

## ANALOGICAL REASONING BY REFERENCE TO STATUTE: WHAT IS THE JUDICIAL FUNCTION?

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*Analogy by reference to statute as a tool of legal analysis in the development of the common law is not prohibited. Recent cases confirm not only the existence of the tool but provide evidence of its use and application. However, to state that the judiciary on occasion develops the common law by analogy to statute – a concept that has been labelled the ‘doctrine of analogy’ – is simply to make a statement of conclusion. And that statement of conclusion invites several further questions. Is analogical reasoning by reference to statute qualitatively different from the usual type of analogical reasoning on which the common law depends? From what authority is this mode of reasoning derived? Put in different terms – what is the judicial function? This paper proposes that viewing the development of the common law through the lens of formal rules and substantive reasoning can assist in identifying the way the judiciary develops the common law by reference to statute, and the basis upon which the judiciary develops the common law by reference to statute.*

### I INTRODUCTION

Form and substance are not synonymous in the law<sup>1</sup> or in life.<sup>2</sup> A formal reason may be described as ‘a legally authoritative reason [or rule] on which judges and others are empowered or required to base a decision or action’.<sup>3</sup> Formal reasoning ‘usually excludes from consideration, overrides, or at least diminishes the weight of, any countervailing substantive reason arising at the point of decision or action’.<sup>4</sup> But substantive reasons – a ‘moral, economic, political, institutional, or other social consideration’<sup>5</sup> – often lie behind formal reasons.

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1 P S Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987) 1–2, 5–11.

2 Aristotle, *Physics* (R P Hardie and R K Gaye trans, University of Adelaide eBooks, 2015) bk III ch 1 [first published 350 BCE].

3 Atiyah and Summers, above n 1, 2.

4 Ibid.

5 Ibid 5.

Common law methodology relies on analogy and adaptation: ‘applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents’.<sup>6</sup> The idea of *analogising* indicates that, at some level, there must be a conscious and, presumably, reasoned choice to adapt a rule in a particular way. Absent a rule and substantive reasoning there can be no analogising.

Statutes have been described as *inherently formal* because they take precedence over other forms of law; they are formal in content, often not corresponding precisely to any underlying rationale; they exclude contrary substantive reasons; and they lend themselves to interpretive formality.<sup>7</sup> As one academic described them – statutes are ‘rooted in policy not principle’.<sup>8</sup>

Analogy by reference to statute as a tool of legal analysis in the development of the common law is not prohibited. Recent cases confirm not only the existence of the tool but provide evidence of its use and application. But given their overwhelming formal attributes, when are statutes relevant to common law reasoning? It is clear that statutes sometimes incorporate or reflect substantive reasoning.<sup>9</sup> Does this explain how statutes and the common law intersect? Does the distinction between formal rules and substantive reasoning assist in identifying how judges use statute to develop the common law?

In this article, I put forward two propositions.

*First*, that viewing the development of the common law through the lens of formal rules and substantive reasoning can assist in identifying the *way* the judiciary develops the common law by reference to statute.

*Second*, that using that lens also assists in understanding the *basis* upon which the judiciary develops the common law by reference to statute. What do I mean by basis? Under the Australian constitutional system, one view is that the Parliament makes the laws and judges merely apply them. In this vein, William Rehnquist, when Chief Justice of the United States, explained the role of a Judge in the United States as follows: ‘The Constitution has placed the judiciary in a position similar to that of a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home court crowd wants him to call it’.<sup>10</sup>

6 *Mirehouse v Rennell* (1833) 1 Cl & F 527, 546; 6 ER 1015, 1023 (Parke J), quoted in Sir Anthony Mason, ‘The Use and Abuse of Precedent’ (1988) 4 *Australian Bar Review* 93, 93.

7 Atiyah and Summers, above n 1, 96–8. Those four points cannot be left unqualified. For example, the emphasis on the ‘interpretive formality’ of statutes may well need to be qualified given modern approaches to statutory interpretation, where although the text of the statute is treated as primary, it is not viewed in a formalistic vacuum. Rather, context and purpose are considered at the first stage of construction: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

8 See J Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 *Law Quarterly Review* 247, 248.

9 Atiyah and Summers, above n 1, 112–14.

10 William H Rehnquist, ‘Dedicatory Address: Act Well Your Part: Therein All Honor Lies’ (1980) 7 *Pepperdine Law Review* 227, 229–30. See also Ruth Bader Ginsburg, ‘Remarks on Judicial Independence: The Situation of the US Federal Judiciary’ in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 57.

The accepted exception is the common law. Judges can develop the common law – but only logically and analogically from *existing legal principles*.<sup>11</sup>

However, to state that the judiciary on occasion develops the common law by analogy to statute – a concept that has been labelled the ‘doctrine of analogy’<sup>12</sup> – is simply to make a statement of conclusion. And that statement of conclusion invites several further questions. For example, is analogical reasoning by reference to statute qualitatively different from the usual type of analogical reasoning on which the common law depends? From what authority is this mode of reasoning derived? Put in different terms – what is the judicial function?

In order to investigate these questions, Part II of this article considers reasoning by analogy to statute as a judicial function; and whether substantive as distinct from formal aspects of statute can assist in explaining that judicial function. Part III of this article considers the implications of federalism for this mode of judicial reasoning, and the place of the principle of coherence.

## II REASONING BY REFERENCE TO STATUTE AND THE JUDICIAL FUNCTION

First, I want to consider the judicial function with respect to statute and the common law, as conventionally understood.

One view is that a judge’s function in relation to statute does not extend beyond interpretation.<sup>13</sup> Legislation is said to be the ‘more truly democratic form of law-making’ and reflect ‘the more direct and accurate expression of the general will’.<sup>14</sup> Altering or rewriting statute is ‘the function of the Parliament, not a Ch III court’.<sup>15</sup> Any encroachment into the legislative sphere by the judiciary is ‘constitutionally impermissible and democratically unpalatable’.<sup>16</sup>

Further, statutes and judge-made law are traditionally understood to be of different character. As Justice Leeming has noted, writing extra-judicially, statutes have a different source of authority, offer abstract solutions, and do not depend on the institution of a proceeding by litigants.<sup>17</sup> And it seems fair to suggest that statutes have a reputation problem. Statutes, in contrast to cases, are commonly perceived to ‘have no facts and lay down rules without any reasoning’; to be ‘dry

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11 *Breen v Williams* (1996) 186 CLR 71, 115 (Gummow J). See also *Momcilovic v The Queen* (2011) 245 CLR 1 155–6 [391]–[393] (Heydon J).

12 *Esso Australian Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 63 [28] (Gleeson CJ, Gaudron and Gummow JJ) (*‘Esso’*).

13 J F Burrows, ‘The Interrelation between Common Law and Statute’ (1976) 3 *Otago Law Review* 583, 586.

14 Roscoe Pound, ‘Common Law and Legislation’ (1908) 21 *Harvard Law Review* 383, 406, quoted in Chief Justice R S French, ‘The Common Law and the Protection of Human Rights’ (Speech delivered at the Anglo Australasian Lawyers Society, Sydney, 4 September 2009).

15 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

16 Justice M H McHugh, ‘The Judicial Method’ (1999) 73 *Australian Law Journal* 37, 43.

17 Justice Mark Leeming, ‘Equity, Ageless in the “Age of Statutes”’ (2015) 9 *Journal of Equity* 108, 115.

and difficult'.<sup>18</sup> and to be an 'unwelcome visitor' or 'alien intruder in the house of the common law'.<sup>19</sup> Justice Leeming suggests that statutes often comprise a 'series of definitions and commands, not necessarily in a sensible order, often reading as if drafted by a committee'.<sup>20</sup> Professor Calabresi has suggested that we are 'choking on statutes'.<sup>21</sup>

In stark contrast to this view of statute, the judicial function with respect to the common law, or at least part of it, is to *develop* common law.<sup>22</sup> Indeed, the common law *must* be developed in order to 'meet the demands which changing conceptions of justice and convenience make'.<sup>23</sup> This imperative is a source of confusion to civil lawyers. Civil lawyers point to the ambiguity that the rule of law requires rules to be 'known, clear, certain and *prospective*' and yet the common law is derived from judicial decisions which are *retrospective* in effect.<sup>24</sup>

However, to identify that there exists a judicial imperative to develop the common law is *not* to suggest that the judiciary can alter the common law at will. The common law judicial function has no operation except within the context of a legal dispute which has been initiated, and *only* within the constraints of the common law judicial method. In *Breen v Williams*, Gaudron and McHugh JJ described that method as follows:

Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles.<sup>25</sup>

Earlier, in *Dietrich v The Queen*, Brennan J had described the tension between the impetus of development of the common law and legal certainty as 'continuous' and stated that this tension 'has to be resolved from case to case by a prudence derived from experience and governed by judicial methods of reasoning'.<sup>26</sup>

The differences between the judicial function with respect to statute and the common law raise serious and interesting questions for the doctrine of analogy. Do the formal characteristics of statutes that I have mentioned mean that statutes cannot be a source of the development of the common law?<sup>27</sup> Does the judiciary

18 Andrew Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232, 232.

19 Ibid, quoting Justice Harlan F Stone, 'The Common Law in the United States' (1936) 50 *Harvard Law Review* 4, 15. See also Leeming, 'Equity, Ageless in the "Age of Statutes"', above n 17, 115.

20 Leeming, 'Equity, Ageless in the "Age of Statutes"', above n 17, 115, citing Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) 60.

21 Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) ch 1.

22 *Momcilovic v The Queen* (2011) 245 CLR 1, 156 [392] (Heydon J), quoting Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 475.

23 Dixon, 'Concerning Judicial Method', above n 22, 476. See also McHugh, above n 16, 38.

24 Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law', in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 1, 10 (emphasis added). See also Jack Beatson, 'Has the Common Law a Future?' (1997) 56 *Cambridge Law Journal* 291, 295; Beatson, 'The Role of Statute', above n 8, 264.

25 (1996) 186 CLR 71, 115.

26 (1992) 177 CLR 292, 320–1. See also McHugh, above n 16, 47.

27 See P S Atiyah, 'Common Law and Statute Law' (1985) 48 *Modern Law Review* 1, 1, cited in Chief Justice Robert French, 'Trusts and Statutes' (2015) 39 *Melbourne University Law Review* 629, 633.

need to widen the scope of what we look at when seeking to develop the common law? Where should the judiciary draw the line in seeking to identify whether there are statutes which may provide substantive reasons or a form of substantive analysis, which might assist in deciding whether to develop the common law? And how can the judiciary rationalise reasoning by reference to statute within the *necessarily constrained* common law judicial method that I have described? Finally, we know that statutes, in their terms, define their field of operation. So, is analogical reasoning by reference to statute an undemocratic extension of that field of operation?<sup>28</sup>

My thesis rests on the proposition that where statutes are confined to their *literal and formal terms*, judicial development of the common law by reference to statute does not occur. What do I mean by literal and formal terms? Atiyah and Summers give the example (derived from Hart)<sup>29</sup> of a formal rule where a statute prohibits the driving of vehicles in a park, and ‘John’ ‘drives through the park because he is taking a short cut in order to not be late for an important meeting’.<sup>30</sup> John thereby has a substantive reason for driving through the park. But the judge has no cause to take account of that substantive reason.<sup>31</sup> Nor does the formal aspect of the statute – the prohibition – offer any principle through which the common law might be developed. The prohibition could not be applied by the judge, for example, to new circumstances not envisaged in the statute. Why? Because the judicial function in relation to statute is limited in the way that I have described. Judges cannot rewrite legislation.

However, statutes differ in *form and complexity* – and many, if not most statutes, require more from the judiciary than the simple application of literal terms. My thesis is that whilst the *formal* aspects of statute cannot assist in the development of the common law, the *substantive* aspects of statute can, in some circumstances, provide principles through which the common law can be developed. The common law may develop by analogy with what legislatures have determined to be the appropriate balance between competing interests in a given field.<sup>32</sup> And my contention is that this process is necessarily separate from the judicial function of statutory construction,<sup>33</sup> and can be distinguished from the principle of coherence. Analogical reasoning by reference to statute can be viewed as one bridge (and there are others) between the separate but overlapping spheres of statute and the common law – and that is why it is so interesting.

But why, given the differences in judicial function with respect to statute and the common law, would the judiciary be willing to extract principles from the

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28 See generally Beatson, ‘Has the Common Law a Future?’, above n 24, 312.

29 See Hart, *The Concept of Law* (1994) 124–9. See also Justice Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room’ (2013) 36 *University of New South Wales Law Journal* 1002, 1015.

30 Atiyah and Summers, above n 1, 8.

31 *Ibid.*

32 *Tame v New South Wales* (2002) 211 CLR 317, 394 [224] (Gummow and Kirby JJ), citing *Esso Australian Resources v Commissioner of Taxation* (1999) 201 CLR 49, 60–3 [19]–[28] (Gleeson CJ, Gaudron and Gummow JJ), cf 86 [97] (Kirby J).

33 See Atiyah, above n 27, 6.

substantive aspects of statute? There are multiple answers to that question. One response is that in the ‘Age of Statutes’,<sup>34</sup> we cannot simply ignore them.<sup>35</sup>

A second, and perhaps more persuasive response, is that there is no reason why statutory manifestations of principle cannot be ‘part of the armoury of the common law judge in determining a hard case and seeking to determine what best fits the fundamental principles of the legal system’.<sup>36</sup> It cannot be said, in light of the High Court’s approach to statutory construction,<sup>37</sup> that all statutes are devoid of principle and are merely ‘enacted rules’.<sup>38</sup> Put in different terms, statutes may articulate legal principles, and these principles may reflect modern social and commercial legal values identified by the legislature.<sup>39</sup>

Third, it is clear that statutes deploy common law principles. For example, in 2001 in *Peters (WA) Ltd v Petersville* the plurality in the High Court noted that section 45 of the *Trade Practices Act 1974* (Cth) had originally used the expression ‘restraint of trade’ in a sense that incorporated the ‘changing standards of the common law’.<sup>40</sup> And there is no reason why there should be ‘one-way traffic’<sup>41</sup> – that *statutory principles* cannot, where appropriate, influence the development of the common law. As I will address, various cases deploying the ‘doctrine of analogy’ reflect that the traffic can and does go both ways.

However, Australian judges differ as to the extent to which statutes should be confined to their literal and formal terms, and differ in their willingness to identify and use principles in statutes to develop the common law. These judicial differences reflect diverse weighting of values such as certainty and flexibility, and development and stability. It follows that whilst the substantive aspects of statute can provide principles through which the common law can be developed, this development is contingent on *judicial willingness to consider* the substantive aspects of statute. Australia is not alone in these judicial differences. Within the American judiciary, Strauss has noted that there is a spectrum of willingness to reason by reference to statute, stating in relation to a series of cases that were decided in the early 1990s:

Justices Scalia, Kennedy, and Thomas most directly, and the Chief Justice and Justice O’Connor often, tended to treat statutes as the one-time pronouncements of an independent Congress – binding so far as they imposed a meaning, *but not*

34 See generally Calabresi, above n 21.

35 See Burrows, ‘The Relationship between Common Law and Statute’, above n 18, 249. See also Mark Leeming, ‘The Statutory Elephant in the Room’, above n 29, 1002–3.

36 Beatson, ‘The Role of Statute’, above n 8, 252.

37 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

38 Cf T R S Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Paperbacks, 1993) 79–84.

39 See *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 274 [296] (Allsop CJ).

40 (2001) 205 CLR 126, 140 [29]–[30] (Gleeson CJ, Gummow, Kirby and Hayne JJ), quoting *United States v Associated Press*, 52 F Supp 362, 370 (1943). For brief discussion of *Peters (WA) Ltd v Petersville*, see Sir Anthony Mason, ‘The Interaction of Statute Law and Common Law’ (2016) 90 *Australian Law Journal* 324, 335. See also Sir Anthony Mason ‘A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law’ in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergences and Unity* (2016) 119, 127.

41 See Beatson, ‘The Role of Statute’, above n 8, 248.

*instructive*, not illuminated either by their political history or by the course of their implementation, not an invitation to judicial partnership.<sup>42</sup>

I now turn to test my thesis that substantive aspects of statute can assist in the development of the common law by reference to a number of decided cases. After doing so, it will be necessary to address questions which remain. I should say at the outset that my review of the case law is not comprehensive – constraints of time and position prohibit it.

### A *PGA v The Queen*

The first decision that I want to consider, that of the High Court in *PGA v The Queen*,<sup>43</sup> is not the first in time but it is one of the most instructive.

In 2010, PGA was charged with a number of criminal offences including two counts of rape, in 1963, of his then wife.<sup>44</sup> In 1963, section 48 of the *Criminal Law Consolidation Act 1935* (SA) (‘the *CLC Act*’) criminalised rape but did not define the elements of rape; it left the elements of the offence to the common law.<sup>45</sup> A Judge of the District Court of South Australia temporarily stayed PGA’s trial and reserved for consideration by the Full Court of the Supreme Court of South Australia<sup>46</sup> the following question of law: ‘was the offence of rape by one lawful spouse of another ... an offence known to the law of South Australia as at 1963?’<sup>47</sup> A majority of the Full Court of the Supreme Court of South Australia answered that PGA could be guilty of rape of his wife in 1963.<sup>48</sup>

In the Full Court<sup>49</sup> and in the High Court,<sup>50</sup> PGA argued that until the High Court’s decision in *R v L<sup>51</sup>* in 1991, the common law with respect to rape in marriage was correctly stated by Sir Matthew Hale, in 1736, when he wrote that a husband could not be guilty of raping his wife because, by marriage, she gave her irrevocable consent to intercourse.<sup>52</sup>

In *PGA*, a majority of the High Court found that if the marital exemption to rape was part of the common law of Australia, it had ceased to be so at least by the time of the enactment of section 48 of the *CLC Act* in 1935.<sup>53</sup> So, in reaching that conclusion, how did the High Court go about formulating that principle or rule?

42 Peter L Strauss, ‘On Resegregating the Worlds of Statute and Common Law’ (1994) 9 *Supreme Court Review* 429, 527 (emphasis added).

43 (2012) 245 CLR 355 (‘*PGA*’).

44 *Ibid* 364 [2], 368 [14] (French CJ, Gummow, Hayne, Crennan and Kiefel J).

45 See *ibid* 366 [8]–[9] (French CJ, Gummow, Hayne, Crennan and Kiefel J).

46 *Ibid* 368 [14]–[15] (French CJ, Gummow, Hayne, Crennan and Kiefel J).

47 *Ibid* 369 [16] (French CJ, Gummow, Hayne, Crennan and Kiefel J).

48 *R v P, GA* (2010) 109 SASR 1.

49 *Ibid* 13–14 [66]–[67] (Doyle CJ).

50 *PGA* (2012) 245 CLR 355, 364–5 [3]–[4] (French CJ, Gummow, Hayne, Crennan and Kiefel J).

51 (1991) 174 CLR 379. In that case, the High Court held that, if it was ever a part of the common law of Australia that by marriage a wife gave irrevocable consent to sexual intercourse with her husband, it was no longer a part of the common law by 1991: at 390 (Mason CJ, Deane and Toohey JJ).

52 *PGA* (2012) 245 CLR 355, 365 [4], 375–6 [37]–[38] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) citing Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (E and R Nutt and R Gosling, 1736) vol 1, 629.

53 *PGA* (2012) 245 CLR 355, 369 [18] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

The answer is that it was formulated by reference to statute. As the majority put it, '[b]y the time of the enactment in 1935 of the *CLC Act*, if not earlier, ... in Australia *local statute law* had removed any basis for continued acceptance of Hale's proposition as part of the English common law received in the Australian colonies'.<sup>54</sup>

The question of whether the foundation or reason for the marital rape exception still existed in 1963 depended on the answer to two questions: first, what *was* the foundation or reason for that exception; and, second, did that foundation or reason still exist at the relevant time?

The Court was unanimous in its answer to the first question.<sup>55</sup> The foundation or reason for the marital rape exception was the concept of irrevocable consent to intercourse by a wife on marriage. This proposition of law had its source, or at least found early expression, in the statement of Sir Matthew Hale, referred to earlier.

If that was the foundation or reason, the next question was whether that foundation or reason still existed in Australia in 1963. The majority said no, the foundation did not still exist.<sup>56</sup> Heydon J<sup>57</sup> and Bell J<sup>58</sup> disagreed. The majority, as well as Heydon and Bell JJ considered specific *local statutes*. However, what the judges did with those local statutes was quite different. The differences are significant for the purposes of my thesis.

It is first necessary to identify the relevant local statutes: divorce legislation;<sup>59</sup> married women's property legislation;<sup>60</sup> and legislation conferring suffrage on women.<sup>61</sup> The statutes were not limited by subject matter, state, or period. The divorce legislation cited by the majority included statutes which conferred jurisdiction in matrimonial causes on the Supreme Courts (of the then colonies) to grant decrees dissolving marriage in certain circumstances and, significantly, extended the grounds on which such decrees could be obtained, thereby giving colonial women greater access to divorce than their contemporaries in the United Kingdom.<sup>62</sup>

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54 Ibid 384 [64] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (emphasis added).

55 Ibid 365 [4], 375 [37]–[38] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), 425 [196]–[197], 441 [236] (Bell J), 384–5 [67] (Heydon J).

56 Ibid 384 [64] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

57 Ibid 394 [103].

58 Ibid 445 [247].

59 Ibid 380–1 [53]–[56] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

60 Ibid 378 [46] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

61 Ibid 384 [62] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

62 Ibid 380–2 [53]–[57] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), citing *Matrimonial Causes Act 1873* (NSW), *Matrimonial Causes Act 1865* (Qld), *Matrimonial Causes Act 1858* (SA), *Matrimonial Causes Act 1860* (Tas), *Matrimonial Causes Act 1861* (Vic), and *Matrimonial Causes Act 1863* (WA).

The legislation enacted the provisions of the *Matrimonial Causes Act 1857*, 21 & 21 Vict, c 85 which:

terminated the jurisdiction of the ecclesiastical courts in matrimonial matters (s 2) and vested that jurisdiction in the new Court for Divorce and Matrimonial Causes (s 6), but the Court was to act on the principles and rules which had been applied by the ecclesiastical courts (s 22). A decree dissolving marriage might be pronounced on a petition by the husband alleging adultery by the wife, and on a wife's petition, alleging adultery coupled with desertion for at least two years and without reasonable excuse, or alleging adultery with aggravated circumstances ... (ss 27 and 31).



To these statutes, the majority added various Acts which removed a procedural disability imposed by the common law:<sup>63</sup> namely that although a wife was liable for her own torts, there was no way in which that liability could be enforced save by an action against the wife in which her spouse was joined as a party. Now a wife was not only liable for her own torts but stood answerable in her own right. Finally, the majority referred to the significance of the conferral by the *Commonwealth Franchise Act 1902* (Cth) of universal adult suffrage.<sup>64</sup>

As I said, what the judges did with those statutes was different.

It is useful to begin with the dissent of Heydon J. His Honour noted that ‘the reasons underlying the legislation which ... altered the status of wives over the last 150 years [were] not necessarily inconsistent with the immunity’.<sup>65</sup> Heydon J looked at the statutes but confined his view and the operation of the statutes to their literal and formal terms. His Honour did not consider the substantive aspects of the statutes, individually or collectively, and did not ask whether the foundation or reason for the marital rape exception still existed in Australia in 1963, or whether it might have been altered by reference to those substantive aspects. For Heydon J, there was no room for that kind of deductive reasoning in ascertaining the common law in 1963. As his Honour put it:

an established rule does not become questionable merely because a justification which appealed to the minds of lawyers more than 300 years ago has ceased to have appeal now. In Australia, the controversy has been resolved. The resolution lies in abolition of the immunity. Abolition came by degrees. It also came from legislatures.<sup>66</sup>

The majority’s approach was different. Those members of the Court extended the inductive and deductive element in judicial reasoning to include a step in addition to those steps that had been formulated by Sir Owen Dixon in the 1950s.<sup>67</sup> The additional step was that ‘where the reason or “foundation” of a rule of the common law depends upon another rule which, by reason of statutory intervention or a shift in the case law, is no longer maintained, the first rule has become no more than a legal fiction and is not to be maintained’.<sup>68</sup>

The majority’s ‘inductive and deductive’<sup>69</sup> reasoning considered the substantive aspects of the statutes both individually and collectively. It recognised

Ibid 381 [54] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). The scope of the grounds for divorce was subsequently extended in some states: see, eg, *The Divorce Act 1889* (Vic), which provided extended grounds such as adultery, habitual drunkenness or habitual cruelty, discussed at *PGA* (2012) 245 CLR 355, 381 [57] n 144.

63 *PGA* (2012) 245 CLR 355, 378 [46] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); see also at 373 [31] n 99, citing *Married Women’s Property Act 1893* (NSW), *Married Women’s Property Act 1890* (Qld), *Married Women’s Property Act 1883* (SA), *Married Women’s Property Act 1883* (Tas), *Married Women’s Property Act 1884* (Vic), and *Married Women’s Property Act 1892* (WA).

64 *PGA* (2012) 245 CLR 355, 384 [62] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

65 Ibid 399 [122].

66 Ibid, citing *Admiralty Commissioners v SS Amerika* [1917] AC 38, 56.

67 Dixon, ‘Concerning Judicial Method’, above n 22, 471–2. See also Mason J in *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 633.

68 *PGA* (2012) 245 CLR 355, 373 [30] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (citations omitted).

69 Ibid 372 [29] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

that each statute fundamentally altered the rights and obligations of women – their right to seek divorce, their legal liability for their own torts and their right to participate in the election of representative government for which the Constitution provides.

The majority's process of reasoning perhaps can be best understood by two passages in their Honours' reasons. First, their Honours quoted from an American case, *State v Smith* that '[i]f a wife can exercise a legal right to separate from her husband and eventually terminate the marriage "contract", may she not also revoke a "term" of that contract, namely, consent to intercourse?'.<sup>70</sup> Second, their reference to Isaacs J in 1930, when his Honour 'was able to say that': 'women are admitted to the capacity of commercial and professional life in most of its branches, that they are received on equal terms with men as voters and legislators, that they act judicially, can hold property, may sue and be sued alone'.<sup>71</sup>

Aspects of the legislation referred to by the majority could be viewed as formal – for example, the conferral of the franchise or ability of a wife to be held liable for her own torts. These rights would not appear to lend themselves to substantive reasoning. Despite their largely formal nature, the statutes removed any basis for the continuing acceptance of Hale's proposition. That is, the rights collectively conferred by the relevant statutes, although largely formal in nature, were *incompatible with* Hale's proposition.

Was this a case about *developing* the common law by analogy to statute, or about looking to statute to determine the *historic state* of the common law at a specific point in time? In the end, the answer does not matter. To ascertain the status of the common law at the relevant time, it was necessary to ascertain if the foundation or reason for a particular rule still existed in Australia at that time. And statutes were important in coming to a conclusion about that question.

So, what was the judicial function? The majority was willing to look at the relevant statutes *together* – whilst each in their terms somewhat limited, prescriptive and confined – to understand the legal status of a married woman at the relevant time, as a *composite* of the formal rights conferred by each of the relevant statutes. Having undertaken that analysis, they identified a *principle* underpinning this composite of formal rights afforded to married women – that women were equal at law to men, or at least becoming so. It was that principle, reflected in those statutes, that the majority found would have been reflected in the common law *as well as in the statutes* at the relevant time. By reference to the *substantive* aspects of various statutes, the majority reasoned that the common law had developed. The result from adopting an alternative approach to that reasoning is self-evident – a formal focus; a very different, and arguably narrower result.

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70 426 A 2d 38 (1981), 44 [6], quoted in *PGA* (2012) 245 CLR 355, 382 [59] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

71 *PGA* (2012) 245 CLR 355, 384 [63] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), quoting *Wright v Cedzich* (1930) 43 CLR 493, 505.

### B *R v Swaffield*

We see a similar process of reasoning in a second example from the High Court, some years earlier, *R v Swaffield*.<sup>72</sup> The appeal concerned the operation, purpose and scope of the discretion at common law to exclude evidence for unfairness.<sup>73</sup> Toohey, Gaudron and Gummow JJ noted that fairness was a vague concept and that the application of the unfairness discretion was uncertain because courts had failed to define the policy behind the discretion or considerations relevant to it.<sup>74</sup> As their Honours explained:

An approach to unfairness which focuses on whether reception of the evidence in question may have jeopardised the accused's right to a fair trial because the statement was obtained in circumstances affecting its reliability does admit of application by a trial judge and review on appeal. However, the unfairness discretion would achieve nothing beyond what is *already required by the general law if it were concerned solely to ensure a fair trial*.<sup>75</sup>

The issue for the Court was, again, twofold: first, was there a substantive principle or reason for the discretion at common law to exclude evidence for unfairness (beyond that already required by the general law to ensure a fair trial); and, second, if there was, how was the discretion to be developed?

The Court's approach to both of these questions was first to ascertain how the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) had sought to address the issue.<sup>76</sup> This is notwithstanding that the appeals were not concerned with the Commonwealth or New South Wales, but with Queensland and Victoria<sup>77</sup> – neither of which then had adopted the uniform evidence legislation.<sup>78</sup>

Having considered the approach adopted by the Commonwealth and New South Wales Acts, the Court invited counsel to consider a staged approach in relation to the admissibility of confessions, which reflected the approach in those Acts<sup>79</sup> – first, the question of voluntariness; next, exclusion based on considerations of reliability; and, finally, an overall discretion which might take into account all of the circumstances of the case to determine whether the admission of the evidence or the obtaining of the conviction on the basis of the evidence was bought at a price which was unacceptable, having regard to *contemporary community standards*.<sup>80</sup>

The question which then arose for the majority was whether the adoption of that broad principle was an appropriate evolution of the common law, or whether its adoption was a matter for the legislature.<sup>81</sup> Their Honours continued:

72 (1998) 192 CLR 159 ('*Swaffield*').

73 Ibid 167 [8]–[9] (Brennan CJ), 189–90 [51]–[56], 193–8 [66]–[79] (Toohey, Gaudron and Gummow JJ).

74 Ibid 193 [66].

75 Ibid (emphasis added).

76 Ibid 193–4 [67]–[68] (Toohey, Gaudron and Gummow JJ).

77 Ibid 202 [92] (Toohey, Gaudron and Gummow JJ).

78 Victoria adopted the provisions of the Uniform Evidence Acts with the passage of the *Evidence Act 2008* (Vic).

79 *Swaffield* (1998) 192 CLR 159, 194–5 [69]–[70] (Toohey, Gaudron and Gummow JJ).

80 Ibid 194 [69] (Toohey, Gaudron and Gummow JJ).

81 Ibid 194–5 [70] (Toohey, Gaudron and Gummow JJ).

Subject to one matter, an analysis of recent cases, together with an understanding of the purposes served by the fairness and policy discretions and the rationale for the inadmissibility of non-voluntary confessions, support the view that the approach ... already inheres in the common law and should now be recognised as the approach to be adopted when questions arise as to the admission or rejection of confessional material.<sup>82</sup>

Their Honours identified, after analysing the applicable case law, that the rationale for the inadmissibility of non-voluntary confessions was the right to choose whether or not to speak. Their Honours' consideration of the issue concluded with the statement:

It is relevant to bear in mind the provisions of the *Evidence Acts*. Although, in general, the Commonwealth Act applies only in the external Territories and in proceedings in federal courts and courts of the Australian Capital Territory (ss 4, 5, 6), it has been substantially re-enacted in New South Wales. It may well be re-enacted in other States. It may be thought undesirable to have two streams, as it were, one legislative and the other judicial, the latter simply echoing the former or perhaps deviating from it. On the other hand there is no comparable legislative provision in Queensland and Victoria, the two States with which the Court is presently concerned. It is therefore appropriate to develop the common law in Australia in terms of a broad principle based on the right to choose whether or not to speak.<sup>83</sup>

So, what was the judicial function? Two matters were identified from the substantive aspects of the relevant statutes – the broad principle which underpinned the discretion of exclusion and, then, the structured approach to determining the admissibility or exclusion of that evidence. This was not simply a question of coherence, a topic to which I will return later.

I do not suggest based on the limited analysis of these cases that the substantive aspects of statute *always* provide principles through which the common law can be developed. They clearly do not. First, there must be a discernible principle. For example, in *R v Young* a question arose as to whether communications with counsellors concerning sexual assault should be subject to a new category of privilege.<sup>84</sup> Spigelman CJ noted that recognising a new category of privilege requires the formulation of public policy by the courts, and could only occur where the public policy was capable of precise statement reflecting so widely held an opinion that the Court's reasoning could be described in terms of 'recognition' rather than 'creation';<sup>85</sup> and that the Court cannot initiate a new principle, rather 'only state or formulate it if it already exists'.<sup>86</sup>

Second, where legislation is subject to frequent revision, it may not be possible to identify a principle capable of developing the common law. As was acknowledged by the Victorian Court of Appeal in *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd*,<sup>87</sup> the common law cannot wax or wane according to the state of the legislation.

82 Ibid 195 [70] (Toohey, Gaudron and Gummow JJ) (emphasis added).

83 Ibid 202 [92] (Toohey, Gaudron and Gummow JJ).

84 (1999) 46 NSWLR 681.

85 Ibid 700 [93].

86 Ibid 700 [94], quoting *Wilkinson v Osborne* (1915) 21 CLR 89, 97 (Isaacs J).

87 (2014) 45 VR 571, 583 [57] (The Court).

Third, in Australia, federal considerations impose a systemic constraint on the extent to which statute may influence the development of the common law.<sup>88</sup> I want to consider this third issue in a little more detail by reference to the decision in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*.<sup>89</sup>

### III FEDERALISM AND COHERENCE

#### A Federalism

The central issue in *Esso* was the applicable test for determining legal professional privilege. The test in the *Evidence Act 1995* (Cth) was, and remains, whether the communication was made, or the document prepared, for the *dominant purpose* of the lawyer providing legal advice or legal services.<sup>90</sup> The dominant purpose test accorded with the common law test which had been adopted at the time in England, New Zealand, Ireland, and most Canadian Provinces.<sup>91</sup> The test had also been favoured by Barwick CJ in the previous leading High Court case on the subject, *Grant v Downs*.<sup>92</sup> However, the majority in *Grant v Downs* (Stephen, Mason and Murphy JJ) preferred a *sole purpose test*,<sup>93</sup> and this was the accepted common law test in Australia at the time that *Esso* came before the High Court.<sup>94</sup>

*Esso* had contended in the Full Court of the Federal Court that, by ‘analogy or derivation’, the common law should be treated as modified to accord with the statutory test, ‘at least in the jurisdictions where the [*Evidence*] Act applies’.<sup>95</sup> In other words, the ‘sole purpose’ test should be jettisoned in favour of the ‘dominant purpose’ test that was in place in the *Evidence Act*: the common law ought to be developed by analogical use of the *Evidence Act* to displace the decision in *Grant v Downs*. That argument had been rejected by the majority in the Full Court of the Federal Court<sup>96</sup> and was advanced by *Esso* again in the High Court.<sup>97</sup>

This argument had previously found favour in various lower court decisions,<sup>98</sup> including one decision, *Adelaide Steamship Co Ltd v Spalvins*, in which the Full Court of the Federal Court (Olney, Kiefel and Finn JJ) stated that ‘such is the significance of the [*Evidence*] Act’s provisions in this that their advent has created

88 See Mason, ‘A Judicial Perspective on the Development of Common Law Doctrine’, above n 40, 129–30.  
89 (1999) 201 CLR 49 (*Esso*).

90 *Evidence Act 1995* (Cth) ss 118–19.

91 *Esso* (1999) 201 CLR 49, 54 [2] (Gleeson CJ, Gaudron and Gummow JJ), citing *Waugh v British Railways Board* [1980] AC 521; *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596; *Levin v Boyce* (1985) 19 DLR (4th) 128; *Milton Farms Ltd v Dow Chemical Canada Inc* (1986) 13 CPC (2d) 174; *Doiron v Embree* (1987) 16 CPC (2d) 70; *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co [No 1]* (1988) 22 CPR (3d) 290.

92 (1976) 135 CLR 674, 677.

93 *Ibid* 688.

94 See *Esso* (1999) 201 CLR 49, 54 [2] (Gleeson CJ, Gaudron and Gummow JJ).

95 *Ibid* 58 [13] (Gleeson CJ, Gaudron and Gummow JJ).

96 *Ibid* 58 [14] (Gleeson CJ, Gaudron and Gummow JJ).

97 See *Ibid* 59–60 [18] (Gleeson CJ, Gaudron and Gummow JJ)..

98 *Telstra Corporation v Australis Media Holdings [No 1]* (1997) 41 NSWLR 277, 279–80 (McLelland CJ in Eq); *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360; *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, 546 (Mason P).

an entirely new setting to which the common law must now adapt itself, and adapt itself in such a way as to “include [the *Act*] as a fundamental part of its fabric”.<sup>99</sup>

Importantly, the plurality in *Esso* did not reject the idea that the Courts could reason by analogy to or derivation from statute in developing the common law. Indeed, the plurality noted that significant elements of the common law had their origin in statute or as responses to statute, citing the derivation of the criminal law of conspiracy from statutes enacted in the 13<sup>th</sup> century;<sup>100</sup> the analogical application of the Statute of Limitations in equity;<sup>101</sup> the decision in *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* where Deane J reasoned by analogy to statute when rejecting the existence of a common law action for unfair competition or unfair trading;<sup>102</sup> and the decision in *R v L*,<sup>103</sup> already mentioned, where the High Court rejected the proposition that it was part of the common law of Australia that, by marriage, a wife gave irrevocable consent to sexual intercourse with her husband.<sup>104</sup>

The High Court also considered decisions in the United States,<sup>105</sup> New Zealand,<sup>106</sup> and the United Kingdom,<sup>107</sup> where courts had also reasoned by analogy to statute. The plurality cited *Erven Warnink BV v J Townend & Sons (Hull) Ltd*, where Lord Diplock said:

Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.<sup>108</sup>

Although the plurality in *Esso* went on to note that their Lordships in the English decisions were speaking in the context of a nation with a single parliament,<sup>109</sup> and that, for reasons that I will explore shortly, the same approach could not be applied to the *Evidence Act* given its patchy adoption across the states and territories, the premise of the Australian and international authorities cited – that legislation could be used analogically – was not doubted.

It is also notable that *Esso* ran a separate argument. That ‘alternative argument’ was that, upon its true construction, the *Evidence Act* did establish a dominant purpose test applicable to circumstances not involving the adducing of evidence.<sup>110</sup>

99 (1998) 81 FCR 360, 373, quoting Calabresi, above n 21, 86.

100 (1999) 201 CLR 49, 60 [19], citing *Peters v The Queen* (1998) 192 CLR 493, 513–15 (McHugh J).

101 *Esso* (1999) 201 CLR 49, 60 [19], citing *Cohen v Cohen* (1929) 42 CLR 91, 100 (Dixon J).

102 (1984) 156 CLR 414, 445, cited in *Esso* (1999) 201 CLR 49, 62–3 [25].

103 (1991) 174 CLR 379, cited in *Esso* (1999) 201 CLR 49, 63 [25].

104 See also Leeming, ‘The Statutory Elephant in the Room’, above n 29.

105 *Moragne v States Marine Lines Inc*, 398 US 375 (1970), cited in *Esso* (1999) 201 CLR 49, 63 [26] (Gleeson CJ, Gaudron and Gummow JJ).

106 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, 298 (Cooke P), cited in *Esso* (1999) 201 CLR 49, 63 [28] (Gleeson CJ, Gaudron and Gummow JJ).

107 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 843 (Lord Wilberforce), cited in *Esso* (1999) 201 CLR 49, 62 [24] (Gleeson CJ, Gaudron and Gummow JJ).

108 [1979] AC 731, 743, quoted in *Esso* (1999) 201 CLR 49, 62 [24] (Gleeson CJ, Gaudron and Gummow JJ).

109 *Esso* (1999) 201 CLR 49, 62 [25] (Gleeson CJ, Gaudron and Gummow JJ).

110 *Ibid* 58 [13] (Gleeson CJ, Gaudron and Gummow JJ).

The significance of this alternative argument is that it is clear that the plurality, when accepting the availability of analogical reasoning by reference to statute, was not describing a judicial function of statutory interpretation. Nor was the plurality reasoning by reference to coherence (although the issue of coherence was discussed elsewhere in the plurality's reasons).<sup>111</sup> Rather, the plurality was identifying and accepting a *different* process to statutory interpretation, motivated by principles *other* than coherence, whereby the *substantive aspects of statute* could be used in the development of the common law. The plurality acknowledged the existence of this 'doctrine of analogy'. But the plurality declined, for reasons that will be explored shortly, to apply it, or venture further opinion on it.<sup>112</sup>

In contrast to the approach of the plurality, Callinan J, writing separately, was of the view that what his Honour described as the 'modification theory' had received no acceptance so far in Australia.<sup>113</sup> His Honour cited the 1987 decision in *Lamb v Cotogno* where the High Court suggested that reasoning by analogy to statute had 'never really gained general acceptance'.<sup>114</sup> Interestingly however, in *Lamb v Cotogno*, after stating that proposition, the plurality continued to consider whether there was a 'principle or trend' to be discerned in the relevant legislation that could be of relevance to the instant facts in that case.<sup>115</sup>

As I said, despite acknowledging the existence of the 'doctrine of analogy', the plurality in *Esso* declined to apply it for the following reasons:

1. First, the relevant provisions of the *Evidence Act* (sections 118 and 119) were concerned with *adducing evidence*. The provisions covered evidence adduced in interlocutory proceedings as well as at a final hearing, or on an appeal, but not all of the circumstances in which a claim for privilege might arise.<sup>116</sup>
2. Second, the claim in contention on the facts was not a claim that certain evidence could, or could not, be adduced.<sup>117</sup>
3. Third, the legislation in question did not apply uniformly throughout Australia.<sup>118</sup> There was no consistent pattern of legislation from which analogy could be drawn.<sup>119</sup>

In my view, federalism was the real reason in *Esso* to reject any analogy to the *Evidence Act*. The limited scope of the statute meant that it was inapplicable to the facts. Therefore, the only sense in which statute could be relevant was as a source of analogical development of the common law through the extraction of a test that reflected a balancing of the competing public interests at stake.<sup>120</sup>

111 Ibid 55–6 [6] (Gleeson CJ, Gaudron and Gummow JJ).

112 Ibid 63 [28] (Gleeson CJ, Gaudron and Gummow JJ).

113 Ibid 99 [144].

114 *Lamb v Cotogno* (1987) 164 CLR 1, 11 (The Court), cited in *Esso* (1999) 201 CLR 49, 99 [144]. See also Mason 'A Judicial Perspective on the Development of Common Law Doctrine', above n 40, 124–5.

115 (1987) 164 CLR 1, 12 (The Court).

116 *Esso* (1999) 201 CLR 49, 59 [16] (Gleeson CJ, Gaudron and Gummow JJ).

117 Ibid 59 [17] (Gleeson CJ, Gaudron and Gummow JJ).

118 Ibid 61 [23] (Gleeson CJ, Gaudron and Gummow JJ).

119 Ibid 61–2 [23], [25], 63 [27] (Gleeson CJ, Gaudron and Gummow JJ).

120 Ibid 64–5 [35] (Gleeson CJ, Gaudron and Gummow JJ).

The plurality considered whether analogical reasoning was available, by reference to various authorities mentioned earlier. However, ultimately, the plurality distinguished those authorities on the basis that there was no ‘consistent pattern of legislative policy’.<sup>121</sup> This finding rested upon the premise, declared in *Lange v Australian Broadcasting Corporation*,<sup>122</sup> that there is ‘but one common law in Australia’.

*Esso* raises the question: what are the implications of federalism for the ‘doctrine of analogy’? I make the following observations. First, the process of analogical reasoning by reference to statute *necessarily depends on the principles which the statute or statutes express*.<sup>123</sup> In other words, this kind of reasoning depends on identifying and extracting the substantive aspects of statute. Any other sort of reasoning, which attempts to extend the application of the literal text of a statute – its formal attributes – outside of its intended field of operation, is impermissible.

Second, this focus on *principle* means that it *may* well be appropriate to develop the common law in the context of a matter arising in one state, by reference to legislative provisions enacted in another state, territory, or by the Commonwealth Parliament. For example, it may be appropriate to develop the common law in the context of a case arising in New South Wales by reference to the statute law of Victoria and the Commonwealth.<sup>124</sup> David St Leger Kelly observed that in the United States, where use is made of legislative analogies within a federal system, there is no suggestion that the courts of a given state are confined to analogies in enactments of that state’s legislature, but no other.<sup>125</sup>

Third, notwithstanding that it may be possible to reason by analogy to legislation within different states and territories, or within the Commonwealth, it will not be possible to do so unless there is a consistent pattern of legislation; or *consistency of approach* across different legislative enactments.<sup>126</sup> This was the reasoning in *Esso*. It was also the reasoning in *Barclay v Penberthy*,<sup>127</sup> where the High Court considered whether the rule in *Baker v Bolton*<sup>128</sup> formed part of the common law in Australia. *Baker v Bolton* is an English decision which established a rule that a person cannot recover damages for the death of another. In *Barclay*, the High Court affirmed that the rule in *Baker v Bolton* formed part of the common law in Australia. The plurality stated that ‘[t]he pattern of Australian legislation is

121 Ibid 61–2 [23] (Gleeson CJ, Gaudron and Gummow JJ); see also 62–3 [25], [27]–[28] (Gleeson CJ, Gaudron and Gummow JJ); *Imbree v McNeilly* (2008) 236 CLR 510, 531 [64] (Gummow, Hayne and Kiefel JJ).

122 (1997) 189 CLR 520, 563 (The Court), cited in *Esso* (1999) 201 CLR 62–63 [23] (Gleeson CJ, Gaudron and Gummow JJ).

123 See D St L Kelly, ‘The *Osmond* Case: Common Law and Statute Law’ (1986) 60 *Australian Law Journal* 513, 519.

124 Ibid.

125 Ibid 519–20.

126 The Civil Liability legislation provides a further example of how complexities can arise in a federation in the context of variable legislation. Whilst the content of the Civil Liability Acts differ, their approach to causation has influence: see *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322, 353–4 [163] (Edelman J).

127 (2012) 246 CLR 258 (*‘Barclay’*).

128 (1808) 1 Camp 493; 170 ER 1033.



a pointer towards the continued existence of the rule in *Baker v Bolton* as a matter of common law'.<sup>129</sup>

What are the principles or reasons that underpin that conclusion?

One reason is that the one common law in Australia cannot be fragmented by the adoption of legislative principles that are inconsistent.<sup>130</sup> But there is a further reason. Development of the common law occurs by reference to *established* principles. Principles cannot be viewed as established if they are subject to clashing approaches across the states, territories and Commonwealth.

And there is a third and final reason, perhaps better identified as a question. Should the courts develop the common law by reference to, for example, the Commonwealth's statutory approach to a legal issue, whilst ignoring inconsistent judicial or legislative approaches in other states and territories? Professor Matthew Harding, amongst others,<sup>131</sup> has drawn attention to this issue in questioning whether the legal concept of charity in the *Australian Charities Act 2013* (Cth) should be allowed to shape equity jurisprudence in cases arising under state law,<sup>132</sup> noting that state legislators around Australia have not enacted legislation to align with the legal conception of charity in the *Australian Charities Act 2013* (Cth).<sup>133</sup> Another way of considering the question is to ask whether a state court should be denied the capacity to mould the common law to reflect state statutory policy. And if the answer is 'yes', does this run counter to the federal character of the Constitution?<sup>134</sup>

An interesting case in which some of these issues were raised is *Brodie v Singleton Shire Council*.<sup>135</sup> In *Brodie*, the High Court considered whether it should overrule a line of cases which established for a public authority a rule of immunity concerning tortious liability. A public authority – when sued by a road user who suffers damage in consequence of the condition of the highway – would be liable for *misfeasance* but *not nonfeasance*.

In the two appeals, heard concurrently, each respondent council had powers in relation to roads under the *Local Government Act 1919* (NSW), including, under section 240, to maintain public roads. Section 12(1) of the *State Roads Act 1986* (NSW) ('the *RTA Act*') then provided that the Roads and Traffic Authority ('the RTA') could exercise the functions of a council in relation to a public road and that the RTA would have the 'immunities of a council in relation to a public road'. The provisions did not specify the content of the 'immunity'.<sup>136</sup>

The plurality noted that the powers vested by statute in a public authority may give it a special degree of control so as to give rise to a duty of care owed by the

129 *Barclay* (2012) 246 CLR 258, 279 [26] (French CJ, Gummow, Hayne and Crennan JJ).

130 *Esso* (1999) 201 CLR 49, 61–2 [23] (Gleeson CJ, Gaudron and Gummow JJ).

131 See generally Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38 *University of New South Wales Law Journal* 367, 370; French, 'Trusts and Statutes', above n 27, 631–2.

132 Matthew Harding, 'Equity and Statute in Charity Law' (2015) 9 *Journal of Equity* 167, 183.

133 *Ibid* 184.

134 Mason, 'The Interaction of Statute Law and Common Law', above n 40, 327. See also Mason 'A Judicial Perspective on the Development of Common Law Doctrine', above n 40, 129–30.

135 (2001) 206 CLR 512 ('*Brodie*').

136 *Ibid* 570–1 [130]–[131] (Gaudron, McHugh and Gummow JJ).

authority.<sup>137</sup> The plurality also noted various problems with the ‘immunity’, stating that the case law speaks in terms which could ‘no longer command an intellectual assent’.<sup>138</sup>

The plurality stated in relation to the ‘immunity’ in the *RTA Act*:

The legislation does not present an occasion for the analogical use of statute law to develop the common law ... There are obvious difficulties in subjecting the common law of Australia to paralysis by reason of the provisions of a State law giving particular protection to the activities of a public authority of that State.<sup>139</sup>

The decision in *Brodie* is interesting – the High Court was willing to develop the common law of Australia even where the State in which the proceedings were initiated had what appeared, on its face, to be a legislative provision standing in opposition to that development. And the plurality did so by reference to federal legislation such as the *States Grants (Roads) Act 1977* (Cth) and the *Roads Grants Act 1981* (Cth), which, according to the plurality, supported the argument that ‘the assumption by central governments of significant financial responsibility for road construction and maintenance has deprived of some of its force the argument that the “immunity” always is necessary because all local authorities require it for the protection of the pockets of their ratepayers’.<sup>140</sup> In other words, the content of federal statutes was relevant to the abolition of the immunity, which was the subject of, and arguably entrenched by, a specific New South Wales legislative enactment.

The significance of this decision is apparent in the dissent of Gleeson CJ. Gleeson CJ observed that in New South Wales the nonfeasance rule had been expressly taken up by the legislature<sup>141</sup> and that the alteration to the law which the Court was invited to make would overturn the settled construction of that legislation.<sup>142</sup>

This decision in *Brodie* can be understood in two ways. One reading is that the *flexibility* in the concept of the immunity in the RTA Act allowed the common law to develop. That reasoning may not have been open if the RTA Act *specifically* entrenched the highway immunity. The plurality stated that the provisions of the RTA Act were drawn so as to ‘[attract] to the RTA such immunity as is available from time to time to councils’.<sup>143</sup>

However, that answer does not entirely explain the decision. Given what would appear to be legislative intention on the part of the Parliament of New South Wales to preserve an existing immunity (or, at least, no indication of a legislative intention to abolish that immunity), the decision is better understood as an example of the desire of the judiciary to *progress* the common law. It is an example of the tension between the constraints of certainty and the impetus to develop the common law, to which I referred earlier. The decision demonstrates that given the

137 Ibid 558–9 [102] (Gaudron, McHugh and Gummow JJ).

138 Ibid 560 [107] (Gaudron, McHugh and Gummow JJ), quoting *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274, 285 (Dixon CJ).

139 *Brodie* (2001) 206 CLR 512, 571 [132] (Gaudron, McHugh and Gummow JJ) (citations omitted).

140 Ibid 543 [65] (Gaudron, McHugh and Gummow JJ).

141 Ibid 534 [36].

142 Ibid 535 [38].

143 Ibid 572 [133] (Gaudron, McHugh and Gummow JJ).

complexity of the statutory landscape in which the common law is situated, development of the common law by analogy to statute must occur with consideration of the constraints imposed by the federal system within which one unified Australian common law operates.

## B Coherence

Finally, I want to address coherence.

It is difficult to define coherence. As Professor Elise Bant has indicated, the concept suggests that ‘rules and doctrines must be applied in such a way that supports or promotes coherence in the law, in particular by producing outcomes consistent with any overriding prohibition or principle’.<sup>144</sup> In other words, the development of common law rules may be affected by a desire to maintain consistency with policies or principles reflected in legislation. You might then be tempted to dismiss all of what I have just said as the judiciary striving to achieve coherence. Can I say at the outset that I accept that the concept of coherence is related to the doctrine of analogy and that coherence provides a powerful argument for allowing the analogical use of statute in the development of the common law.<sup>145</sup>

For example, we can see the principle of coherence operating in ‘illegality’ cases such as those dealing with negligence actions in the context of a joint criminal enterprise: *Smith v Jenkins*,<sup>146</sup> *Jackson v Harrison*,<sup>147</sup> *Gala v Preston*<sup>148</sup> and *Miller v Miller*<sup>149</sup> immediately spring to mind. In a different context, coherence may be relevant to deciding the enforceability of commercial agreements which have been rendered unlawful by statute, as was the case in *Equuscorp Pty Ltd v Haxton*.<sup>150</sup> And the principle of coherence arises in a negligence context, in relation to the need to avoid subjecting individuals to conflicting obligations in the context of ascertaining the scope of their duty of care, as occurred in *Sullivan v Moody*<sup>151</sup> and *Hunter and New England Local Health District v McKenna*.<sup>152</sup> In these cases the need for coherence with statutory proscription is confronted, and has been identified as a ‘central policy consideration’.<sup>153</sup>

Some literature suggests there is an increasing emphasis on coherence.<sup>154</sup> Another view might be that its importance has long been recognised, but that its relevance has increased with (1) the rise of statutory regulation, (2) the concomitant increase in occasions for interaction and (3) other doctrinal

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144 Bant, above n 131, 367–8.

145 Burrows, above n 18, 248–9.

146 (1970) 119 CLR 397.

147 (1978) 138 CLR 438.

148 (1991) 172 CLR 243.

149 (2011) 242 CLR 446.

150 (2012) 246 CLR 498.

151 (2001) 207 CLR 562.

152 (2014) 253 CLR 270.

153 *Miller v Miller* (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

154 See generally Bant, above n 131.

developments such as the increased *scholarly* focus on the relationship between statute and judge-made law.

Coherence is relevant to analogical reasoning by reference to statute, in that it provides a *justification* for that reasoning, and it provides *examples* of that reasoning in operation. But I do not think that the development of the common law by reference to statute can be explained by the principle of coherence *alone*.

*First*, Professor Burrows' comments in relation to statutory illegality in contract and the tort of breach of statutory duty are instructive. Professor Burrows states that if one takes the view that the common law concept comes *first*, with the courts then applying the statute in giving content to that concept, this application is closely linked to the doctrine of analogy.<sup>155</sup> Professor Burrows notes however that '[o]n an alternative approach ... those areas [and he referred to statutory illegality or breach of statutory duty] are *merely applications of statutory interpretation* and, in any event, *filling out a common law concept is not quite the same as developing the common law by analogy to a statute*'.<sup>156</sup>

This analysis speaks to the fact that a principle at common law, such as breach of statutory duty, may be expanded by its application to a new statute; or the common law may raise a nice question of statutory construction, such as whether a contract rendered illegal by a statute was intended to be also rendered unenforceable at common law. However, these situations do not encompass all of the ways in which the common law may be developed by reference to statute. These include, for example, where a previously understood principle of the common law has become ill-adapted to modern circumstances, or where the common law may be shown to be based on wrong assumptions of historical fact.<sup>157</sup>

This is because the *expansion* of a pre-existing common law principle, whilst a form of development of the common law, is not the only way to develop the common law. This is not to suggest that issues of coherence do not arise in the context of cases which develop the common law by analogy to statute. The principle of coherence is often relevant in this context. It is simply to posit that the principle of coherence *alone* does not explain the development of the common law by reference to statute.

*Second*, this point – that coherence *alone* does not necessarily explain the development of the common law by reference to statute – is amplified by the fact that the judiciary develops the common law by reference to statute where there is no issue of coherence at stake.<sup>158</sup> Historically, significant elements of the common law had their origin in statute, as a gloss on statute, or in response to statute.<sup>159</sup> It is not possible to explain this history, or the contemporary application of the 'doctrine of analogy', by recourse to the principle of coherence alone. Coherence was not the basis for the development of the common law in *R v Swaffield*. Similarly, in *Tasita Pty Ltd v Papua New Guinea*, Young J noted that courts of

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155 Burrows, 'The Relationship between Common Law and Statute', above n 18, 250.

156 *Ibid* (emphasis added).

157 See *Wik Peoples v Queensland* (1996) 187 CLR 1, 180 (Gummow J).

158 See generally Burrows, above n 18.

159 *Esso* (1999) 201 CLR 49, 60 [19] (Gleeson CJ, Gaudron and Gummow JJ).

equity mould their application of principles depending on changes in statute law<sup>160</sup> and in that decision was willing to '[reason] by analogy' to a 'general principle' in a statute<sup>161</sup> even where there was no issue of coherence *per se*.

In *Ralevski v Dimovski*,<sup>162</sup> a young man challenged an assessment of damages related to disfiguring injuries to his face. The trial judge reasoned in relation to his award of damages that the young man's injuries were 'not quite as serious ... as [they] might be for a young lady of similar problems and age'.<sup>163</sup> In finding that the trial judge had erred in his approach to assessing the appellant's entitlement to damages on the basis of preconceived discriminating gender-based distinctions, Kirby P noted that statutes had been enacted, both at a Commonwealth and state level to render unlawful, in a number of activities of life, discrimination against a person on the ground of his or her sex.<sup>164</sup> Kirby P considered those developments were 'important and beneficial' and that the 'common law should move on a parallel course'.<sup>165</sup> It is clear from the foregoing that the 'gravitational force'<sup>166</sup> of statute does not only operate in the context of ensuring coherence.

This development outside of the framework of coherence, in my view, is because judges also have a responsibility to develop the common law aside from the need to ensure coherence. The common law cannot remain static. The common law must respond to 'developments of the society in which it rules'.<sup>167</sup> A previously understood principle of the common law may become ill-adapted to modern circumstances. Next, it may emerge that the rationale of a particular cause of action rests on a dubious foundation in the case law. Finally, the approach of the common law may be shown to be based on wrong assumptions of historical fact.<sup>168</sup> In short, considerations of coherence, whilst central to maintaining a legal system free from internal contradiction,<sup>169</sup> are *not* the only factors motivating the development of the common law by reference to statute.

#### IV CONCLUSION

So where are we? I return to where I began.

The question of how the common law should function in an 'Age of Statutes'<sup>170</sup> remains a difficult one: and it remains a question to which we still only have a

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160 (1991) 34 NSWLR 691, 701–2, citing Atiyah, above n 27, 7.

161 *Tasita Pty Ltd v Papua New Guinea* (1991) 34 NSWLR 691, 701.

162 (1986) 7 NSWLR 487.

163 *Ibid* 492 (Kirby P) (emphasis altered).

164 *Ibid* 492–3.

165 *Ibid* 494. See also Mason 'A Judicial Perspective on the Development of Common Law Doctrine', above n 40, 131.

166 Beatson, 'The Role of Statute', above n 8, 259.

167 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, 591–2 (Lord Radcliffe), quoted in *Wik Peoples v Queensland* (1996) 187 CLR 1, 179 (Gummow J).

168 *Wik Peoples v Queensland* (1996) 187 CLR 1, 180 (Gummow J).

169 See Ross Grantham and Darryn Jensen, 'Coherence in the Age of Statutes' (2016) 42 *Monash University Law Review* 360, 363.

170 See generally Calabresi, above n 21.

‘very partial set of answers’.<sup>171</sup> The doctrine of analogy is just one part of that partial set of answers. But I contend that viewing the development of the common law through the lens of formal rules and substantive reasoning can assist in identifying the *ways* the judiciary engage with and develop the common law through statute and, using that lens also assists in understanding the *basis* upon which the common law is developed by reference to statute by the judiciary. It is a work in progress.

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171 Beatson, ‘Has the Common Law a Future?’, above n 24, 299.