UNSW School of Private and Commercial Law Seminar Series

The Entangled Complexity of Statute Law and Judge-made Law

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It is a great honour to speak at, and indeed to launch, this Private and Commercial Law Series, to such a large and distinguished and – if I may say so – engaged audience. I am flattered by the turn out, both in quantity and quality. I would like to think that it is not just the promised canapes after the talk, and that there is a genuine appetite for serious debate about the legal system, slightly removed from the white noise of individual cases.

One aspect of *Common Law, Equity and Statute: A Complex Entangled System* is a description of the Australian legal system, seen from the perspective of a practitioner and judge. And central to that conception are the ideas of complexity and entanglement.

It is easy to say that the sources of law are statute and common law. Chapters 2 and 3 try to explain how "common law" is very complex, and "statute" is the opposite of a monolithic concept. But one theme of the book, which is illustrated in a number of different ways, is that generalities are one thing, but there is nothing like detailed examples from real litigation to explain points. So let me start with some examples.

Suppose you go to NSW Caselaw (which has judgments of most State courts and tribunals), and choose a random sentence. It will be obvious that it is reasons for judgment, and not merely because Caselaw does not have statutes.

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* This is a lightly revised presentation given at the first of the series of "Private and Commercial Law" series, hosted by the University of New South Wales. I am grateful to Dr Allison Silink and Professor Michael Handler for the invitation, and the helpful comments and questions from participants, including Professor Dimity Kingsford Smith, the Hon Kevin Lindgren, the Hon Keith Mason and Professor Prue Vines. Participants had been provided with and asked to read chapter 4 of M Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023), to which the presentation was directed.

Now suppose instead you take a random page from AustLII (which has cases *and* statutes) and choose a random sentence. It will probably be immediately apparent whether it is a provision of a statute or a sentence in a judgment.

It is natural to think of statute law and judge-made law as two opposites. They have different styles. They derive from different sources. They employ different methods – statutes lay down rules of general application as opposed to judgments which determine the particular dispute between the litigants by applying the law to the facts, and only incidentally creating law. Judgments are sometimes interesting, telling a story which has winners and losers, although more often they are more than a little tedious, and I certainly include some of my own efforts in that category – but one thing is sure, they are enormously more interesting that reading a statute from beginning to end. Even assuming you can do so in this lifetime – because statutes (especially federal statutes) have a tendency to prolixity, and while there is a principle of construction that "the statute should be read as a whole" that simply cannot be done with the *Corporations Act 2001* (Cth) or the Income *Tax Assessment Act 1997* (Cth) or the Commonwealth *Criminal Code* or many others.

There are more sophisticated differences too. We read statutes differently. Even the statute we call *Lord Cairns' Act*, which was propounded by one of the more distinguished Lord Chancellors, speaks in the same voice as any other statute in force in the jurisdiction. Contrast the differences between judgments of Lord Sumner and Sir Owen Dixon, on the one hand; as opposed to those of less distinguished judges. And that has consequences for legal analysis. Of course we read statutes textually, and of course we apply textual arguments – even dangerous arguments like *expressio unius* – that we would never think of applying to the language of a judgment, which instead must always be read contextually by reference to the facts of the case and the arguments advanced. Moreover statutes normally have an express provision within them saying what their operation or application is – what Francis Bennion called the "extent" of a statute. And there are other provisions, notably s 12 of the *Interpretation Act 1987* (NSW), which themselves purport to impose localising constructions upon generally worded statutes.

I think it is deeply simplistic to think that the sketch outlined above is anything like the whole truth. The more I think about, and experience, the legal system (or, more accurately, the tiny minority of the legal system which is the *litigated* legal system), the

more I think that its most important aspects are about the complex entanglement between statute law and judge-made law. That is one of the main themes of chapter 4, and of the book.

For example, in what I have already said, there are deeply interesting principles of judge made law about how to understand the general command in s 12 of the *Interpretation Act* about how the localising effect of that provision is to be applied. Section 12 says that offices, things, persons and places referred to in a statute are prima facie to be construed as offices, things, persons and places "in and of" New South Wales. How does that work when a statute gives a client a right to recover against a solicitor's failure to account, when the solicitor had a New South Wales practising certificate but failed to account to a client in Coolangatta?[1] Or when a statute gives a victim of crime a right to compensation from criminal conduct, if the victim is in Afghanistan, the perpetrator was formerly a resident of New South Wales, and committed an offence offshore?[2] Or if a Queensland gaoler acting pursuant to an order of a Federal Magistrates Court which is void for jurisdictional error seeks to take advantage of a Queensland law authorising the detention pursuant to "any" court having jurisdiction – does that mean only Queensland courts exercising jurisdiction of the State of Queensland?[3] But s 12 is just one example, albeit a particularly rich one; of course, every provision of an interpretation act is directed to how courts are to construe other statutes, and most provisions of an interpretation act have themselves been construed by courts. These and other examples of "unarticulated complexity" are mentioned in section 4.1 at pp 92-93.

Here is another example of the complex entanglement. I am shortly going to ask you a question about three rules mentioned in chapter 4:

(1) a council is liable for misfeasance but not non-feasance on a road;

(2) a will only be admitted to probate if it is shown to have been known and approved by the testator, and

(3) a solicitor acting for himself or herself cannot obtain costs at his or her ordinary hourly rate.

They are basic and familiar. Some may seem long-standing: the second has been around for about 170 years – that is not especially long in the time-frame of the law received in

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1 Cf *Law Society of New South Wales v Glenorcy Pty Ltd* (2006) 67 NSWLR 169; [2006] NSWCA 250.

2 Cf *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692; [2020] NSWCA 242.

3 Cf *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [536]-[548] (in the context of s 35 of the *Acts Interpretation Act 1954* (Qld), which is in equivalent terms to s 12 of the NSW *Interpretation Act*).

this country, and it is well less than half the time since Henry VIII's statute of 1540 which (begrudgingly) expanded testamentary capacity after Cromwell managed to wind back uses.[4] The third was overturned in *Bell Lawyers Pty Ltd v Pentelow*,[5] over-ruling the so-called "Chorley exception". The first was overturned in *Brodie v Singleton Shire Council*,[6] and then reinstated by statute.[7] Most of you know all of them and something about their history. You all know that they are rules of law within the legal system.

Here is the question: are those rules sourced in statute or in judge-made law?

It may be a question you have not much thought about. You might be thinking that the answer matters about as much as how many angels can dance on the head of a pin. (The way we use language is quite complex, and I cannot resist saying that the better view seems to be that that question was never debated by scholastics it was intended to mock, but was invented by protestant scholars to attack Catholicism at about the same time Henry VIII was cutting back uses but granting testamentary capacity.) But to return to law, it mattered very much in the two 21st century High Court decisions which decided these points. Critical to the arguments in *Brodie* and *Bell* was correctly characterising the question. In both cases, those resisting change said that if there were to be change, it should be by legislation, and that was appropriate since the rules were themselves based in statute.

Six members of the High Court in *Bell*, and four members of the High Court in *Brodie*, regarded the rule as part of the common law of Australia *and for that reason amenable to change.* Members of the majority in *Brodie* regarded the task of the Court as being one of "placing the common law of Australia on a principled basis".[8] Gleeson CJ, in a rare dissent, regarded the immunity of highway authorities for non-feasance as "intimately related to questions of statutory interpretation", and that consideration informed his conclusion that it should be amended or abrogated by statute.[9]

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4 See, for an accessible account of them and other Tudor statutes, P Vines, "Land and Royal Revenue: The Statute for the Explanation of the Statute of Wills, 1542-1543" (1997) 3(1) *Australian Journal of Legal History* 113.
5 (2019) 269 CLR 333; [2019] HCA 29.
6 (2001) 206 CLR 512; [2001] HCA 29.
7 See, eg, *Civil Liability Act 2002* (NSW), s 45.
8 *Brodie* at [61].
9 *Brodie* at [13].

Why did Gleeson CJ say that? You have to go back to the rules whereby the parish was liable to indictment for failing to repair roads, and ancient laws that said that because of the criminal liability, no action lay for damages. Then when a surveyor was appointed who was responsible for road maintenance, and they were vested in statutory authorities, statutes preserved the immunity. Those ideas were then transplanted to Australia. Then later statutes made reference to the conferral of the "immunities" of a highway authority upon the Road and Traffic Authority. That in turn led to a debate over whether the statute had itself, by referring to immunities in terms, mandated that they continue in this country. A majority of the High Court construed that provision as meaning in effect the immunities of a highway authority from time to time, and thus did not stand in the way of its abrogation. The fact that the High Court divided on whether the rule was sourced in statute or judge-made law well illustrates the entangled complexity of statute and judge-made law.

An aside. Murray Gleeson once said that when he was Chief Justice of the High Court, three members of his Court were appointed by Conservative governments, and 4 members by Labor governments – and the Court only once divided 4:3 on those lines. *Brodie* was that case: a case about the misfeasance/non-feasance liability of highway authorities. That fact that the Australian court system was so unpoliticised was, to him, a singularly satisfying thing.[10]

Very few litigators in personal injury litigation know much of that history, and that is the point. Applying the law is moderately straightforward. None of that history needs to be known in order to run litigation. Until a question of law arises.

Maybe some litigant seeks to change the law. Or maybe the newly enacted statute says that "A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual

[10] M Gleeson, "The Centenary of the High Court: Lessons from History", reproduced in H Dillon (ed), *Selected Papers of Murray Gleeson* (Federation Press, 2017) 132 at 140: "In my first five years in the Court, four of the Justices had been appointed by Labor governments, and three by a Coalition government. The only case that I can think of in which the Court divided along those lines was a tort case of no party political significance. It is interesting that this has gone unremarked. The fact that Australians take it for granted that the Court does not divide along such lines is, it seems to me, itself an achievement worth noting."

knowledge of the particular risk the materialisation of which resulted in the harm".[11] *Brodie* was itself overturned by statute, stunningly quickly – I can imagine the "Smiler" smiling at that – and then questions arise about what is and what is not a "failure … to carry out road work" within the meaning of the new statute, which plainly enough is intended in that respect to overturn the result reached in *Brodie* – and one is led back to those contestable questions about what is misfeasance and what is non-feasance and what is work on the road as opposed to some artificial structure on the road. And the new statute, s 45 of the *Civil Liability Act 2002* (NSW), also asks new awkward questions about when the road authority has "actual knowledge" of the particular risk whose materialisation resulted in the harm, which has continued to provoke controversy.

The position is even more obscure in the case of knowledge and approval. It is unquestionably an element of a valid will. But as is explained in section 4.3 of the book, it is fairly clear that that was *not* the law when the Court of Probate was created in 1857, and that there were early decisions squarely rejecting arguments for any such requirement – until the first judge, Sir Cresswell Cresswell (who is the most famous jurist from a small coastal town in Northumberland: Cresswell – his parents seem to have been unimaginative in their choice of name) was replaced by Sir James Wilde, later Lord Penzance, who had a different view, and said (in my view wrongly) that that was what earlier decisions had held – and wrote that view into the court's rules, and decisions followed upholding the rule. Those rules were eventually made in New South Wales, only to be repealed in 2013. I say that to show that asking "what is the source of the rule that a testator must know and approve of a will" is to ask a simple question with a complex answer (that makes it no different from much in law).

Sometimes labels do not help. The so-called "Chorley exception" is named after a case,[12] (although the rule – like many rules named after particular decisions – preceded the decision),[13] which was a decision on a statute governing the recoverability of costs. Exceptionally, a self-represented solicitor was able to recover professional costs. Once again, in *Bell* it was said that if it were part of the common law of Australia, then it was appropriate for the High Court to abrogate it, but if it were part of statutory law, it was said that it should be left to Parliament.

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11 *Civil Liability Act 2002* (NSW), s 45(1).
12 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877.
13 See for example *Pennington v Russell [No 2]* (1883) 4 LR (NSW) Eq 41.

All this complexity is easily hidden. That is because in the decisions which determine litigants' rights, emphasis is only given to the points in issue. What matters is the rule, not whether it comes from statute or judge-made law. Hence we forget about the source of those rights if it is common ground that the council has a defence for non-feasance or that the proponent of a will must establish knowledge and approval. And because the judgments in such cases appropriately skip over what is common ground, it becomes natural to say that the rule is part of the common law (or, as I prefer, "judge-made law", because "common law" is very ambiguous).

Hopefully those examples give something of the entangled complexity of statute law and judge-made law. The second half of the chapter explains the ideas underlying what I have called "entanglement".

Of course it is almost impossible to draft a statute which does not employ language which already has a meaning in judge-made law. There is recurringly a question whether aspects of that meaning are affected by pre-existing judge-made law. Does the injunction in s 80 of the *Trade Practices Act 1974* (Cth) have the same characteristics as that developed in equity? What about the pledge in the *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) – did it mean a pledge at common law, or did it also extend to the chattel mortgage that Palgo Holdings obtained from its customers.[14] Or to be topical, what is the meaning of "excise" in s 90 of the *Constitution*, which is after all just another statute (although one that as we have seen in the past few days is easier to change by decision than by referendum).

And if statute is the source of a rule, then there is what Windeyer J described as the "anchoring effect" of statute[15] – one cannot readily say this is what those words really meant, or should be understood today, in the same way one can of the reasons for judgment. If a statute says that there is a 6 year limitation period for a cause of action founded on contract including quasi contract, like s 14(1)(a) of the *Limitation Act 1969* (NSW), one has to give meaning to quasi contract. If (to anticipate the themes of the

[14] Cf *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249; [2005] HCA 28.

[15] V Windeyer, "History in Law and Law in History" (1973) 11 *Alberta Law Review* 123 at 130, reproduced in B Debele (ed), *Victor Windeyer's Legacy, Legal and Military Papers* (Federation Press, 2019) 132 at 140.

middle third of the book), there is a statute that says wherever there is any conflict of variance between the rules of equity and the rules of common law relating to the same matter, the rules of equity shall prevail, that says something about the continued distinction between rules of equity and rules of common law, and if your theory of the legal system is that it does not make sense to distinguish the two, then you need to explain how that came about and what s 5 of the *Law Reform (Law and Equity) Act 1972* (NSW) means.

There are important questions about the ambulatory effect of statutes, which are in a sense an antidote to their anchoring effect, and the way in which, importantly, "statutory law tends to be transformed into case law". Two very distinguished commentators, White and Summers, who spent much time contrasting the English and American legal systems, placed that prominently and provocatively in the preface to their work on the Uniform Commercial Code.[16] The fact of the matter is that statutes give rise to contestable points which get determined by courts, and then develop into a body of law based around the statute. And before too long, it becomes customary to apply the cases, rather than going back to the statute.

Conversely, there is the process whereby statutes can themselves influence judge-made law. Statutes can of course expressly override judge-made law. They can also do so much more subtly, by being necessarily inconsistent with a common law duty (such as the posited duty to take reasonable care before releasing a mentally unwell person, which could not co-exist with the statutory obligation to release the person unless it were necessary to detain him or her).[17] And they can do so through notions of incongruity or incoherence, such as in *Miller v Miller*[18] or *Bevan v Coolahan*.[19] If there are special aggravated offences for driving when affected by particular illicit drugs, then it was incoherent with that purpose to posit a duty of care owed by a driver to a passenger, both of whom were complicit buying and ingesting those illicit drugs thereby committing the aggravated offence.

And when none of the above apply, there may still be statute's "gravitational pull", and the end of the chapter deals with two equitable doctrines: partial rescission in equity,

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16 J White and R Summers, *Handbook of the Law under the Uniform Commercial Code* (West Publishing Co, St Paul, 1972), third sentence of preface.
17 *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44.
18 (2011) 242 CLR 446; [2011] HCA 9.
19 (2019) 101 NSWLR 86; [2019] NSWCA 217.

influenced by the powers conferred by what is now the *Australian Consumer Law*, and the Australian notion of penalties, preceding the next three chapters consideration of the role of equity.

So I hope that you can see that this entanglement operates in many different ways.

I happen to think all this is deeply interesting, not least because of the quotidien complexity in what litigators argue and courts determine every day. That is the main reason for writing the book. But I am also a little selfish. I want advocates and for that matter judges to improve their game, especially on questions involving statutory construction. And since "[m]ost cases in most courts in Australia are cases in which all or most of the substantive and procedural law that is applied by the court to determine the rights of the parties who are in dispute has its source in the text of a statute",[20] that is a great deal of litigation. We sometimes hear very sophisticated arguments involving statutes (we heard one last week where I was astonished at the industry and imagination of counsel). But quite often there is a feeling that more could be done developing arguments in the interests of a litigant. If the book leads to that happening even to a small extent, I would regard it as worthwhile.

[20] S Gageler, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common law Process" (2011) 37(2) *Mon ULR* 1 at 1.