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Introduction: Legislation and the Shape of Tort Law

TT ARVIND AND JENNY STEELE

So far as we are aware, this volume represents the first extended treatment of the role of legislation in the law of tort. As the contributions to this volume demonstrate, legislation is a vital and inherent part of, and influence upon, the law of tort; yet current tort theory is so focused on common law alone that it risks handing the study of legislation to other disciplines. This volume is an attempt to remedy that problem. In this introductory chapter, we draw upon the diverse and original contributions that follow in order to begin a new appreciation of the contours of statutory influence in the law of tort.

This exercise, however, raises broader questions about the implications of omitting legislation from the centre of tort scholarship. In a concluding chapter,¹ we draw out these themes in greater detail, discussing the deeper causes and implications of the present marginalisation of statute and the possible impact for tort scholarship of incorporating legislative influence more fully within its frame.

I. TORT LAW WITHOUT THE LEGISLATURE

Our starting point is that there has been a relative lack of scholarly attention devoted to legislation in the law of tort, which this collection seeks to redress.² It is not that the existence of legislation has gone entirely unnoticed. Tort lawyers know, of course, that there are many statutes applicable to the law of tort; and are well aware of the key provisions. Close attention has also been paid in recent time to reforms seen as being unsympathetic to the law as previously developed, particularly in Australia, where there has been an upsurge in legislation in response to an ‘insurance crisis’ perceived to be related to the principles of the law of tort.³ And there is a long-standing concern, particularly prominent in the United

¹ ‘Bringing Statute (Back) onto the Radar: Implications’ ch 21.

² The ‘woefully neglected’ subject of statutory influence on the law of obligations has been recently discussed by A Burrows, ‘The Relationship Between Common Law and Statute in the Law of Obligations’ (2012) 128 *LQR* 232. See further n 6; n 42.

³ This upsurge forms the backdrop to the forensic examination of the impact on tort defences by James Goudkamp in ch 3 of this volume. See also, eg B MacDonald, ‘Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Law in Australia’ (2005) 27 *Sydney Law Review* 443; P Cane, ‘Reforming Tort Law in Australia: A Personal Perspective’ (2003) 27 *Melbourne University Law Review* 649; J Edelman, J Goudkamp, S Degeling, ‘The Foundations of Torts in Commercial Law’ in S Degeling, J Edelman, and

States⁴ but with some parallels in England,⁵ that a proliferation of statute has undermined the adaptive capacity of common law.

What is missing, rather, is a sense of the ways in which common law and statute come together in the law of tort, and the full implications of incorporating their interaction in our study of tort. The importance of this point has recently been emphasised by Andrew Burrows, who has argued that the two sources of law are considerably more integrated in the law of obligations (including tort) than has generally been accepted.⁶ At the same time, it must be admitted that the sheer diversity of legislation renders it unrealistic for lawyers to be familiar with all of it at all times in the way that they may be aware of all of the key common law principles.⁷ This probably contributes to the absence of a sense of ownership of legislation on the part of lawyers: it defies academic expertise in this respect (among others, perhaps), and escapes the boundaries of legal ‘common knowledge’. Nevertheless, we argue that the academic focus on recent, and unsympathetic, legislation reflects an imbalance and under-emphasis of at least two forms in the way the contribution of legislation is perceived.

First, it reflects the fact that legislation tends to be left at the periphery of the subject, either unconsciously, or deliberately. Legislation is generally thought of as interfering with, amending, restricting, replacing, or supplementing common law, or dealing with purely practical issues,⁸ so that there remains an identifiable core of common law which appears to be independent of statute.⁹ This, rather than the adjusted picture involving legislation, is taken to supply the core features or internal structure of the law. Statute is not, generally, presented as underpinning, shaping, enabling, directing, transforming, or (still less) creating or constituting the law of tort at the core of its operations, nor are statutory provisions

J Goudkamp (eds), *Torts in Commercial Law* (Sydney: Thomson Reuters, 2011) 3: ‘In the present “age of statutes”, the coherence that the law of torts has achieved is under threat . . . In some jurisdictions, radical statutory changes have been made to the law of torts that do not seem to have clear regard to its structure’.

⁴ See the first chapter of G Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Harvard University Press, 1982): ‘Choking on Statutes’.

⁵ Compare Calabresi’s argument with CK Allen’s remarks in *Law in the Making*, 3rd edn (Oxford, Oxford University Press, 1939) that ‘the continuity of legal development would be greatly imperilled’ were it not for the ‘essential guiding rule’ that legislation which was ‘in derogation of the Common law’ should be strictly construed (379). Allen’s conclusion was that ‘if Parliament has to intervene in the development of the law, it should intervene as little as possible’ (414).

⁶ Burrows, (n 2). We endorse the argument that the two are closely integrated, which is consistent with much of what follows. Burrows adds an important discussion of statutory influence ‘by analogy’ in judicial reasoning. See further n 42.

⁷ The point is illuminated by James Goudkamp’s critical evaluation of the way that alterations to tort defences have been hidden away in portmanteau legislation, for example (ch 3). It is also illustrated by Keith Stanton’s analysis of little-known and hardly accessible provisions affording remedies to consumers, which nevertheless contribute in important ways to the pattern of protected interests and remedies (ch 13).

⁸ This connection between statute and practical concerns is consistent with the greater emphasis on statutory provisions to be found in broadly socio-legal work concerned to show the *impact* of the law of tort in action. Classically perhaps Atiyah’s *Accidents, Compensation and the Law*, now in its 7th edition and edited by P Cane (Cambridge, Cambridge University Press, 2006); and D Dewees and M Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford, Oxford University Press, 1996). There are also more specific works focused on the way that compensation works in practice, and paying considerable attention to statutes, eg R Lewis, *Compensation for Industrial Injury* (Oxford, Professional Books, 1987).

⁹ For an argument that English legislative reform of fault liability was essentially conservative and limited during the period 1850–2000, remaining deliberately subordinate to the common law, see P Mitchell, ‘England: the Elaboration of Fault Liability’, in P Mitchell (ed), *The Impact of Institutions and Professions on Legal Development*, vol 8, Comparative Studies in the Development of the Law of Torts in Europe (series editors: John Bell and David Ibbetson) (Cambridge University Press, 2012). The argument focuses particularly on statutes amending substantive principles of fault liability. The present collection casts its net wider in pursuing the impact of legislation on the nature of the law of tort, taking in a more diverse range of statutes, such as legislation introducing compulsory insurance, or providing for recovery of state benefits from damages. This leads us to a different appraisal of statutory influence.

typically seen as merging with common law principles, for that would introduce murky issues about their nature and parentage. This grossly understates the impact of legislation, and overemphasises the contrasts and boundaries between legislation and common law at the expense of their similarities, mutual influence and continuities.

Secondly, it reflects the manner in which engagement with statutes tends to start and stop with the nature of applicable provisions – what statutes require. This contrasts markedly with the rich diversity of ways in which court decisions are treated, and indeed minutely studied, and raises interesting questions about the acceptance of statutory provisions as definitive and self-contained, as ‘canonical texts.’¹⁰ Cases have traditionally been approached in terms of their contribution to the evolution of legal principles. To ask about the broader outlook of and influences upon a particular judge is implicitly to question the objectivity and autonomy of principle; to look at the origins and surrounding context of a legal decision is to question the continuity of legal reason, and to introduce possible elements of contingent influence. Nevertheless, drilling down into the influences on a case is rightly seen as offering the potential to supplement and enrich standard accounts of the derivation and nature of private law, even if there is resistance around how much these studies tell us about the law.¹¹ But where statutes are concerned, frankly neither the contingent historical context, nor the contribution made to emerging patterns and principles in the law, has generally been investigated by tort scholars. Indeed, given the tendency to treat statute as essentially operating at the margins of the common law – or as outside it, chipping in – it is rather more of a challenge to treat statute as contributing to the pattern of principles to be found in the law. This could merely indicate a preference or leaning on the part of tort scholars, exacerbated by the fact that the surface material itself – the statutory provisions – do not approach the level of interest and engagement to be derived from case reports (statutes themselves are not ‘a good read’).¹² But there is reason to think there is something deeper at work.

We can begin to address this by asking how the role of legislation is described by tort lawyers. Oddly enough, given the marginalisation of statute in general accounts of the law of tort, legislation can *appear* to come out ahead in a comparison with common law. The issue appears not to need discussion. Statute is superior to common law as a means of achieving change in the balance of rights and liabilities because of its democratic credentials (expressing the will of an elected legislature), so that it can create or limit liability in a way that courts should not.¹³ This is not an exception from the preoccupation with common law. Rather, the succinctness of the treatment of legislative superiority reflects a continued focus on the role that ought to be played by the courts. The separation is underlined by clear demarcation between the judicial and legislative roles, and between the factors thought appropriate for each to take into account in developing or changing the law.¹⁴

¹⁰ P Cane, ‘Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law’ (2005) 25 *OJLS* 393, 405.

¹¹ The path was broken by AWB Simpson, *Leading Cases in the Common Law* (Oxford, Oxford University Press, 1995), including a number of tort cases. More recently, the collections of *Landmark Cases* by C Mitchell and P Mitchell have continued the project (with some variety of objective, of course) – with the recent addition of *Landmark Cases in the Law of Tort* (Oxford, Hart Publishing, 2010).

¹² A similar reason is among those suggested by Burrows (n 2) 233 for the neglect of statute in the study of obligations: ‘Cases are fun; statutes are perceived to be dull, dry and difficult’.

¹³ An example can be seen in Beever’s succinct reference to legislation in respect of dependency claims in the case of fatal accidents: ‘This is appropriate because it is mandated by statute’. A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007) 36.

¹⁴ eg Stevens argues that if judges are to decide cases on policy grounds, ‘a different sort of judiciary will be required’, in the sense that judges ‘will need political legitimacy’. Further, judicial decisions would need to have prospective effect only, resembling statute: R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 312.

In an important sense, the compliment is in any case a back-handed one. It acknowledges the superiority of the legislature, but at the same time, principled constraints operating on private law are treated as not applying to legislation. Legislation is not the domain of principle, but of political will.¹⁵ It is therefore cast outside the realm of what private lawyers most centrally need to discuss; even perhaps outside the core of jurisprudence, and the disciplinary expertise of theoretical tort law.

Statute may in other senses be implicitly considered inferior to common law. To the extent that legislation is taken to express the will of the legislature, it may be perceived as subject to short-term political ambitions, blinkered in outlook, and potentially ill-informed in respect of its impact on existing legal principle.¹⁶ This approach, again treating legislation as largely 'outside' the domain of legal principle, emphasises the political aspects of law-making, in the sense of an association with electoral manifestoes, ideologies and interest groups, and understates the legal expertise which is often (though not always) involved in legislation. The contributions to this volume therefore resonate with Paul Mitchell's argument that standard accounts of the institutions involved in law-making radically neglect the degree to which the personnel of each institution (courts, legislatures, law reform bodies, and academia) are overlapping, their more influential members forming part of a single 'legal elite'.¹⁷ But the existence of those standard accounts underlines our general point, that there is little sense of ownership of legislation in theoretical approaches to tort.

All of the contributions to this book turn this picture around and focus primarily on legislation, or on the interaction between legislation and judicial decisions.¹⁸ The very diversity of the contributions illustrates how much ground there is to make up when comparing this exercise with the study of judicial decisions. While some contributors have chosen to investigate the background and to some extent the effects of a single statute – in many cases offering the first such consideration outside the 'updating' sections of legal journals and practitioner works – others have looked at much broader patterns – a range of statutes, a wide historical sweep, or the interplay between courts and legislature on a particular issue. Put together, they make the case that the interaction between the judiciary and the legislature is far more complex and takes place at far more levels, than is usually assumed.

¹⁵ Cane (n 10) argues that common lawyers associate legislation too readily with the 'will of the sovereign', in reference to the Benthamite positivism which is so closely associated with statutory reform. Lieberman has shown however that the relationship between common law and statute was already a well-established topic of legal theory (and a concern of Blackstone's) when Bentham entered the fray in 1770. The radical part of Bentham's argument was that common law should be replaced with comprehensive legislation: D Lieberman, *The Province of Legislation Determined* (Cambridge, Cambridge University Press, 1989) ch 11.

¹⁶ Historically, this reached its peak in the bitter criticisms of secondary legislation in the inter-war period. See, eg G Hewart, *The New Despotism* (London, Ernest Benn, 1929) and CK Allen, *Bureaucracy Triumphant* (London, Oxford University Press, 1931). The less extreme point – that the political dimension of legislation can result in laws that 'are often bad and indifferent as well as good' – is typically conceded even by those who are generally favourably disposed to legislation. See, eg RJ Traynor, 'Statutes Revolving in Common Law Orbits' (1968) 17 *Catholic University Law Review* 401, 425, which despite referring to the 'unguided missiles' launched by legislatures (402), is principally devoted to making the case for a programme of 'orderly research of statutes' to enable judges to 'make optimum use of statutes . . . as sources of judicial lawmaking' (426).

¹⁷ P Mitchell, 'Introduction', in P Mitchell (ed), n 9.

¹⁸ For contributions in the latter mould, see the chapters in Pt I.

II. STATUTES AND THE SHAPE OF TORT LAW: SIX MODES OF INTERACTION

A. Type 1: Amending ‘Bad’ Rules

A major reason why legislation and the legislature remain peripheral in descriptions of tort law is that the interaction between tort law and statutes is seen in very narrow terms. Because the law of tort is studied chiefly through the manner in which it is applied by courts to the resolution of disputes, statutes are principally seen as being directed to altering the outcomes produced by tort law where they are unsatisfactory, and at doing so in a limited and precise way.

Such statutes do exist in several areas of tort law. Section 3 of the Compensation Act 2006, which was specifically designed to reverse the rule in *Barker v Corus*,¹⁹ is a recent example.²⁰ In this collection, this type of statute is represented by the contributions of Stephen Bailey²¹ and Donal Nolan.²² Nolan, discussing the first Fatal Accidents Act 1846, makes the point that the Act was largely the result of dissatisfaction both with the practical consequences of the decision in *Baker v Bolton*²³ – which denied an action to the dependents of a person killed as the result of an act that would have been a tort had she merely been injured – and with the adequacy of the remedy provided by deodands. Bailey, discussing the genesis and impact of the Occupiers Liability Acts, makes the point that the changes the Acts effected ‘could have been produced by a final appellate court freed of the shackles of precedent and less inhibited from being seen in effect to legislate.’²⁴ The need for legislation here is practical – courts could produce the necessary changes, but in practice are unlikely to do so, either because they feel constrained by a reluctance to disturb established precedent, or to take the law in a direction that may be seen as an innovation too far, or for some other such reason. In his contribution, Willem van Boom points out that even in civilian jurisdictions where, according to received wisdom, courts are unable to develop law and remain subservient to the authority of the Code at all times, the pragmatic nature of the courts emerges unevenly through a willingness to make law nevertheless.²⁵

Statutes of this type are familiar, and several of the other contributions deal with legislation that sets out to amend rules that had come to be seen as undesirable.²⁶ Even so, while the rules they create are usually faithfully discussed in most accounts of tort law, the process that led to their enactment rarely is, an omission which has important consequences. As Nolan’s and Bailey’s contributions show, a close examination of the history of statutes can shed light on their provisions and challenge our understanding of what leads particular

¹⁹ *Barker v Corus* [2006] UKHL 20.

²⁰ On the statute more generally, see the contribution of Morris, ‘The “Compensation Culture” and the Politics of Tort’ ch 4.

²¹ ‘Occupiers’ Liability: the Enactment of “Common Law” Principles’ ch 9.

²² ‘The Fatal Accidents Act 1846’ ch 7.

²³ *Baker v Bolton* (1808) 1 Camp 493.

²⁴ Bailey, ch 9.

²⁵ ‘Torts, Courts, and Legislatures – Comparative Remarks on Civil Law Codifications of Tort Law’ ch 2.

²⁶ See, eg the contributions of Arvind, ‘Restraining the State through Tort? The Crown Proceedings Act in Retrospect’ ch 19, Bagshaw, ‘The Animals Act 1971’ ch 10, Simpson, ‘Trade Disputes Legislation and the Economic Torts’ ch 6; and Steele, ‘Law Reform (Contributory Negligence) Act 1945: Collisions of a Different Sort’ ch 8, which we discuss in more detail elsewhere in this Section.

types of outcomes to be considered ‘bad’ or ‘unsatisfactory’ in the context of balancing competing principles, interests and goals.

Yet, as the contributions to this volume also point out, this is only one of a much wider variety of ways in which common law and legislation interact, and in which the legislature influences the development or application of tort. In the remainder of this Section, we discuss five further types of interaction between tort law and legislation, which are less discussed in the literature on tort law but which nonetheless have significant implications for the way in which we view the subject.

B. Type 2: Rules, Exceptions and Interests

The first of these forms of interaction is that legislation which carves out new exceptions to existing principles may do so to such a significant extent and in such a sustained way that viewing the result as an ‘exception’ would ignore the breadth and significance of the change. The result of the legislation, rather, is that the law now protects an interest that the common law historically did not. Whilst we are used to new torts being created by statute, Keith Stanton’s contribution to this volume²⁷ provides a good example of how legislation that seems to carve out an exception to an existing rule can in effect protect a new interest. It is common to find it said that tort law does not protect a person against pure economic loss. As Stanton shows, once statute is taken into account, this is simply untrue. Not only does English tort law protect persons against pure economic loss in a wide range of circumstances, but the manner in which it does so shows a significant extent of continuity with other aspects of the law. Here, then, ignoring statute or treating it as a minor modification will lead us not just to misunderstand what the law is, but to miss important aspects of what the law of tort protects and what it does not. It leads us, in other words, to a false understanding of the shape of the law.

C. Type 3: Courts, Legislatures and ‘Political’ Changes to Tort Law

A somewhat different type of interaction occurs where legislation seeks to alter or amend a rule or rules of common law but, unlike the examples discussed above, is only partially successful, usually because it leaves deeper underlying issues unaddressed. In some cases, this is simple oversight, whose most likely cause is inadvertence, or a failure to note an area of law that is of relevance to a statute under preparation. James Lee, for example, points to the manner in which equitable wrongs are repeatedly overlooked in both substantive and procedural statutes, leading to much confusion in the case law.²⁸ In other cases, however, the problem is deeper. The process that produces legislation usually reflects a complex mixture of considerations, where questions of core principle rub shoulders with issues of policy that sometimes reflect a political consensus, but can also sometimes be ideologically charged. The resulting statutes reflect the tangled mixture of politics, policy and principle from which they emerged and are often political compromises or fixes directed to ques-

²⁷ ‘Legislating for Economic Loss’ ch 13.

²⁸ ‘A Civil Law for the Age of Statutes’ ch 5.

tions of immediate political importance. This shapes not only how successfully legislation deals with the issues that it was created to address, but also the impact it has on future cases and on the shape of the law.

For example, the Crown Proceedings Act, the subject of TT Arvind's contribution,²⁹ sought, like the statutes discussed by Nolan and Bailey, to expand tort liability by removing a rule denying recovery to certain classes of claimants – in this case, those harmed by acts of government entities. Yet because the idea was so controversial – particularly within the government – and was driven by political considerations, the Act embodied a messy compromise which not only failed to resolve the underlying issues that made the statute necessary, but also raised questions of principle and policy which it neither addressed nor gave the courts tools to address. The result has been to leave these issues to judges to deal with under general rules of tort law, producing a haphazard and unsystematic extension of public authority liability that has left both this body of law and tort doctrine in an unsatisfactory state.

Similar results can be seen in relation to statutes that seek to *limit* tort liability, which are considered in the contribution of James Goudkamp.³⁰ Goudkamp deals with legislation introducing or extending defences in various branches of tort law, and demonstrates how the piecemeal nature of such defences – itself usually a result of the political context of the legislation – leaves a legacy of unresolved, and problematic, questions for the courts to deal with. He also points to the problems caused by the increasing complexity of defences and of the sources where they are found, which leads judges, jurists and even legislators to sometimes overlook their existence entirely. Bob Simpson describes the difficulties faced by the legislature in aligning the common law with legislative policy in the area of trade union liability.³¹ Not only were successive legislative attempts to withdraw trade union activity from the realm of tort law unsuccessful, but the failed attempts had a longer-term impact on the evolution of the economic torts, reaching beyond the immediate context of labour disputes.³² In this instance, as in several others, identifying the particular context from which legal principles emerged supplies important information in the process of understanding their nature and current reach.

Both the form and the use of these statutes reflected the political overtones of the process that led to their enactment. The response of the courts reflects the difficulty of translating political objects into the depoliticised language in which the common law is typically expressed. Not surprisingly, their effect is a far cry from the picture of legislative intervention cleanly and precisely altering selected aspects of the law in an almost surgical fashion, leaving the bulk of it untouched. Their impact invites comparison, rather, with a patch roughly sewn onto a tapestry, whose precise placement and impact on the overall pattern is left to the courts – a process that is then, in turn, influenced by the judges' own conceptions of the law. The end result has typically been far from happy, but much of modern tort law has nonetheless been shaped by such legislation and by the reaction of the courts to it. The period covered by the contributions discussed above – stretching, in each case, to the present – gives little reason to think that this is likely to change in the foreseeable future.

²⁹ ch 19.

³⁰ 'Statutes and Tort Defences' ch 3.

³¹ ch 6.

³² See also the discussion of L Hoffmann, 'The Rise and Fall of the Economic Torts' in Degeling, Edelman, and Goudkamp (n 3).

D. Type 4: Multiple Contexts and the Spread of Concepts

At the other extreme from the statutes discussed in the previous Section, legislation sometimes ends up being *too* successful, in that its impact upon tort law goes beyond the rule or rules it was intended to alter. This typically happens where legislation deals with a subject that can arise in a variety of contexts and where, in consequence, the persons charged with drafting the legislation have to deal with a wide range of types of conduct and interaction. Multiple contexts create conceptual and drafting complexities, as well as highlighting issues of policy, which, cumulatively, have important consequences for what the statute is capable of accomplishing.

The Animals Act 1971, discussed by Roderick Bagshaw,³³ is a good example. In contrast to the statutes referred to so far, this statute was specifically designed *not* to extend the scope of strict liability. Nevertheless, the drafting of section 2(2) of that Act, and the manner in which it defines when an animal is ‘dangerous’, had the effect of doing so, as demonstrated by the decision in *Mirvahedy v Henley*.³⁴ Bagshaw traces the drafting problems that produced this effect to a variety of reasons, including the difficulty of finding general language that defines ‘an arbitrary boundary between two competing liability schemes’³⁵ (in this case, fault-based liability and strict liability), and the difficulty of anticipating what a court will do when faced with a provision that – to the judges – is capable of being read in ways that cannot be anticipated. Problems of this type, Bagshaw suggests, are inevitable when the provision in question has to deal with subjects as varied as ‘escaped tigers, terrified horses, nomadic sheep, and nursing poodles.’³⁶

Yet the effect of having to deal with a complex range of factual contexts can go further, in some cases extending to influencing the content of principles and concepts that are generally taken to be fundamental to tort law. Jenny Steele’s discussion of contributory negligence provides a good example.³⁷ As she shows, the core question in this statute was one of principle, seen as being ‘lawyer’s law’. Yet, almost unavoidably, the range of contexts with which the measure had to grapple meant that – although, in principle, it ought to have been straightforward – it raised a range of complex issues including, amongst other things, political and policy questions in relation to the differential treatment of victims of road and industrial accidents, and the relationship of both with aspects of the emerging welfare state. Not only did these influence the final form that contributory negligence took, they also had a wider impact on the manner in which courts employed ideas of ‘cause’ and ‘responsibility’ in cases where both claimants and defendants were at fault. A clear implication of Steele’s chapter is that the *content* of these concepts came to be influenced in unexpected ways by the introduction of apportionment as a response to contributory negligence.

Other chapters point to equally significant influences in other areas of tort law, and to the *continuing* impact of statutory influences over extended periods of time. Simon Deakin’s findings in his contribution are of particular importance in this respect.³⁸ Deakin demonstrates that concepts which were at the core of the twentieth-century law of vicarious liability

³³ ch 10.

³⁴ *Mirvahedy v Henley* [2003] 2 AC 1.

³⁵ Bagshaw, ch 10.

³⁶ *ibid.*

³⁷ ch 8.

³⁸ ‘Tort Law and Workmen’s Compensation Legislation: Complementary or Competing Models?’ ch 12.

ity were not solely formed through the working out of principles immanent in the cases, but also by analogy with the way in which those concepts were used and developed in the statutory regime governing workmen's compensation. Statutory innovation, in other words, influences not only the specific area of law it sets out to change, but even areas of law to which, on first sight, it has a looser or 'contextual' connection.

These contributions highlight an important theme in the influence of the legislature upon the courts. The fact that a legislative rule has an important political dimension (as in the examples discussed in the previous Section), or has to be applied in relation to a wide variety of factual circumstances and areas of activity, creates conceptual challenges not only for its drafters, but also for the judges who will be called upon to interpret and apply its provision. The drafters will necessarily deploy legal concepts as the tools to achieve specific political or contextual ends. The complexities of drafting and the limitations of the legislative process, however, mean that any solution produced by the legislature is likely to require ongoing judicial development and contextualisation, so that the effect of legislation will not be to *resolve* the problem, but rather to make the development of the law of tort a joint work of the legislature and the judiciary. Legislation of this type works at its very best when it can become a source of concepts, ideas and notions for the development of case law, and a resource to be drawn upon to fill intellectual or conceptual gaps not just in that area of law, but also in other areas of the law in the common law process of analogical reasoning – in other words, when it is created in a way that lets it merge with case law into a single intellectual system.

The idea that statutes can and should be used in this way is most familiar from the mid-twentieth century US literature on the doctrine of 'the equity of the statute'.³⁹ In England, a similar stance was taken by Patrick Atiyah⁴⁰ and Jack Beatson.⁴¹ Whilst both believed that English courts generally did not engage with statutes analogically, Andrew Burrows has recently used a number of examples to show that English courts are indeed willing to 'reason by analogy' from statutes.⁴² A good example of this type of consistent development is provided in this volume by Steve Hedley's study of the historical development of personal injury law,⁴³ which shows how a combination of case law, statutes (substantive, procedural, and evidentiary) and private initiatives supported by the legislature and judiciary (such as the Ogdon tables) have contributed to the evolution and systematisation of personal injury law around identifiable trends, despite the diversity of sources involved. Paying attention to only one part of the picture would not allow this important lesson to emerge. To this example, the statutes and case law discussed by Goudkamp and Simpson form an unfortunate counterpoint. This suggests a lack of shared outlook in the time frames and contexts on which they focus.

³⁹ See, eg JM Landis, 'Statutes and the Sources of Law' [1934] *Harvard Legal Essays* 213, reprinted in (1965) 2 *Harvard Journal on Legislation* 7; William H Page's discussion of the early common law doctrine of 'the equity of the statute' in 'Statutes as Common Law Principles' [1944] *Wisconsin Law Review* 175; and Traynor (n 16).

⁴⁰ P Atiyah, 'Common Law and Statute Law' (1985) 48 *MLR* 1.

⁴¹ J Beatson, 'The Role of Statute in Common Law Doctrine' (2001) 117 *LQR* 247.

⁴² Burrows (n 2) 249–59. This stands in contrast to Dworkin's scepticism as to whether statutes can have what he calls 'gravitational pull'. R Dworkin, *Taking Rights Seriously* (Cambridge, Harvard University Press, 1977) 22–28.

⁴³ 'Tort and Personal Injuries, 1850 to the Present' ch 11.

E. Type 5: Procedure and Remedies

Wider effects of the sort just discussed come not only from statutes dealing with substance, but also from statutes dealing with procedures and remedies. Hedley's contribution highlights the role of procedural, evidentiary and remedial statutes in influencing the effectiveness of substantive law. Similarly, Robert Merkin and Sheila Dziobon focus on the sources of redress, rather than on abstract principles alone. They contrast compulsory insurance regimes in relation to road accidents and employers' liability to show that the nature of the latter has a discernable adverse effect on the extent to which employees can rely on the right supposedly granted by the statute.⁴⁴ Their analysis leads us to a broader point, about the centrality in practice of legal provisions which are generally treated as being at the margins.

To the extent claimants contemplating litigation will choose a forum and action whose procedure and remedies most favour them, statutes which create new procedures or remedies or alter existing ones can result in claimants attempting to 'stretch' more favourable areas of law. This process is familiar to legal historians, from the work of SFC Milsom who has shown how procedural issues led to fundamental shifts in private law in mediaeval England, including matters such as the rise of the action on the case in the King's Courts as a result of the more favourable (to claimants) processes made available.⁴⁵ Milsom also makes the point that procedural changes systematically alter the nature of the question a court considers. Thus he argues that principles of law, in the form we understand them today, could only develop because of procedural changes that permitted them to be raised – including both mediaeval changes and, more recently, the disappearance of the civil jury which in his account has vastly increased the complexity of the common law.⁴⁶

Elsewhere in private law, we have seen how differences in the interest awarded⁴⁷ and in insolvency rules have led to increased pressure upon the law of constructive and resulting trusts, and that differences in limitation periods have led to the rise of concurrent liability in tort and contract⁴⁸ and to important developments in the law of restitution.⁴⁹ The concern of the claimants in the litigation that led to these results was not with substantive principle – it was with procedural or remedial advantage. In the statutes covered in this collection, the failure to take equitable wrongs into account when framing procedural statutes, described by James Lee in his contribution, has arguably created very similar incentives, and has affected the direction in which the law develops. Similarly, as Steele points out, legislation in relation to contributory negligence – originally intended to empower judges to achieve just results – has as a result of procedural changes favouring out of court settlement had the very different result of empowering negotiators to reduce damages.⁵⁰

Equally, shifts in procedure and remedies can affect the type of cases that come before the courts and, hence, the types of circumstances and rules that come to be seen as the key features of the tort. Consider another example. *Sturges v Bridgman*⁵¹ is a leading case in the

⁴⁴ 'Tort Law and Compulsory Insurance' ch 15.

⁴⁵ SFC Milsom, *A Natural History of the Common Law* (New York, Columbia University Press, 2003) 76–84.

⁴⁶ SFC Milsom, 'Tenth Wilfred Fullager Memorial Lecture: The Past and the Future of Judge-Made Law' (1981) 8 *Monash University Law Review* 1.

⁴⁷ *Westdeutsche Landesbank v Islington LBC* [1996] AC 669.

⁴⁸ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

⁴⁹ *Deutsche Morgan Grenfell v Commissioners of Inland Revenue* [2006] UKHL 49, [2007] 1 AC 558.

⁵⁰ See, in this context, also H Genn, *Judging Civil Justice* (Cambridge, Cambridge University Press, 2009).

⁵¹ *Sturges v Bridgman* (1879) LR 11 Ch D 852.

tort of nuisance, and the nature of its principle – and the relevance of the case’s social context – has been the focus of an academic debate that goes to the root of the nature of nuisance.⁵² Yet if similar facts were to arise today, it is very unlikely that the tort of private nuisance would be implicated at all – they would (in England), be far more likely be resolved by recourse to the local authority’s statutory powers under part III of the Environmental Protection Act 1990, or through proceedings before a magistrate under section 82 of the Act, a remedy which is quicker, cheaper and far more advantageous to a claimant.⁵³

F. Type 6: The Influence of Regulation

Our focus thus far has been on statutes that have set out to amend the substance of tort law – whether by extending liability, or by limiting it, or by seeking to remake an area of law – or the procedure associated with tort actions. This does not, however, exhaust the ways in which statutes influence or illuminate tort law. Statutes which, on the face of it, have little to say about tort law can, nonetheless, exert a significant influence over tort cases. In the modern context, where many types of activities are regulated by legislation, courts increasingly take account of applicable legislation and regulations in determining questions as to liability. The use of the *Highway Code* in road traffic accidents is a case in point.⁵⁴ But so, too, is *Caparo Industries v Dickman*,⁵⁵ where the decision in the House of Lords on the duty question was quite significantly influenced by the fact that the auditor’s report was procured for reasons of compliance with a statutory requirement, and that the statutory requirement was clearly understood to exist for a specific purpose. More complex issues, however, arise where a court hearing a tort case comes face to face with legislation creating a regulatory scheme in an area that could potentially also be occupied by tort law, as was the case with the Water Industry Act 1991, the subject of *Marcic v Thames Water* and Maria Lee’s contribution to this volume.⁵⁶ As Lee points out, the Water Industry Act provided that it did not affect the common law. Nevertheless, the House of Lords ultimately ruled that granting a remedy in tort would be incompatible with the statutory regime.

The essential problem in such cases is that the alternate regime established by legislation must either supplement, exclude or compete with tort law, and it is not always clear which of these is most appropriate. Whereas the House of Lords in *Marcic* decided that the regulatory framework excluded tort law, Michael Lobban in his contribution on the Rivers Pollution Prevention Act 1876 shows how the courts took a very different approach to that statute, effectively using the common law to provide redress where the statutory framework failed to do so.⁵⁷ This may also manifest itself in the motives of the drafters of the statute in

⁵² AW Brian Simpson, ‘“Coase v Pigou” Re-examined’ (1996) 25 *Journal of Legal Studies* 53; R Coase, ‘Law and Economics and Brian Simpson’ (1996) 25 *Journal of Legal Studies* 103.

⁵³ This, of course, presents a very clear parallel with Milsom’s account of legal change in mediaeval England which, again, was often driven by claimants choosing the forum that gave them the best chance of getting the type of remedy they sought.

⁵⁴ *Goad v Butcher* [2011] EWCA Civ 158.

⁵⁵ *Caparo Industries v Dickman* [1990] 2 AC 605.

⁵⁶ *Marcic v Thames Water* [2003] UKHL 66, [2004] 2 AC 42; ‘Occupying the Field: Tort and the Pre-emptive Statute’ ch 18.

⁵⁷ ‘Tort Law, Regulation and River Pollution: the Rivers Pollution Prevention Act and its Implementation, 1876–1951’ ch 16.

question, a point made in this volume by Sarah Wilson, who demonstrates that late Victorian statutes on fraud were shaped by the same underlying intellectual and ideological forces as the common law of deceit, and represented a deliberate decision to bring criminal law into play as a tool against fraudsters.⁵⁸ Richard Clayton and Hugh Tomlinson discuss yet another type of outcome in their analysis of the Human Rights Act, whose impact on the law of tort has been more mixed.⁵⁹ On the one hand, some torts – notably, the new tort of privacy and defamation torts – have been significantly altered. At the same time, however, there has been very little impact on the liability of public authorities in tort generally, which remains more or less unaffected by the statute which is not infrequently seen as *excluding* a remedy in tort, in a manner that invites comparison with *Marcic*.

What we see from these examples, therefore, is a range of different ways in which legislation creating an alternate remedial framework affects the law of tort. Yet, whilst the fact of an effect is quite clear, why certain statutes affect the law in one way whilst others affect it in a different way remains unclear. In none of these cases was the effect of the statute on tort a foregone conclusion at the time of its enactment, and the judicial decisions that set the law on its path do not provide much insight into why that path was chosen. Nor, regrettably, does Commonwealth tort theory currently engage with the question of how the courts *should* engage with regulatory frameworks when the two occupy the same field. Lee's contribution marks a welcome beginning towards grappling with that issue, which is likely to play an increasingly important role in influencing the development of tort law.

The failure to consider the proper relationship between tort law and regulatory frameworks is not, however, confined to case law – it sometimes extends to the frameworks themselves. As Merkin and Dziobon demonstrate in their contribution, when one compares the degree of practical protection provided to employees by compulsory insurance regimes with that available to victims of motor accidents under the corresponding regime, there are fundamental inconsistencies which are difficult to account for in legal terms, but which may have a political explanation.⁶⁰ A similar situation is seen if we turn from regulatory schemes to the welfare state. Much like regulatory schemes, the welfare state too potentially occupies some of the same domain as tort law, and the argument that core aspects of tort should be replaced by the welfare state was an important theme in debate about tort from the 1940s to the 1980s.⁶¹ Whilst this debate has, on the face of things, grown less prominent since, Richard Lewis in his contribution demonstrates that legislation continues to engage the issue of the boundary between the tort system and the welfare state – specifically, in the form of legislation that seeks to claw back welfare benefits and certain types of NHS expenditure from the compensation recovered by a successful claimant.⁶² As he shows, in stark contrast to the position advanced by those who began the debate, the effect of this legislation is to roll back rather than extend the welfare state and to reinforce the tort system at its expense.

Each of these statutes reveals decisions as to the domain of tort law that are hard to account for in terms of legal principle, but somewhat easier to explain in terms of political

⁵⁸ 'Tort Law, Actors in the "Enterprise Economy", and Articulations of Nineteenth-Century Capitalism with Law: the Fraudulent Trustees Act 1857 in Context' ch 17.

⁵⁹ 'The Human Rights Act and its Impact on the Law of Tort' ch 20.

⁶⁰ ch 15.

⁶¹ Starting with Beveridge's *Report on Social Insurance and Allied Services* (Cmd 6404, 1942) (the *Beveridge Report*), and continuing through the work of Fleming, Ison, Atiyah, and the *Report of the Royal Commission on Civil Liability and Personal Injury* (Pearson Chair, Cmnd 7054, 1978). On the background to the *Beveridge Report* itself, see B Abel-Smith, 'The Beveridge Report: Its Origins and Outcomes' (1992) 45 *International Social Security Review* 5.

⁶² 'Recovery of State Benefits from Tort Damages: Legislating for or Against the Welfare State?' ch 14.

expediency and, perhaps, government or judicial policy. In either case, however, the decisions ought to have significant implications for our understanding of what tort law is 'about,' a point to which we return in the conclusion.

III. THE CENTRALITY OF STATUTE

Our aim in this introduction has been to illustrate the rich variety of ways in which tort and legislation interact. This interaction is more complex than conventional accounts would suggest. How, then, should we look at the position of statutes within the overall shape of tort law? Or, to speak in institutional terms, how should we view the role of the legislature – vis-à-vis the judiciary – in the creation of modern tort law, and in shaping the principles and doctrines on which it is based?

Given the wide range of ways in which statutes and cases interact and influence each other, we need not only to study the impact of statutes more closely, but also to cast the net wider and study a broader range of statutes than those we typically look at. We are accustomed to thinking in terms of statutes expanding tort liability, or limiting tort liability, or restating and remaking an area of tort law. Yet, as the discussion in this Section has shown, any typology of statutory influences on tort law will necessarily have to be more complex than this. In addition to the simple expansion, restriction or restatement of rules of tort liability, we also have statutes that have had significant influences – and, typically, unexpectedly so – upon concepts and principles in the law of tort, including in areas that the statutes were not drafted to target. Even more fundamentally, the influence on tort law of procedural statutes, of limitation periods, and of statutes creating regulatory structures has been significant. These statutes are not what conventionally come to mind when speaking of 'tort statutes,' but their influence on tort nevertheless flows intrinsically from the ends for which they were enacted, either because 'supplementing' or 'complementing' the tort system was very much on the minds of their drafters (as in the statutes discussed by Sarah Wilson and Michael Lobban), or because their nature makes it inevitable that courts will have to have regard to them in deciding tort cases (as in the case of the statutes discussed by Maria Lee, James Lee, and more generally in this introduction). The result is that, to borrow a metaphor from Ronald Dworkin, tort law is 'drenched' in statute, and to exclude statutes from accounts of tort is to present a grossly incomplete picture.⁶³

If we are to present a more accurate picture of who shapes tort law then, as we have argued thus far, the starting point must be to recognise that common law and statute law at times represent a single complex phenomenon shaped by the joint actions of courts and the legislature, where each influences the other on a continuing basis, and where the products of both reflect common influences and common limitations. It is therefore wrong to assign a subsidiary role to legislation as conventional accounts of tort implicitly do. As the contributions to this volume illustrate, understanding the law of tort requires us to look at it through a framework where legislation plays at least as much of a role as does case law. In the concluding chapter, we return to the question of what such a framework might look like, and what implications its adoption has for lawyers' understanding of legal development more generally.

⁶³ Dworkin's original use of the metaphor was to say that the law is 'drenched' in theory. See R Dworkin, 'In Praise of Theory' (1997) 29 *Arizona State Law Journal* 353, 360.