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Dietrich, Joachim

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Papers from the Tort Law Academic Workshop

Teaching torts in the age of statutes and globalisation

Joachim Dietrich[*]

Most spheres of life are now regulated by statute and, after the recent spate of tort law 'reform', many of the fundamental principles of negligence law are now either contained in statute, or at least have been modified by the 'Civil Liability Acts'. The focus of this article is on some of the challenges posed by statute for those of us who teach torts, in particular. One such challenge is that there are now significant jurisdictional differences that did not previously exist. How does one deal with such differences, as well as the complexities and sheer volume of legislation, especially when teaching students from many different jurisdictional backgrounds in an era of globalisation of legal education? This article considers the options in teaching torts in the statutory context; in particular, it suggests a balanced approach between the two extremes of either teaching too much detailed content, or else teaching only general common law principles and largely avoiding statute and questions of statutory interpretation.

Statute: what statute?

Many lawyers, it seems, do not like statutes. As Professor Beatson has said, many see 'statutes as evil devices marring the symmetry of the common law'.[1] Those who teach the law seem to have a particular aversion to statutes. Justice Finn has written extrajudicially:

> if there was much to be said about the relationship [between common law and statute], it did not seem worthy of significant consideration in legal scholarship nor in the curricula of law schools where, in the face of reality, the common law retained primacy of place.[2]

* Faculty of Law, Bond University. This is a modified version of a paper delivered to the Tort Law Academic Workshop, University of Sydney, 20 March 2009. My thanks go to Jim Davis, Harold Luntz and Barbara McDonald for helpful comments on an earlier draft.

1 J Beatson, 'Has the Common Law a Future?' (1997) 56 *CLJ* 291 at 299; the examples that he gives show that the affliction is, of course, not a recent phenomenon. See also R Pound, 'Common Law and Legislation' (1908) 21 *Harv L Rev* 383.

2 P Finn, 'Statutes and the Common Law: The Continuing Story' in S Corcoran and S Bottomley (Eds), *Interpreting Statutes*, Federation Press, Sydney, 2005, p 52. See also Lord Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2002) 25 *Syd L Rev* 5 at 5, cited in Finn, p 55: 'the academic profession and universities have not entirely caught up with the reality that statute law is the dominant source of law in our time.' In a broader context, I have criticised the utility of some of the academic writing on the taxonomy of the law of obligations because it ignores statute. See J Dietrich, 'What is "Lawyering"? The Challenge of Taxonomy' (2006) 65 *CLJ* 549. To continue to theorise

I would suggest that torts lawyers have displayed a similar bias against statute; indeed, teachers of torts (and contracts) have continued to assert until quite recently (and perhaps still assert), that they are concerned with common law, that is, case law-based, subjects.[3]

If such a position was ever sustainable, it is certainly no longer sustainable today, and not in the law of torts. Most spheres of life are now regulated by statute.[4] Even those bastions of the common law, contract and tort, have not been immune. The law of contract (broadly speaking) has been the subject of major statutory modifications and has seen the introduction of wide statutory remedial powers. Similarly, much of the conduct traditionally within the purview of equity is now the subject of statutory regulation and remedial powers (for example, 'unconscionable' conduct in its broadest sense); again, impacting upon contracts and well beyond. The same applies to torts: the economic torts, fraud, negligent misrepresentation, and passing off, are torts that may now be largely supplanted (in practice) by statutory remedies (for example, as a result of the statutory remedies available under the Trade Practices Act 1974 (Cth)). And I have not even mentioned the recent spate of tort law 'reform'.[5] Many of the fundamental principles of negligence law are now either contained in statute, or at least have been modified by the 'Civil Liability Acts'.[6] But even before these recent developments, and more broadly, statute law has not been given the emphasis or prominence it deserves as a source of tort law. Indeed, at times, law sourced in legislation is not even identified as such. As Professor Landis has pointed out, 'much of what is

about the structures and taxonomy of the common law as if statute simply did not exist is, in my view, adopting the words of Beatson, above n 1, at 313, 'like shining an ever brighter light on an ever shrinking object'.

3 Cf Hon Justice W M C Gummow, *Change and Continuity: Statute, Equity, and Federalism*, OUP, Oxford, 1999, p 2.

4 Cf, eg, K Mason, 'Fusion: Fallacy, Future or Finished?' in S Degeling and J Edelman (Eds), *Equity in Commercial Law*, Lawbook Co, Sydney, 2005, p 62; Hon Justice W M C Gummow, 'Statutes: The Sir Maurice Byers Annual Address' (2005) 26 *Aust Bar Rev* 1.

5 Much has already been written about the process and consequences of the tort law 'reform' debate at the start of the decade. See, eg, Hon Justice J J Spigelman, 'Negligence and insurance premiums: Recent changes in Australian law' (2003) 11 *TLJ* 291; Hon Justice P Underwood, 'Is Ms Donoghue's snail in mortal peril?' (2004) 12 *TLJ* 39; P Vines, 'Faith, Hope and Personal Injury: The Ipp Report and the Civil Liability Acts' (2004) 1(1) *Australian Civil Liability Newsletter*, LexisNexis Butterworths; J Dietrich, 'Duty of Care under the Civil Liability Acts' (2005) 13 *TLJ* 17; and, with a particular focus on New South Wales, B McDonald, 'Legislative Intervention in the Law of Negligence' (2005) 27 *Syd L Rev* 443; D Villa, *Annotated Civil Liability Act 2002 (NSW)*, Lawbook Co, Sydney, 2004, 'Introduction'. For the perspective of one of the members of the Ipp Committee and one of the politicians involved in the legislative process, respectively, see P Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 *MULR* 649 and R Debus, 'Tort Law Reform in New South Wales; State and Federal Interactions' (2002) 25 *UNSWLJ* 825.

6 Although I have used the shorthand reference 'Civil Liability Acts', the titles of the various Acts, like their content, are not uniform. The relevant Acts in each jurisdiction are as follows: Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 2002 (NSW); Personal Injuries (Liabilities and Damages) Act 2003 (NT); Civil Liability Act 2003 (Qld); Civil Liability Act 1936 (SA); Civil Liability Act 2002 (Tas); Wrongs Act 1958 (Vic); and Civil Liability Act 2002 (WA).

ordinarily regarded as "common law" finds its source in legislative enactment'.[7]

Hence, as the Hon Justice R S French (as he then was) has said:

> The law of torts comprises both the common law and statute. It is not informed by any unifying principle or single underlying policy. It is made more complex by indirect interaction between common law and statute, through the action for breach of statutory duty and the potential development of analogical use of statutes.[8]

The challenges posed by legislative and jurisdictional differences

The predominance of statute in our law[9] poses many challenges for those of us who are interested in teaching, researching, or learning the law, including as practitioners seeking to find the right solution to a particular problem. In part, as others have pointed out, this challenge arises from the complexity of the interaction between statute and common law. That is not the main focus of this article. Excellent articles by commentators such as Professors Beatson, Finn (and later as Justice Finn) and Corcoran, and Justices French and Gummow, have canvassed the complexities of the relationship between common law and statute. These articles demonstrate a renewed interest in the topic.[10] In the context of torts law, Professor Barbara McDonald has provided a detailed account of the Civil Liability Acts and their impact on the common law of torts.[11] She has also provided a historical overview of some of the statutory incursions upon torts law. I do not propose to go over the same ground as covered by these articles, though I will make some brief observations about the interaction between statute and common law below. For now, it is only necessary to note that despite the tendency in our jurisprudence to treat common law and statute as 'oil and water',[12] as Gleeson CJ observed in *Brodie v Singleton Shire Council*: 'Legislation and the

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7 See Gummow, above n 3, p 2, citing Professor J M Landis, 'Statutes and the Sources of Law' in R Pound (Ed), *Harvard Legal Essays*, Harvard University Press, Cambridge, Mass, 1934, p 213 at p 214. Gummow gives a number of examples, including the doctrine of part performance and developments in relation to limitation periods. In the context of torts, an example is provided by the contributory negligence defence. Although this defence originated at common law, its modern operation is the product of statute, a fact that is, at times, glossed over or forgotten, I would suggest. See also below n 47.

8 The Hon Justice R S French, 'Statutory Modelling of Torts' in N J Mullany (Ed), *Torts in the Nineties*, LBC Information Services, North Ryde, 1997, p 211.

9 This is so even if 'common law principle is the "default" rule in common law jurisdictions'. See J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *LQR* 247 at 247. As Beatson goes on to demonstrate, however, the view that statute law has no role 'in the development of the common law' and that there 'appears therefore to be a fundamental difference between the role of statutes and the role of codes' (in civil law systems) is overstated; the 'difference may not be as fundamental as it appears' (at 247).

10 See Beatson, above n 9; P Finn, 'Statutes and the Common Law' (1992) 22 *UWA L Rev* 7; Finn, above n 2; S Corcoran, 'The Architecture of Interpretation: Dynamic Practice and Constitutional Principles' in Corcoran and Bottomley, above n 2, p 31; French, above n 8, specifically addressing the relationship between torts law and statute; and Gummow, above n 3.

11 See McDonald, above n 5.

12 Beatson, above n 1.

common law are not separate and independent sources of law; one the concern of parliament, and the other the concern of courts. They exist in a symbiotic relationship.'[13]

The focus of this article is on some of the challenges posed by statute for those of us who teach and, in particular, teach torts. There are some obvious challenges. For example, the sheer volume of law being generated as a result of general principles, as well as more detailed rules, being expounded within both case law and legislative enactments, can seem overwhelming. How does one structure courses and teach them in a way that gives both an accurate picture of the law on the topics being considered, and ensuring that students have a grasp of the basic concepts and principles?[14] The difficulty is getting the right balance between giving students an accurate picture of the current law, without getting bogged down in too much detail, such that students may lose sight of the wood for the trees. The danger becomes that torts students do not even understand the most fundamental and important general concepts.

However, legislation poses an extra challenge in the new era of the globalisation of legal education. This is the challenge posed by jurisdictional differences. Putting the problem in its simplest terms, is there any point in teaching the details of, say, the NSW Motor Accident Compensation Act 1999, if more than half of the students come from interstate or from around the globe? And even local students may not intend to practise in the local jurisdiction. In torts law, this problem has become particularly acute only in the last few years. In part this is because the Civil Liability Act reforms have not been uniform, despite a plea from the authors of the *Final Report* of the Negligence Review Panel chaired by Justice Ipp[15] for such uniformity.[16] There are significant differences between the relevant Acts in each jurisdiction.[17] Even before these developments, however, torts law, like most other areas of law, has been the subject of piecemeal legislation aimed at solving particular perceived problems.

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13 (2001) 206 CLR 512; 180 ALR 145; 33 MVR 289; [2001] HCA 29; BC200102755 at [31].

14 This is so particularly in the modern educational environment, where foundational and introductory subjects such as torts are often taught in first year and often in only one semester. It may simply not be possible to explain to students all or most of the fundamental concepts of the law of torts, while also bombarding them with the details of applicable statutes. This will be discussed further below.

15 Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, Canberra, 2002 (Ipp Report) <http://tinyurl.com/28tf3zl> (accessed 22 April 2010).

16 Recommendation 1 of the Ipp Report was that its recommendations be incorporated 'in a single statute . . . to be enacted *in each* jurisdiction': ibid, p 1 (emphasis added). This recommendation was based on the Report's 'unqualified' support for the aspiration of developing a 'consistent national approach' 'to bring the law in all Australian jurisdictions as far as possible into conformity' (p 26). The enactment of the recommended provisions was aimed at achieving 'uniformity' and 'consistency' (p 35).

17 Some legislatures have gone further than the Ipp Report's recommendations; indeed, passing laws contrary to some of the recommendations. See, eg, Civil Liability Act 2002 (NSW) s 50 (contrast Ipp Report, above n 15, pp 125–6). Some legislative changes were introduced and passed even before the release of the initial report of the Ipp Committee on 2 September 2002 (eg, the Civil Liability Act 2002 (NSW) was assented to on 18 June 2002). Other jurisdictions were more restrained.

To give one example, in the important context of motor vehicle accidents,[18] a survey of the jurisdictions in Australia reveals no uniform policies, as reflected in the diverse legislative regimes in place. Three jurisdictions have adopted no-fault liability schemes for those injured as a result of a motor vehicle accident, although all the schemes are of different types and some preserve common law claims.[19] Four jurisdictions continue to provide compensation only on the basis of negligence, that is, fault-based liability. And most recently, New South Wales has adopted a partial no-fault regime — allowing for no fault compensation in many cases, but not to drivers of vehicles who have themselves caused an accident, unless they are 'catastrophically' injured.[20] Further, in those jurisdictions where fault-based liability exists (whether as a sole, or an alternative, source of liability), there is no uniformity as to whether or not motor vehicle accidents are dealt with under the general legislative scheme or under separate, specific legislation.[21]

The problem is compounded by the fact that even in a single jurisdiction, the interaction between various statutes, and their scope of operation, can be messy, to say the least. In a 2007 decision of the NSW Court of Appeal, Ipp JA commented that the interaction and operation of the various statutes dealing with civil liability has resulted in a complex, illogical 'hodge-podge', so that there is no discernible legislative purpose:

> There is no doubt that . . . the legislation that presently governs civil liability in this state [can produce anomalies]. For example, different persons injured in the same incident may be governed by one of three different statutory regimes, the Civil Liability Act, the Motor Accidents Compensation Act 1999 (NSW), and the Workers' Compensation Act. This may result in different legal consequences for each person. In *Landon v Ferguson* (with the concurrence of Hodgson and Santow JJA) I said:
>
> 'The statutes in this state relating to workers compensation and common law damages claims by workers against their employers and others can be described as a hodge-podge. No consistent thread of principle can be detected. For example, the caps on damages under the Workers' Compensation Act are lower than the caps under the Motor Accidents Compensation Act. Some workers' injuries occur in circumstances where the workers are required to bring their claims under the Workers' Compensation Act. In other circumstances workers are required to bring their claims for damages under the Motor Accidents Compensation Act. In yet other circumstances neither Act applies, but other legislation governs the claims. No detectable rational reason explains the difference in categories. In some cases it is difficult to discern under which particular statute the case falls, and difficult and sometimes illogical distinctions have to be drawn.'[22]

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18 It is the source of most large compensation awards in Australia: H Luntz et al, *Torts: Cases and Commentary*, 6th ed, LexisNexis Butterworths, Sydney, 2009, p 10.

19 See Luntz et al, ibid, p 53 for an overview of the schemes.

20 See Motor Vehicle Compensation Act 1999 (NSW) Pt 1.2 Divs 1 and 2; and the Motor Accidents (Lifetime Care and Support) Act 2006 (NSW).

21 See, eg, Civil Liability Act 2003 (Qld), which applies to motor vehicle accidents (see s 5 exclusions); and compare the Motor Vehicle Compensation Act 1999 (NSW).

22 (2005) 64 NSWLR 131 at 135; [2005] NSWCA 395; BC200510060.

> It is impossible, in my view, in this context, to arrive at a contextual purpose. The different legislative regimes that have application to civil liability, generally, render any legislative purpose . . . impossible to determine with any degree of reliability.[23]

Such complexity may be exacerbated where Federal legislation, state legislation and the common law, all potentially operate in the context of a particular fact scenario.[24] How, then, does one deal with these legislative complexities and jurisdictional divergences, especially when teaching students from many different jurisdictions? From a personal perspective, when I was teaching at the ANU, there was no clear policy in place, and no uniform approach between different courses and academics, as to whether we were to teach the law of New South Wales or the Australian Capital Territory.

One solution: teaching general principles

Perhaps there is not really a problem, or at least, the solution is readily at hand. For one could take the view that when teaching, the details of particular statutes (or for that matter, case law) in a specific jurisdiction are largely irrelevant. Instead, the focus must be on teaching students fundamental legal techniques: specifically, for example, (1) teaching skills such as reading cases, interpreting statutes, identifying legal issues in complex factual scenarios and applying the law to those problems; (2) focusing on giving the students an understanding of the key concepts and principles that recur throughout the 'common law' jurisdictions (in relation to negligence law, for example, reasonable care, 'but for' causation, *volenti*); and (3) teaching students about the varying interactions between statute and case law and giving them exposure to issues of statutory interpretation.

So, it may well be perfectly justifiable to teach students in the Australian Capital Territory, the law of New South Wales;[25] or to teach the English or (if there were such a thing) Australian law of torts, in a university in the United States;[26] or even to 'make up' law in order to teach a particular legal skill, as

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23 *New South Wales v Ball* (2007) 69 NSWLR 463; [2007] NSWCA 71; BC200702203 at [9]–[10] (McColl JA and Young CJ in Eq concurring).

24 See the discussion in relation to 'recreational services' in J Dietrich, 'Liability for personal injuries arising from recreational services: The interaction of contract, tort, State legislation and the Trade Practices Act and the resultant mess' (2003) 11 *TLJ* 244.

25 This was the view I adopted when teaching at the ANU. I took the view that there was no reason to teach the law of one of the smallest jurisdictions, particularly given that its laws were not necessarily in harmony with those of other jurisdictions, and particularly given that approximately half the students came from New South Wales or other states.

26 Professor Jane Stapleton made this point to me a number of years ago, when discussing the difficulties of teaching torts law in the United States given the 50 jurisdictions, each with its own common law and applicable legislation. See also McDonald, above n 5, at n 15. At least in Australia, we only have, at least in theory, one common law. I say 'in theory', because although the High Court has stated that Australia has but one common law (see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563; 145 ALR 96; [1997] HCA 25; BC9702860; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [86]), presumably, it is only in those areas of law where a High Court appeal has settled the correct law, where we will know precisely what that law is and can ignore any different approaches at the intermediate appellate level. However, state courts are obliged, since there is but one common law, not to depart from an interpretation of law made by intermediate appellate courts in other jurisdictions 'unless they are

is often done in teaching statutory interpretation.[27] Indeed, with globalisation driving the search for harmonised, internationally applicable legal principles, some of the general principles could be sourced from such developments.[28]

In theory, I have no particular problem with such solutions; indeed, I have often felt that many of my teaching colleagues (though not usually torts teachers) place an unnecessary emphasis on content, so that there is an overloading of detail, as a result of a perceived obligation to ensure that the students are given an accurate elucidation of the law of, say, Queensland, in relation to such and such a specific matter. This may often be motivated by concerns about the attitudes of accrediting professional bodies. But content-heavy courses come at a price, namely, that not enough emphasis is placed on ensuring that the students have understood the most basic principles, and how they work and apply.

However, the possible solution to the problem, of focusing largely on broad principles and thus not tying oneself to the more specific and detailed law of a particular jurisdiction, comes with a danger. The danger is that inadequate attention is paid to statute. I would suggest that this danger has, indeed, manifested itself, both generally and in torts. The problem becomes, not that students are unaware of the fact that the general principles that they have learnt have been the subject of minor modification as a result of, say, s 7(1)(c) of the No Great Consequence Act, but that students are almost oblivious to statute law altogether, let alone aware of its central importance and function. I would suggest tentatively, that there are two related reasons for this. First, few courses on torts, or indeed, even some of the textbooks, give a sufficient and representative treatment of statute law, and address adequately the importance of statutes as a source of relevant and operative law. There appears to be still a considerable bias against statute. Second, inadequate attention may be being given to the third of the three important tasks outlined above, namely, of teaching the interaction between common law and statute and statutory interpretation.

The neglect of statute

Such (perhaps controversial) conclusions need to be justified. Before giving examples, I must say that I hope the comments thus far, and those to follow, are not perceived as being presumptuous or as stating the obvious.

Let us start with some examples from the textbooks.[29] In the third edition

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convinced that the interpretation is plainly wrong': *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [135]. See also *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 260 ALR 606; [2009] HCA 47; BC200910034 at [48]–[51].

27 I am not sure why this should be so, however; it seems to me that there is so much legislation around that one could find any number of real examples to use both to teach and examine students on statutory interpretation.

28 See, eg, European Group on Tort Law, *The Principles of European Tort Law, Text and Commentary*, European Centre for Tort and Insurance Law, Vienna, 2005, online version at <http://tinyurl.com/24wwved> (accessed 22 April 2010).

29 McDonald, above n 5, observes that John Fleming's treatise on *The Law of Torts* did not add a table of statutes until its seventh edition.

of Balkin and Davis, *Law of Torts*,[30] the various Civil Liability Acts tend to be relegated largely to the footnotes. For example, the discussion of causation notes that there is now a 'statutory basis' for addressing causation questions, with the relevant legislation cited in a footnote to a brief paragraph, and adds the words: 'It is assumed that in interpreting these provisions the courts will look to the [needless to say, common law] general principles stated in this chapter.'[31] The discussion of breach of duty makes only a brief, footnote reference to the Civil Liability Acts and their enactment of the operative test for breach of duty.[32] Intoxication as a basis for contributory negligence is dealt with in six paragraphs. Only one half of these paragraphs, and one lengthier footnote, consider the special provisions in relation to intoxication enacted in three jurisdictions.[33] The recent fourth edition of the work has not changed its approach.[34] By way of contrast, other sections of the book demonstrate a much more integrated approach to statute, successfully merging discussion of general principles without sacrificing an accurate portrayal of statutory sources and developments.[35]

Even less attention is paid to statute in the fourth edition of Trindade, Cane and Lunney,[36] published well after the introduction of the various Civil Liability Acts. Some of the chapters make only sparse and passing reference to the Civil Liability Acts, even where such statutes have had a dramatic impact on the law. Indeed, at a number of points, Trindade, Cane and Lunney briefly summarise the effect of legislation in general terms without reference to the specific (and differently named) Acts, let alone specific sections. This is the approach in relation to the discussion of obvious and inherent risks,[37] 'nervous shock',[38] and liability in negligence of statutory authorities.[39] And further, the legislation is treated completely separately from the common law without any attempt to integrate the two. One is left with the impression that even where statute has displaced the common law, the latter still operates as the 'main game' and starting point for any discussion. Readers of these parts of the work could be excused for thinking that there exist competing approaches to torts law, and that the common law approach is more important and to be preferred.

This tendency not to give prominence to important statutory amendments is accentuated by the tendency to devote more extensive and detailed

30 R P Balkin and J L R Davis, *Law of Torts*, 3rd ed, LexisNexis Butterworths, Sydney, 2004.
31 Ibid, [9.1], p 317. This assumption may or may not be correct: see McDonald, above n 5, at 472–7.
32 Ibid, [8.4], p 274.
33 Ibid, [10.12], pp 362–3.
34 R P Balkin and J L R Davis, *Law of Torts*, 4th ed, LexisNexis Butterworths, Chatswood, NSW, 2009. See pp 301, 259 and 345–6 respectively.
35 See, eg, the discussion of pure mental harm, Balkin and Davis, 3rd ed, above n 30, pp 250–63.
36 F A Trindade, P Cane and M Lunney, *The Law of Torts in Australia*, 4th ed, Oxford University Press, South Melbourne, 2007.
37 Ibid, [8.3.5.2].
38 Ibid, [9.4.3].
39 Ibid, [10.4.4]. This is not the approach to statute in all sections of the book, however; eg, [14.2.4.2] is more specific in its treatment of statutory changes to the voluntary assumption of risk defence.

commentary to (admittedly) interesting and important cases concerning the common law, compared to that reserved for important cases on statute. Here, textbooks reflect (or dictate) what is probably classroom practice. Hence, Balkin and Davis discuss at length *Cattanach v Melchior*[40] (whether a negligent doctor should bear the economic losses incurred by parents as a result of negligent sterilisation procedures). The discussion places considerable emphasis on the case itself and only notes the fact that, in some jurisdictions, there have been legislative responses immediately following that decision. There is a danger that the discussion of the topic is overshadowed by the case law, and that the ultimate legal position, now encapsulated by statute in some jurisdictions, is given little attention. Admittedly, the lack of universality of such legislative response may be the reason for this.

These observations are not intended to be overly critical of the authors. It is not an easy task to encapsulate, accurately, the law in a multi-jurisdictional forum in a few brief sentences. It is all the more difficult when different statutes are at issue (a casebook can more easily avoid these difficulties simply by giving a sample provision from one jurisdiction and adding a 'compare others' footnote). In part, textbooks need to concentrate on the broader and more general principles that underlie the law of torts rather than to focus on the minutiae of legislation that applies in only some of the target jurisdictions. Obviously, it is for the practitioners practising in a particular jurisdiction to do their research and determine whether any specific provisions directly apply to the problem at hand. But the problem is that graduates who are educated in torts as if it were a 'common law' subject, may forget that statutes are even relevant to the law of torts; if they read the textbooks, and pay only scant attention to the footnotes, they may not even realise their error.[41] Of course, this is an exaggeration; or is it? Let us consider *Joslyn v Berryman*.[42]

Textbook authors' and university lecturers' bias against statutes appears to be shared by the profession; some practitioners and judges seem reluctant to delve into the quicksand of statute as well. Kirby J was moved to chastise lower courts for ignoring statute in *Joslyn v Berryman*, in which he said:

> In this case, the issue . . . was not therefore to be decided by reference to . . . common law, as modified by the apportionment statute. It was governed by 'enacted law'. The duty of the Court of Appeal was therefore to apply that enacted law. This is yet another instance in which applicable statute law has been overlooked in favour of judge-made law.[43]

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40 (2003) 215 CLR 1; 199 ALR 131; [2003] HCA 38; BC200303801; see Balkin and Davis, 3rd ed, above n 30, [7.57].

41 That is surely their just desserts for not reading the footnotes.

42 (2003) 214 CLR 552; 198 ALR 137; 38 MVR 41; [2003] HCA 34; BC200303073.

43 Ibid, at [137]. See also at [122]–[123] and [135]. Kirby J cited these examples in a footnote: *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72; 181 ALR 307; [2001] HCA 49; BC200104553 at [46]; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520; 182 ALR 321; [2001] HCA 53; BC200105442 at [63]; *Allan v Transurban City Link Ltd* (2001) 208 CLR 167; 183 ALR 380; [2001] HCA 58; BC200106149 at [54]; *Commonwealth v Yarmirr* (2001) 208 CLR 1; 184 ALR 113; [2001] HCA 56; BC200106150 at [249]; and *Conway v R* (2002) 209 CLR 203; 186 ALR 328; [2002] HCA 2; BC200200143 at [65]; cf K Hayne, 'Letting Justice be Done Without the Heavens Falling' (2001) 27 *Monash L Rev* 12 at 16. This may in part be

As Kirby J stated, it is not appropriate to resolve legal issues to which express statutory provisions apply, by reference to the common law. To do as the Court of Appeal had done was a grave legal error. Kirby J speculated that perhaps the Court of Appeal was simply not made aware of the applicable sections.[44] (It should be noted that the general principles that the Court of Appeal applied were themselves, strictly speaking, 'common law' principles as modified by the apportionment statute.[45] Hence, the competition here was not between common law and statute, but between general (legislative/case law) principles and specific legislative enactments; but the point being made holds nonetheless.) As the numerous other examples that Kirby J gave demonstrate, such omissions are not limited to torts. Perhaps it is only the conservative leanings of lawyers schooled in a legal education system that gives undue focus to 'common law' (and a taxonomy and structure dictated by the 'common law')[46] that gives rise to such oversights.

Alternative solutions

What solutions are there to the problem of giving adequate treatment to statute, especially given the limited time available to teach important subjects in modern law curricula? It is important that we do not largely ignore statutes, otherwise students may gain a false impression as to their importance as a source of law, and we may fail to explore the complex and myriad ways in which statute and common law rules interact, as well as issues of statutory interpretation. The approach of teaching torts law as if it consisted of a series of common law principles, with only passing references to some of the most important statutes that may modify some of those fundamental principles and their operation,[47] simply is not an option, in my view.

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because of a perception by some that statute law is less interesting and of lesser importance than case law: see generally, Gummow, above n 3, and Finn, above n 10.

44 (2003) 214 CLR 552; 198 ALR 137; [2003] HCA 34; BC200303073 at [123]. Ironically, Gummow, Callinan and Hayne JJ in *Joslyn v Berryman* overlooked a preliminary point of statutory interpretation, namely, whether the relevant statute, the Motor Accidents Compensation Act 1999 (NSW), applied to the second of the two defendants (a local council), seemingly assuming that it did. (Kirby J treated the two defendants differently.) Whether that statute does or does not apply to councils is still an open question: see *Road and Traffic Authority v Ryan* (2005) 62 NSWLR 609; 43 MVR 40; [2005] NSWCA 34; BC200501357 at [51]–[54].

45 See the Law Reform (Miscellaneous Provisions) Act 1965 (NSW).

46 See, however, contra, Professor P Birks, who in numerous works argued that more attention needs to be paid to a general taxonomy of the (common) law in our legal education. See, eg, 'Equity in the Modern World: An Exercise in Taxonomy' (1996) 26 *UWA L Rev* 1; 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 *MULR* 1.

47 Eg, the 'case law' on contributory negligence is itself an interpretation of the apportionment legislation that converts contributory negligence from a complete defence into a partial defence giving rise to the apportionment of damages. From my recollection as a student, the brief reference to the apportionment legislation quickly fades and one is left with the impression that the cases that one is learning are espousing common law principles. As *Astley v Austrust Ltd* (1999) 197 CLR 1; 161 ALR 155; [1999] HCA 6; BC9900546 demonstrates, we must constantly remind ourselves of the legislative roots of the defence and the consequent statutory interpretation questions that thus arise whenever new legal issues need to be resolved. See also McDonald, above n 5, at 449–50. This does not mean I agree with the decision in the case; like most commentators, I found the decision

The second approach is to give more than a passing reference to statute, so that the materials reflect at least those significant statutory provisions that encapsulate or modify important principles (eg, breach of duty), and also note legislation that operates in specific, factually important, spheres (eg, motor vehicle accidents). When identifying the elements of negligence law, for example, we need to consider placing sufficient emphasis on the relevant sources of those elements, including statutory sources. On this approach, one still concentrates on the law of negligence in its general operation, notes how statute modifies some of those principles and notes some of the key areas where those principles may no longer apply (eg, because a statutory scheme such as a no-fault motor vehicle liability scheme has displaced the common law in some factual contexts).

The third approach, one that I suspect is not adopted by too many torts teachers, at least, would be to attempt to give students a full overview of all the statutory schemes in place. On such an approach, one would still, of course, teach the general principles, as modified in all circumstances by statute, but one would also attempt at least to alert students to the many factual contexts in which statutes have a specific sphere of operation.

All three of these approaches have their own difficulties. I have identified the problem with the first approach already. The second approach suffers from the problem that it may be difficult to do justice to all the major areas and topics, as well as to all the general principles to which the students need to be introduced. Students may have an accurate picture of where the law of torts comes from, but may not have a sufficient or adequate understanding of some of its key principles. Further, students may become confused as to why they are studying particular topics, their relative importance, and how they inter-relate.

The third approach is probably the least desirable, because it may leave students bogged down in the messy details of numerous statutes, albeit ones that may all be relevant to the resolution of particular factual problems. Consequently, students may be left confused, so as not to have grasped the most basic concepts. As noted above, such approach may be motivated by a desire to ensure that all relevant law is thoroughly canvassed, so that graduates of that subject could go out into the workforce and solve a legal problem with the knowledge they have acquired. But this, of course, is an impossible task and also ultimately a fruitless one: for the details of the law will almost certainly subsequently change.

How to resolve these dilemmas? I guess, like most teachers, I have tended to just muddle along and hope that I achieve a happy balance somewhere between the first and third approaches. But if the second approach seeks to strike such a balance, it means that obviously, not all topics can thus be covered in equal depth. Some important topics must be largely ignored, sacrificed on the altar of time and pragmatism. Other topics must be dealt with on a fairly superficial basis. But at least some topics are covered in depth and the students are exposed to a detailed analysis of some relevant general

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unnecessary and its obvious lack of pragmatism in interpreting the relevant contributory negligence legislation was evidenced by the immediate legislative response overturning the decision.

principles, while also being made aware of the important ways in which statutes operate to modify, add to, or displace those principles.

One example suffices. When considering the defence of contributory negligence one could point out that in one recurring context in which the defence arises, namely, that of passengers entering a car with a drunk driver, there are now specific provisions in some jurisdictions that deal with that problem. Hence, *Joslyn v Berryman*. This may provide a departure point for considering the merits of the fact-specific legislative approach, compared to the more general approach dictated by the common law. And it may provide a departure point for a discussion of statutory interpretation. Which fact scenarios does the legislation cover; are the lines drawn logical; are they expressed with sufficient certainty, or are there doubts about what precisely is covered?

In part, what we choose to concentrate on may turn on fundamental issues as to how we conceive of the subject. Some scholars clearly perceive torts as a conceptual subject whose function is to teach students the law of civil wrongs; concerning, largely, fault-based liability having clear theoretical underpinnings. (The corrective justice view of torts is being advocated with renewed vigour, for example recently by Beever,[48] wrongly, in my view.)[49] On such a view, inconvenient details such as the new no-fault liability now included in the Motor Accidents Compensation Act 1999 (NSW) Pt 1.2, can be ignored.

For those of us who share the view of Professor Graycar that we should be teaching torts in a way that is reflective of, and relevant to, the real world,[50] however, and see torts in functional terms, different choices may be made. In particular, it may be desirable to highlight the role of negligence law as one of the significant sources of personal injuries compensation law. Hence, such a new source of no-fault compensation in the motor vehicle accidents context is important (in New South Wales) and worthy of consideration. We may wish to focus on the boundaries drawn by those recent amendments, issues of interpretation surrounding those amendments, and perhaps the arbitrariness of the boundaries that have been drawn. The choices as to what we teach may thus reflect fundamentally different views as to what we are trying to achieve and what we conceive the subject of torts to be about.

In other circumstances, choices as to which topics to focus on or give more detailed treatment, do not depend on such philosophical differences. I have stressed already that what is really important is to give students a sense of the various ways in which the common law and statute interact, as well as a basic understanding of statutory interpretation issues. Provided that our graduates also have adequate research skills to find the relevant law,[51] then we may well

48 See A Beever, *Rediscovering the Law of Negligence*, Oxford: Hart Publishing, 2007. See also R Stevens, *Torts and Rights*, Oxford, Oxford University Press, 2007.

49 See the critical review by C Witting, 'The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence' (2008) 71 *MLR* 621. Although I must confess that I have only briefly skimmed Beever's book, I share the bias of the reviewer. Cf also P Vines, 'Book Review: *Rediscovering the Law of Negligence* by Allan Beever' (2008) 16 *TLJ* 182.

50 See R Graycar, 'Teaching Torts as if the World Really Existed: Reflections on Harold Luntz's Contribution to Australian Law School Classrooms' (2003) 27 *MULR* 677.

51 About which one may have serious doubt. That comment is not a criticism of those who are

have done all that we are required to do. This does mean teaching a Canadian student, studying in New South Wales, some of the details of the Civil Liability Act 2002 (NSW), even where such details are not replicated in other jurisdictions. But the relevance of those details rests in their utility as a means of teaching the basic legal research, writing and analysis skills. As previously mentioned, in relation to statute, it is important, in my view, that students are familiarised with the various ways in which statutes interact with the common law and how statutory provisions are interpreted and read. It is appropriate to turn to this issue.

The interaction between statute and case law

The relationship between statutes and case law is complex. At one extreme, a statute may be a code and completely displace the common law. Codification, however, of an entire area of law 'is not an activity that is engaged in at all commonly in common law countries'.[52] However, 'codifying' part only of an area of law is an important legislative activity, for example, codifying a particular concept within a larger context, 'that is covering the field on a discrete subject or concept'.[53] Clearly, the Civil Liability Acts are, at most, only partial codifications. A major issue that therefore arises is the continuing relevance, if any, of common law case law.

More specifically, in the context of the Civil Liability Acts, McDonald has identified a range of 'pertinent' questions that arise as a result of the legislation. They are as follows:

> i Is the legislation a code or a supplement to the common law?
> ii Does the legislation 'cover the field', or only deal with some particular mischief, leaving the common law intact [presumably, outside that area of mischief]?
> iii What room is there for the common law to continue to apply or develop in the light of particular legislative provisions?
> iv To what extent may the development of the common law be affected *indirectly* by some broader influence of these legislative enactments?[54]

The first two of these questions are obviously related and turn on whether the legislation codifies some or all of the principles in some or all of their areas of operation.

Some parts of the Civil Liability Acts codify and change aspects of the common law of negligence. That is the case with the sections that state the general principles applicable to determining breach of duty (eg, Civil Liability

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charged with teaching legal research skills (which must surely be the responsibility of all throughout the students' law degree). I make that comment, because I myself feel inadequately armed by the research tools at our disposal, despite the fact, or perhaps because of that fact, that we have some of the most advanced technological tools available. I often have the sense that there is something hit and miss about many of the internet and database search engines.

52 See D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 6th ed, LexisNexis Butterworths, Chatswood, NSW, 2006, [8.7].

53 See M Gani, 'Codifying the Criminal Law: Issues of Interpretation' in Corcoran and Bottomley, above n 2, p 197 at p 206.

54 McDonald, above n 5, at 444 (emphasis in the original).

Act 2002 (NSW) s 5B).[55] In effect, these sections 'tinker'[56] with the common law test for breach of duty. They restate the threshold test of breach, as well as the calculus of negligence factors to be considered in determining whether, ultimately, there is a breach, in slightly different terms to those of the common law principle contained in *Wyong Shire Council v Shirt*.[57] Yet even after this change, probably few teachers teach breach of duty of care without detailed reference to *Wyong v Shirt*. Thus it becomes all the more important that we explain why it is that the case is still relevant, if at all. Is it being referred to as the relevant source of the law and applicable principle (which in this case would be misleading)? Is it relevant as an aid in interpreting an operative statutory test (if it is in essence the same test)? Is *Wyong v Shirt* being used to reason analogously when applying a different statutory test? Is it relevant as a useful factual example of the application of a different, but sufficiently similar, test? Or is the case relevant only as a historical prelude to the current law? Balkin and Davis suggest that 'when interpreting this legislation, the courts will be guided by the principles already developed by the common law over the previous century or more'.[58] But this assumption avoids the question of what form such guidance takes. More importantly, the assumption may obscure the correct approach that where there is governing statute, the starting basis for analysis must be the statute.[59]

Since the Civil Liability Acts displace the common law in some of its field of operation, but do not cover the field, one particular challenge may be to determine where precisely only the common law principles apply, where only the statutory provisions apply, and where both still potentially apply, as well as where other, specific legislation applies.

Some parts of the Civil Liability Acts may merely provide a gloss or modification of common law principles that have ongoing application and relevance. Hence, s 5G of the Civil Liability Act 2002 (NSW) makes it easier to establish one element of the defence of voluntary assumption of risk, which continues to operate as a common law-based defence.

Finally, it is arguable that parts of the Civil Liability Acts may be intended merely to provide a framework for, or guidance to, the courts as they continue to apply common law principles. That is one possible interpretation of the effect of the causation principles contained in the Civil Liability Acts, in the view of McDonald.[60] That is certainly the assumption on which Balkin and Davis proceed. Alternatively, however, these provisions may modify the common law causation principles, dictating an entirely new approach.[61] The

55 Equivalent provisions in other jurisdictions are: Civil Law (Wrongs) Act 2002 (ACT) s 43; Civil Liability Act 2003 (Qld) s 9; Civil Liability Act 1936 (SA) s 32; Civil Liability Act 2002 (Tas) s 11; Wrongs Act 1958 (Vic) s 48; and Civil Liability Act 2002 (WA) s 5B. The Northern Territory does not have equivalent provisions.

56 McDonald, above n 5, at 463.

57 (1980) 146 CLR 40; 29 ALR 217; [1980] HCA 12; BC8000072.

58 Balkin and Davis, 3rd ed, above n 30, p 274; 4th ed, above n 34, p 259.

59 This is made clear, for example, in *Neindorf v Junkovic* (2005) 222 ALR 631; [2005] HCA 75; [2006] Aust Torts Reports 81-820; BC200510492, dealing with occupiers' liability.

60 McDonald, above n 5, at 473–5.

61 For example, F McGlone and A Stickley, *Australian Torts Law*, 2nd ed, LexisNexis Butterworths, Chatswood, NSW, 2009, consider that there are significant differences between the common law and legislative tests for causation: see pp 271–3.

latter view seems more consistent with the clear signals from the High Court that where statutory provisions apply, they provide the starting point for analysis; indeed, references to the common law may simply not be relevant.[62]

Given that statute and common law can interact in many different ways, it may be useful to answer some preliminary questions in order to focus one's attention on how best to deal with statute in a particular factual context. These are merely some suggestions: (1) what is the source of applicable law? (2) What is the source of the applicable structure that needs to be adopted: eg, does a statutory scheme 'slot' into the common law structure, or does it mandate a different structure either at the macro level (such as the relevant approach to 'negligence', or 'breach of duty') or at the micro level (eg, when considering only one aspect of duty of care, such as for nervous shock)? (3) Since the first two questions obviously involve issues of statutory interpretation, how does one best address such statutory interpretation issues? (4) Is the terminology used in a statute specifically defined in the statute and, if so, how do these definitions differ from the accepted use of such concepts? (5) If a statute does not define, but draws on or assumes, the meanings of key concepts (found at common law), how much is it necessary to explain and refer to such common law concepts? Answering such questions will allow us to explore the particular interaction between the common law and statute at issue; obviously, statutory interpretation forms a prominent part of any such exercise.

Statutory interpretation

I turn briefly to the issue of statutory interpretation: obviously, torts law is not a forum for a fully-fledged course on the general principles and specific rules of statutory interpretation, given the constraints of time. However, it is arguable that it still important to give students as much exposure to statutory interpretation questions as possible. Thus it may be desirable to focus on some specific sections of legislation in order to provide students with the experience of reading, interpreting and thinking about statutes and their application to the solution of particular problems. For example, it might be worthwhile to consider the statutory threshold limits placed on damages for voluntary services, in order to show students the difficulties of interpretation that can be created by one little word such as 'or'.[63] It would, however, be a mistake to consider all the relevant statutory sections applicable to the assessment of damages, to take that particular example. That would be to burden the students with an unnecessary and overwhelming amount of material.

Obviously, however, in making a decision as to which statutory provisions to consider, it is necessary to make decisions about the relevant importance of particular sections and the educational benefits to be obtained from the consideration of those sections.

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62 See above n 59, and *Joslyn v Berryman* (2003) 214 CLR 552; 198 ALR 137; 38 MVR 41; [2003] HCA 34, also discussed above.

63 See, eg, the difficulties that the courts have had in interpreting that word as part of the threshold limits placed on damages for voluntary services in Civil Liability Act 2002 (NSW) s 15(3), leading to a turnaround in *Harrison v Melham* (2008) 72 NSWLR 380; (2008) Aust Torts Reports 81-951; [2008] NSWCA 67; BC200803962 and the subsequent reinstatement of the previous position in Civil Liability Legislation Amendment Act 2008 (NSW).

Conclusion

In summary, we cannot let ourselves be slaves to content. It is simply impossible to give an accurate picture of all the governing legislative and case law rules covering a particular topic or problem area. We must be selective in what we teach. But in making the selection we must resist the temptation to focus only on general principles, often found in or derived from common law, at the expense of statute. In selecting what content we teach, we should bear in mind that we give the students an accurate picture of the full range of the sources of our law, give students a sense of the many ways in which statute and the common law interact, while also giving students the opportunity to learn and apply skills of statutory interpretation. No matter how messy, inconvenient or objectionable we may find particular exercises of legislative power, it is our duty, as law teachers, to arm our students with a capacity to find and apply the law as it is, never forgetting of course, that we assess such law with a critical eye focused on the aim of achieving justice. And in some cases, statute can be an important mechanism in achieving such aim. We should heed the words of French J, immediately after the quotation at the start of this article: 'Statutory principles of liability promise coherency, order and democratic legitimacy in the development of the law without the need to codify the entire field.'[64] Unfortunately, as the disappointing Civil Liability Acts show, such promise has not yet been fulfilled.

64 French, above n 8, p 211.