSWCA 388 (companion animal legislation); *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312; 356 ALR 63 (civil aviation legislation).

9 The term “judge-made law” seems preferable to “common law”, not so much in order to avoid confusion with equity or admiralty (of which there is but little in this work – see, for example, sections 4.6, 4.10 and 8.4 below) but because it is more obviously contrasted with statutes made by legislatures.

10 *Vigolo v Bostin* [2004] HCATrans 107. For another example, see *Adeels Palace Pty Ltd v Moubarak*; *Adeels Palace Pty Ltd v Bou Najem* [2009] HCATrans 233:

FRENCH CJ: We have had more than one case in which the Civil Liability Act applied. Nobody seems to want to talk about it much.

MR CAMPBELL: I was in court when your Honour Justice Gummow spoke about the Bar being a bit slow to latch on to this, but could I say, your Honours, by way of interpolation, that often the view has been taken – perhaps erroneously no doubt in a particular case – that the provisions do not make much practical difference, but that may not be a correct approach.

11 *Gammage v The Queen* (1969) 122 CLR 444 at 462.

the principles applied to determine the outcome of the litigation; indeed “case law tends to flatter juristic intelligence by challenging the reader to follow and assess reasoned arguments”.¹² Reading statutes and construing them is utterly different, although Johnson went too far to say that even “a plodding blockhead may excel” at the statutory part of law.¹³ In many ways, legislative language as analysed in litigation is an unnatural and intellectually demanding use of language. The usual class of case in contested litigation will deal with a situation which may well not have been contemplated when the statute was drafted, and reliance will commonly be placed on changes in text and structure which would not be regarded as significant in most other contexts. Reading a statute is much closer to reading the source code for computer software or the rules of a game or the fine print of a consumer contract than reading a judgment.

Whatever its cause, the preference for judgments over statutes deeply informs how law is taught to students, and how law is understood by practitioners. Indeed, this is reflected in the observation: “In our system of law statutory law tends to be transformed into case law”.¹⁴ It is often easier to read a judgment explaining the meaning of a statute than to read the statute itself, high authority to the contrary notwithstanding.¹⁵

One theme of this work is that the interaction between statute and judge-made law warrants greater attention than it receives, and indeed that much judge-made law is best seen as a response to or a consequence of statute. The two are *entangled*, so that to refer merely to a “line of authority” on a particular topic can distort the truth that the so-called “line” is really a series of decisions themselves responding to legislation enacted as a consequence of earlier decisions. Statute is commonly a reaction to judge-made law, and is itself the occasion for further development of the law. Entanglement has a familiar meaning applied to hair, rope, nets and other fibres. In physics, quantum entanglement refers to the interdependence of two separate particles, so that information about one cannot be provided in full without providing information about the other. Schrödinger defined entanglement “not ... *one* but rather *the* characteristic trait of quantum physics”.¹⁶ It would be an exaggeration to regard entanglement as *the* salient facet of the relationship between statute law

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- 12 N Duxbury, *Elements of Legislation* (Cambridge University Press, Cambridge, 2013), p 60.
- 13 J Boswell, *Life of Johnson* (ed R Chapman) (Oxford University Press, Oxford, 1980), p 358, cited by Duxbury, above n 12.
- 14 J White and R Summers, *Handbook of the Law under the Uniform Commercial Code* (West Publishing Co, St Paul, 1972), third sentence of preface, a topic addressed more fully in M Leeming, “Statute Law in the Law of Obligations – Dimensions of Form and Substance” (Paper presented at Obligations IX, University of Melbourne, July 2018).
- 15 See, for example, the regularly cited passage from *Ogden Industries Pty Ltd v Lucas* [1970] AC 113 at 127: “It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself”.
- 16 E Schrödinger, “Discussion of Probability Relations Between Separated Systems” (1935) 31 *Proceedings of the Cambridge Philosophical Society* 555. See, for a popular account, A Aczel, *Entanglement: The Greatest Mystery in Physics* (John Wiley & Sons, Chichester, 2003).

and judge-made law, but it is nonetheless vitally important. The significance of this idea may not immediately be obvious; the following example is intended to allay sceptical readers.

1.2 An example: causation and contributory negligence

The historical defence of contributory negligence led to elaborate refinement in the analysis of causation, often in connection with the “last opportunity rule”. Both the defence and the exception reflected common law’s “traditional preoccupation with finding a *sole* responsible cause”.¹⁷ Legislation which abrogated the defence replacing it with just and equitable apportionment prompted the re-examination of causation in *March v Stramare (E & MH) Pty Ltd*.¹⁸ In the short term, McHugh J’s proposed reformulation did not prevail over the majority which favoured preserving what had come to be called “commonsense causation”, although both Mason CJ¹⁹ and McHugh J²⁰ expressly viewed the enactment of just and equitable apportionment as the occasion for the review. That analysis was a direct precursor to the provisions governing causation in the civil liability legislation in most Australian jurisdictions.²¹ The mandated separation of the new statutory terms “factual causation” and “scope of liability” and the need to apply a but-for test *in every case* to which the civil liability legislation applies²² recalls McHugh J’s reasons, and has in turn important consequences for the development of the law.

The change from “commonsense causation” to separate determinations of “factual causation” and “scope of liability” is quite profound;²³ so too is the change from identifying a single effective cause to an assessment of contributing causes in order to apportion liability.

There are also further and rather subtler consequences, largely because statutes give rise to unforeseen complexity. Consider the many cases where the same court must determine two separate causes of action in negligence,

17 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [12].

18 (1991) 171 CLR 506.

19 “[C]ourts are no longer as constrained as they were to find a single cause for a consequence and to adopt the ‘effective cause’ formula”: *ibid* at 511.

20 “In my opinion, now that legislation allows liability for damage to be apportioned in accordance with what the court thinks is just and equitable having regard to the comparative responsibility of the parties, the preferable course is to use the *causa sine qua non* test as the exclusive test of causation”: *ibid* at 533-534.

21 NSW: CLA s 5D; Qld: CLA s 11; SA: CLA s 34; Tas: CLA s 13; Vic: *Wrongs Act*, s 51; WA: CLA s 5C; ACT: *Civil Law (Wrongs) Act*, s 45.

22 See *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [12] and [14]-[16]; *Badenach v Calvert* (2016) 257 CLR 40; [2016] HCA 18 at [36].

23 See *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [11] (“The distinct nature of those two questions [the question of historical fact posed by factual causation, and the normative question posed by scope of liability] has tended, by and large, to be overlooked in the articulation of the common law. In particular, the application of the first question, and the existence of the second, have been obscured by traditional expressions of causation for the purposes of the common law of negligence in the conclusory language of ‘directness’, ‘reality’, ‘effectiveness’ and ‘proximity’”).

one of which is governed by the rules in *March v Stramare*, the other as stated in the civil liability legislation. A plaintiff who sues his or her employer and a manufacturer or contractor on site is a ready example. There may in those circumstances be a tendency to assimilate the different tests (which indeed may be quite similar).²⁴ Further, how are *other* statutory provisions to operate? If in a case of contribution between tort-feasors, the court is seeking to assess the “causal potency” of each defendant’s conduct, how does that process occur when there are different tests of causation governing the liability of each? Will there be a different apportionment as between, say, an occupier and an employer before the enactment of the civil liability legislation (when the liability of both was governed by the same test of causation) and after that legislation’s enactment (when the liability of the former but not of the latter is governed by the legislation)?

Another instance is that the reasoning in *March v Stramare* was used as the basis for overturning a line of English authority in employer’s liability cases, where it had been held that where an employer was in breach of a statutory duty, but the conduct constituting the breach was the sole fault of the employee, then the employer was not treated as liable. The result was that the employee could not sue in negligence, nor could a third party claim statutory contribution from the employer. These decisions were reviewed in *Andar Transport Pty Ltd v Brambles Ltd*,²⁵ the English authorities disapproved, and to the extent that the High Court had adopted their reasoning in *Nicol v Allyacht Spars Pty Ltd*,²⁶ the dissenting judgment of Dawson J was preferred.²⁷ This complexity reflects the working out into a “coherent and interlocking whole” to which Moses and Edgeworth referred, for the indirect cause of all of the above was the enactment of statutory apportionment to replace contributory negligence.

This book contains many other examples drawn widely from the law of negligence. The immunities of highway authorities display multiple dimensions of interaction: the misfeasance/non-feasance “rule” is in truth a rule of statutory construction; the submissions and reasoning in the leading Australian case²⁸ turned on statutory construction, and its result has been fresh statutory provision in every State and the Australian Capital Territory.²⁹ The peer professional opinion defence and many of the heads of damages reflect similar interplay, as indeed does the breakdown of the traditional distinction between general and special damages.³⁰ The availability of damages for psychiatric injury is another example: the late 19th century decision of *Victorian Railways Commissioners v Coultas* prompted legislation, as did the High Court of

24 See, for example, *Vincent v Woolworths Ltd* [2016] NSWCA 40 at [48] and *Bauer Media Pty Ltd t/as Network Services Company v Khedrlarian* [2018] NSWCA 208 at [45].

25 (2004) 217 CLR 424; [2004] HCA 28.

26 (1987) 163 CLR 611.

27 *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; [2004] HCA 28 at [39]-[45]; see section 6.3 below.

28 *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29.

29 See Chapter 5 below.

30 See sections 3.3 and 8.2 below.

Australia's decision *Chester v Waverley Corporation*, and each and every significant High Court decision thereafter is a response to separate legislation enacted in one or other Australian jurisdiction.³¹ And so on. There may be areas of the law of negligence relatively unaffected by statute. But much reflects the entangled interaction of statute law and judge-made law.

1.3 Four themes

First, there are statutes and statutes. The legislation which has so powerfully impacted the law of negligence operates in very different ways. And it would be most naïve to think that the curial response has been one-dimensional. Rather, as a distinguished United States judge has said, "Statutes vary in design and substance, and so the interpretative task may change and the tools used may vary depending on the particular statutory issue at hand".³² The relationship between statute and judge-made law is the opposite of monolithic. The examples already mentioned well illustrate the different ways in which statute and judge-made law interact. One theme of this work is identifying the different ways in which statute and judge-made law interact.

Secondly, "legal history" is not the whole of the answer to the multiplicity of problems that continue to arise. However, it is an indispensable starting point to analysis. Legal meaning cannot be given to a statutory text without an understanding of the context in which it was enacted. And often the reasons of courts are deeply influenced by the statutory context. Those influences may not be immediately apparent. As Holmes cautioned at the beginning of his first lecture in *The Common Law*, it is an error to think that ideas which now seem natural and familiar were always thus: "Many things which we take for granted have had to be laboriously fought out or thought out in past times".³³ It is normally important to look at the purpose of statutes and judgments in order to assess their ongoing significance in the resolution of the point presently in issue.

Thirdly, the labels given to legal concepts, even those predominantly derived from statute, are often sourced from judge-made law. "*Griffiths v Kerkemeyer* damages" and "modified *Sullivan v Gordon* damages" are obvious examples, but the phenomenon recurs throughout the law of negligence and indeed the law generally. Labels matter. The labels given to legal concepts have a powerful and pervading influence on legal reasoning. Labels shape the way people think. Labels are particularly important in litigation, where advocacy is intended to persuade, and reasons are given to explain the result, not least to the losing party. "The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended

31 *Scala v Mammolitti* (1965) 114 CLR 153; *Jaensch v Coffey* (1984) 155 CLR 549; *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33; *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22; *King v Philcox* (2015) 255 CLR 304; [2015] HCA 19. See Chapter 7 below.

32 R Katzmann, *Judging Statutes* (Oxford University Press, New York, 2014), p 55.

33 O Holmes, *The Common Law* (Dover Publications, New York, reprint edition, 1991).

to be more precisely stated in the definition.”³⁴ Lord Hoffmann was there, in his last judgment in the House of Lords, referring to definitions in contracts, but the sentiment surely applies *a fortiori* to the labels used by lawyers to refer to a legal doctrine. Renaming the “prerogative writs” as “constitutional writs” is an example.³⁵ It was for this reason that Lord Goff was disdainful of the term “proximity”:³⁶ prophetically, as it turned out, anticipating that term’s decline in Australia and indeed England and Wales.³⁷

Fourthly, the relationship between statute law and judge-made law, as Atiyah once said, “must be seen as the relationship between two developing and moving bodies of law and the way in which they interact on each other becomes a matter of no little importance”.³⁸ “[T]ort law ... can no longer be regarded as largely a common law field [but] must now well and truly grapple with theoretical and practical issues of statutory scope and interpretation that have arisen in many other fields of law.”³⁹ Professor McDonald captured an important insight: the need to revisit how “the law of negligence” is understood.⁴⁰ We owe an immense debt to Pollock, but his essentially Victorian notion of that bountiful sovereign “our lady the Common Law”,⁴¹ where statutes were an unwelcome and unwholesome intrusion, does not survive into the 21st century. Nor has Maine’s prophecy that codification would spell the end of the common law come to pass.⁴² Most practising lawyers are conscious that somehow or other, the legal system proceeds by drawing upon both sources of law. Traynor’s typically Californian metaphor of a continuity script is a

34 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101; [2009] UKHL 38 at [17] (Lord Hoffmann).

35 “Conceiving of the constitutional writs as ‘prerogative writs’ is liable to lead those who make that error to the mistake of burdening an important Australian constitutional remedy, needlessly, with all the limitations, restrictions and procedural convolutions found in the history of English prerogative writs”: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 81; [2000] HCA 57 at [137] (Kirby J); see also at [20] and [164]-[165]. A recent example of the appreciation of the significance of labels may be seen in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43 at [76]-[77], explaining a preference for “ancillary liability” over “accessorial liability”.

36 In his 1983 Maccabean lecture, “The Search for Principle”.

37 In Australia, see *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 at [48] and see section 2.4 below. In the United Kingdom, the inutility of proximity was emphasised by Lord Toulson in *Michael v Chief Constable of South Wales* [2015] AC 1732; [2015] UKSC 2 and Lord Reed in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 at [24]-[29].

38 Atiyah, above n 2.

39 B McDonald, “Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia” (2005) 27(3) *Syd L Rev* 443.

40 Or, as it has also been put, “a preferable approach to the relationship between statute and common law is that of viewing both sources of law as emanations of the common law legal tradition of which they are part”: P Stewart and A Stuhmcke, “The rise of the common law in statutory interpretation of tort law reform legislation: Oil and water or a milky pond?” (2013) 21 *Torts LJ* 126 at 127.

41 F Pollock, *The Expansion of the Common Law* (Stevens and Sons, London, 1904), pp 137-138 and see N Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, New York, 2004), Ch 4 “The Sanctification of the Common Law”.

42 Referring to “the greatest experiment which has ever been tried on English jurisprudence – the still-proceeding codification and consolidation of the entire law of New York”: H Maine, *Village Communities: Roman Law and Legal Education* (1856), pp 360-361.

much better description of the messiness and contingency of much of the law: “judges are called upon to interpret all manner of statutes and to fit more and more pieces of statutory law into the continuity script of the common law”.⁴³ Is there a more principled way of viewing that interaction?

Those questions prompt a larger one: what is the law of negligence? One purpose of this book is to enable informative answers to be given to those deceptively simple questions. Indeed, the gravamen of the balance of this book is to seek to demonstrate that the extent of that entanglement is far more extensive, and subtle, and engaging, than may commonly be thought.

This work does not purport to cover the whole law of negligence, as is obvious, apart from anything else, from its brevity. Emphasis is given to areas where the influence of statute is greatest. Further, the focus is not so much upon the detail of the statute and the case law construing it, but rather upon the entangled interaction between statute and judge-made law. It is written in part with a view to use by those undertaking an advanced course in tort, or as a component of a masters course (hence in particular, the “Further questions and references” at the conclusion of each chapter). But that should not prevent its use by a practitioner, for whom in particular the following section is directed.

1.4 A note on jurisdiction and application statutes

Most cases of negligence in the real world are affected by a range of statutes. The burden of this work will be to explain just how deeply those statutes are entangled with issues of duty, breach, causation, damages, and doctrines such as contribution, vicarious liability and contributory negligence. But it is also necessary in any real case to determine which bodies of judge-made and statute laws comprise the applicable law governing the particular dispute. This is largely statutory law too, but of a different nature from that addressed in the remaining chapters in this work (it reflects another dimension of entanglement). These areas are rarely taught, and have some Australian peculiarities. It is hoped that the following note on jurisdiction and application statutes may assist.

Federal jurisdiction

Courts have authority to decide actions in negligence, but mostly only because a statute says so. Within the Australian legal system, an important distinction is drawn between controversies in federal jurisdiction, which are determined by the exercise of the judicial power of the Commonwealth, and other cases. The first step is to determine whether there is a matter in federal jurisdiction. “[A] fundamental question necessary to be considered in every case: the identification of the character of the jurisdiction being exercised by the court – whether

⁴³ R Traynor, “The Unguarded Affairs of the Semikempt Mistress” 113 *U Penn L Rev* 485 at 489-490 (1965). See also J Phillips, “Why Legal History Matters” (2010) 41 *VUWLJLR* 293 esp at 295-302.

State or federal. The importance of this early enquiry, *in every case*, is that the answer to it may affect the law applicable to the controversy."⁴⁴

Quite commonly in an action for negligence in a case involving two parties, it will be clear that federal jurisdiction has not been invoked and is not being exercised. But there are many exceptions to that general rule. Without being exhaustive, there will be a matter in federal jurisdiction if:

- the parties are natural persons resident in different States;⁴⁵
- the Commonwealth or a person which is the Commonwealth or a person suing or being sued on its behalf for the purposes of s 75(iii) of the Constitution is a party;⁴⁶
- the matter arises under a federal law, for example, because there is also a claim under the *Corporations Act 2001* (Cth) because it is alleged that a director or officer of a corporation has not exercised his or her duties with reasonable care and diligence,⁴⁷ or a corporation has in trade or commerce engaged in conduct contrary to the Australian Consumer Law, or that the negligence of the operator of an aircraft had also breached the *Civil Aviation Act 1988* (Cth);⁴⁸
- because the plaintiff owes its right to sue under federal law (because, for example, it is a deed administrator appointed under Part 5.3A of the *Corporations Act*).⁴⁹

For details on the circumstances in which there is a matter in federal jurisdiction, and the way in which federal jurisdiction is conferred and invested in federal and State courts, reference should be made to specialist works.⁵⁰ For present purposes, it may be noted that if, and only if, there is a matter in federal jurisdiction, the plaintiff may be able to commence in a federal court.

44 *CSL Australia Pty Ltd v Formosa* [2009] NSWCA 363; 261 ALR 441 at [22] (original emphasis); see also *Eberstaller v Poulos* (2014) 87 NSWLR 211; [2014] NSWCA 211 at [14].

45 The matter is that described in s 75(iv) of the Constitution, and the court will then be exercising jurisdiction invested by s 39(2) of the *Judiciary Act 1903* (Cth): see, for example, the important decision of *Wilson v McLeary* (1961) 106 CLR 523 in which a Queensland passenger injured by a New South Wales driver was substantially awarded, by way of general damages, an allowance for much of the cost of her mother's travel expenses in caring for her component, pre-dating *Griffiths v Kerkemeyer* (see section 8.3 below), *Pozniak v Smith* (1982) 151 CLR 38, *Foxe v Brown* (1984) 59 ALJR 186 and *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22.

46 See the litigation of which the most familiar aspect is *Commonwealth v Mewett* (1997) 191 CLR 471; the underlying claims in negligence were determined in *Mewett v Commonwealth* [2003] FCA 808.

47 *Corporations Act 2001* (Cth), s 180(1).

48 See *Scott v Davis* (2000) 204 CLR 333; [2000] HCA 52 at [143].

49 See *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136; [2000] HCA 39 at [10] and *Vopak Terminal Darwin Pty Ltd v Natural Fuels Darwin Pty Ltd (Subject to Deed of Company Arrangement)* [2009] FCA 742; 258 ALR 89 at [48].

50 G Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, Sydney, 4th ed, 2016) and M Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, Sydney, 2012). A clear and accessible description may be found in J Allsop, "Federal Jurisdiction and the jurisdiction of the Federal Court of Australia in 2002" (2002) 23 *Aust Bar Rev* 29.

Further, where a court is exercising federal jurisdiction, separate analysis will be required to determine whether some important provisions of the civil liability legislation apply as to breach and causation (a court “is to consider” certain matters before determining breach and causation)⁵¹ as well as many provisions regulating and limiting the availability of damages, for example, a court “cannot make an award of damages for economic loss for consequential mental harm resulting from negligence” except in specified circumstances.⁵² At least on their face, those are provisions which are directed to courts, and thus in accordance with *Rizeq v Western Australia* do not apply of their own force.⁵³ However, following the same decision, it seems that State laws regulating the parties’ rights, obligations, powers, privileges and immunities apply of their own force in the exercise of federal jurisdiction.

Determining the applicable law

In claims for negligence, the determination of the applicable law proceeds in two stages. First, it is now established that ordinarily⁵⁴ the applicable choice of law rule will be to apply the *lex loci delicti*, whether that occurs within Australia⁵⁵ or in another country,⁵⁶ so that it will be necessary to ask where the damage was suffered. It is probable⁵⁷ that only the local legislation regulating civil liability for negligence will be applicable. That said, it is not unusual, having regard to federal legislation for service of process throughout Australia and the cross-vesting legislation,⁵⁸ for one jurisdiction’s legislation to be applied or construed by a court of another Australian jurisdiction.⁵⁹

In each Australian jurisdiction, local statutes make it necessary to identify the nature of the claim, because local laws apply or disapply other statutes.⁶⁰ This is analogous to, but more precise than, identification of the

51 NSW: CLA ss 5B(2) and 5D(2); Qld: CLA ss 9(2) and 11(2); SA: CLA ss 32(2) and 34(2); Tas: CLA ss 11(2) and 13(2); Vic: *Wrongs Act*, ss 48(2) and 51(2); WA: CLA ss 5B(2) and 5C(2); ACT: *Civil Law (Wrongs) Act*, ss 43(2) and 45(2); NI: LNA ss 8(2) and 11(2).

52 NSW: CLA s 33; SA: CLA s 53(3); Tas: CLA s 35; Vic: *Wrongs Act*, s 75; WA: CLA s 5T; ACT: *Civil Law (Wrongs) Act*, s 35(2); NI: LNA s 35.

53 [2017] HCA 23; 344 ALR 421. The full ramifications of this decision remain to be determined, but see J Stelios, “Choice of law in federal jurisdiction after *Rizeq v Western Australia*” (2018) 46 *Aust Bar Rev* 187.

54 For the special case of negligence committed on the high seas, see *Blunden v Commonwealth* (2003) 218 CLR 330; [2003] HCA 73.

55 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36 at [102].

56 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10 at [75]-[76].

57 By parity with the reasoning in *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; [2011] HCA 16 at [27]-[36].

58 *Service and Execution of Process Act 1992* (Cth); *Jurisdiction of Courts (Cross-vesting) Acts 1988* of each State and Territory.

59 See, for example, *Steen v Stenton* [2015] ACTCA 57; 73 MVR 336 and *Waldron v Joondalup Hospital Pty Ltd* [2018] NSWCA 182.

60 See NSW: CLA s 3B; Qld: CLA s 7(3); Tas: CLA s 3A; Vic: *Wrongs Act*, ss 46 and 70; WA: CLA s 4A. For application laws, see M Leeming, “Constitutional Aspects of Commonwealth and State Application Laws (with special attention to ss 79 and 80 of the *Judiciary Act 1903* (Cth))” in N Williams (ed), *Key Issues in Public Law* (Federation Press, Sydney, 2018), Ch 7.

“characterisation” or “character in law” of a claim,⁶¹ in choice of law analysis. It also reflects the basic fact of jurisdiction and application laws, namely, that they turn on what is *claimed*, rather than what is ultimately determined.⁶² By way of illustration, the most important New South Wales provision is s 3B of the *Civil Liability Act 2002*, which selectively applies and disapplies parts or all of that statute depending upon the nature of the liability alleged by the plaintiff. Its operation, speaking generally, is as follows:

- if the claim is for injury or death to a worker caused by the negligence of the worker’s employer, then the provisions of Division 3 of Part 5 of the *Workers Compensation Act 1987* (NSW) apply,⁶³ and none of the provisions of the *Civil Liability Act 2002* (NSW) apply;⁶⁴
- if (broadly speaking) the claim arises out of a motor accident within the meaning of the *Motor Accidents Compensation Act 1999* (NSW), then only the provisions identified in s 3B(2) apply;⁶⁵
- if the claim arises out of a “public transport accident” (which broadly speaking includes trains, buses, ferries, taxis but not air transport), then once again only the provisions identified in s 3B(2) apply;⁶⁶
- if the claim is that of a passenger arising out of the commercial transport operations by an aircraft, then liability in negligence for personal injury may be extinguished and the plaintiff’s rights may be determined by the *Civil Aviation (Carriers’ Liability) Act 1959* (Cth) or the *Civil Aviation (Carriers’ Liability) Act 1967* (NSW);⁶⁷
- if the claim is for a dust-related condition alleged to have been attributable, wholly or partially, to a breach of duty, then the whole *Civil Liability Act* is disapplied, save for ss 15A, 15B and 18(1);⁶⁸
- similarly, if the claim is for personal injury damages arising from smoking or the use of tobacco products, then only ss 15B and 18(1) apply.

61 The term used in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362; [2006] HCA 8 at [25] was “character in law”. Choice of law selects the applicable law area; application laws identify particular laws which are applicable.

62 See the construction given to s 5 of the *Civil Liability Act 2003* (Qld) by *Newberry v Suncorp Metway Insurance Ltd* [2006] 1 Qd R 519; [2006] QCA 48 at [23] (construe as if the words “the claim is that” preceded the words “the harm”). The sufficiency of a bona fide claim to invoke jurisdiction is central to *Miller v Haweis* (1907) 5 CLR 89 at 93 and *Troy v Wrigglesworth* (1919) 26 CLR 305 at 311; see further Leeming, above n 50, pp 34–35.

63 *Workers Compensation Act 1987* (NSW), s 151E.

64 CLA s 3B(1)(f).

65 CLA s 3B(1)(d) and (e). If the claim is *both* a motor accident and a worker’s claim for the negligence of the employer, then generally the regime is as for a motor accident: *Workers Compensation Act 1987* (NSW), s 151E(2). There are special provisions for injuries to coal miners caused by off-road motor accidents where there is no motor accident insurer: see *Motor Accidents Act 1988* (NSW), s 3D and *Motor Accidents Compensation Act 1999* (NSW), s 3B.

66 CLA s 3B(1)(e) and *Transport Administration Act 1988* (NSW).

67 See, for example, *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312; 356 ALR 63.

68 CLA s 3B(1)(b).

The same broad approach, of providing separate regimes for claims against employers, and claims involving motor accidents, is seen in the other jurisdictions.⁶⁹

Further, there is commonly interaction between the applicable law and the jurisdiction of the court. For example, the Dust Diseases Tribunal⁷⁰ has exclusive jurisdiction for claims for dust-related conditions,⁷¹ while the District Court has unlimited pecuniary jurisdiction for all motor accident claims and work injury damages claims.⁷² In the case of claims for personal injury, the amount of the damages awarded very much depends upon the nature of the claim and which of the categories summarised above the claim falls into. In the case of claims for physical damage or economic loss, it will be necessary to determine whether the claim is an apportionable claim.⁷³ The very numerous – and far from uniform – statutes applicable in these cases are considered below in Chapters 6 and 8.

On one view, it may be thought that some or all of the provisions summarised above do not really form part of the law of negligence, or, at least, do not form part of the *foundations* of the law of negligence. The contrary view is that it is appropriate to start from the beginning, which is by what authority is a court authorised to decide claims that a defendant was negligent, and, if so, what is the body of applicable law to adjudicate that claim. Indeed, the multiplicity of divergences in that body of applicable law, depending upon the nature of the claim, means that it will be unsafe in any real world case to neglect questions of jurisdiction and applicable law. Nor is the parties' agreement dispositive; no court is bound by propositions of law on which the parties agree.⁷⁴ As Sir George Jessel MR said long ago, "The Court is bound to give judgment according to law".⁷⁵

1.5 Further questions and references

1. Do the issues introduced in this chapter as to the interrelationship between statute law and judge-made law apply elsewhere in the legal system? In

69 For example, see *Wrongs Act 1958* (Vic), s 45(1) (although s 46 makes the Part subject to express provisions in a contract), while in Queensland, the *Civil Liability Act* is disappplied to workers compensation claims, but does apply to "journey claims": see *Ballandis v Swebbs* [2015] QCA 76.

70 Despite its name, this is a court of record with unlimited monetary jurisdiction: *Dust Diseases Tribunal Act 1989* (NSW), s 4, although its judgments and orders may be filed in the Supreme Court and executed as a judgment of that court: s 14.

71 *Dust Diseases Tribunal Act 1989* (NSW), s 11(1).

72 *District Court Act 1973* (NSW), s 44(1)(d) and (d1). There are costs consequences for commencing and continuing litigation in a higher court when a lower court had jurisdiction. See section 6.5 below.

74 *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561; [2012] HCA 22 at [66].

75 *Chilton v Corporation of London* (1878) 7 Ch D 735 at 740; see also, in this context, *Redbro Investments Pty Ltd v Ceva Logistics (Australia) Pty Ltd* (2015) 89 NSWLR 104; [2015] NSWCA 73 at [15]-[20].

defamation?⁷⁶ In criminal law?⁷⁷ In the law of charity?⁷⁸ Are there in fact *any* areas of law unaffected by statute?

2. Stephen Gageler has written:⁷⁹

[T]he meaning of a statutory text is reformed by the accumulated experience of courts in the application of the law to the facts in a succession of cases. The meaning of a statutory text is also informed, and reformed, by the need for the courts to apply the text each time, not in isolation, but as part of the totality of the common law and statute law as it then exists. The attribution of meaning by courts to the statutory text in this way resembles the declaration and development by courts of the common law. The common law and statute law as applied by courts are, to a significant degree, products of the same inherently dynamic legal process.

Discuss by reference to statutes affecting the law of negligence.

3. “Oil and water or a milky pond?”⁸⁰ Discuss.

4. What is the law of negligence? Is it best viewed as a body of judge-made law, subject to statutory intrusion? When a court is asked to develop the law of negligence, is it enunciating common law principle or engaged in statutory construction, or does it depend on the area of law? Is there a crisp distinction between statute law and judge-made law?

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A Burrows, “The Relationship Between Common Law and Statute in the Law of Obligations” (2012) 128 *LQR* 232

A Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, Cambridge, 2018)

G Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, Cambridge, 1982)

J Dietrich, “Teaching Torts in the Age of Statutes and Globalisation” (2010) 18 *Torts LJ* 141

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76 See *Fairfax Media Publications Pty Ltd v Bateman* (2015) 90 NSWLR 79; [2015] NSWCA 154 at [127]ff.

77 See, for example, the law of duplicity considered in *Environmental Protection Authority v Truegain Pty Ltd* (2013) 85 NSWLR 125; [2013] NSWCCA 204 at [36]-[52] and the offences considered in *Grajewski v DPP(NSW)* [2017] NSWCCA 251, special leave granted [2018] HCATrans 89.

78 Consider the *Statute of Elizabeth* and more modern legislation such as the *Charitable Trusts Act 1993* (NSW).

79 S Gageler, “Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process” (2011) 37(2) *MonULR* 1 at 1-2.

80 See J Beatson, “Has the Common Law a Future?” (1997) 56 *CLJ* 291 at 300 and Stewart and Stuhmcke, above n 40.

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