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# Statute Law in the Law of Obligations: Dimensions of Form and Substance

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> We too need education in the obvious – to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law.[1]

Holmes' words introduced Summers' article published four decades ago: 'General Equitable Principles under Section 1–103 of the Uniform Commercial Code'.[2] The article was directed to a statute that made 'the principles of law and equity, including the law merchant' applicable to the Uniform Commercial Code unless displaced by the particular provisions of the Act – thereby softening the impact of a new legislative regime.[3] In turn, Atiyah and Summers drew upon the effect of that provision and others like it as part of the explanation for the greater emphasis on substance in the US legal system, contrasting it with the relative formality of the English legal system.[4] It is no surprise that the pair – one steeped in the English common law, the other with a deep expertise in the Uniform Commercial Code (which in part is a reaction against common law[5] and reflects the heritage of Field[6]) –

* I acknowledge the research assistance of Mr Marcel Delany. All errors are mine.

[1] OW Holmes, 'Law and the Court' in *Speeches by Oliver Wendell Holmes* (Boston, MA, Little, Brown & Co, 1934) 102.

[2] RS Summers, 'General Equitable Principles under Section 1-103 of the Uniform Commercial Code' (1978) 72 *Northwestern University Law Review* 906.

[3] See generally D Litowitz, *Perspectives on the Uniform Commercial Code*, 2nd edn (Durham, NC, Carolina Academic Press, 2007) especially 8–11. The provision is associated with Karl Llewellyn, who was its principal drafter and leading exponent. See A Kamp, 'Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism and the Uniform Commercial Code in Context' (1995) 59 *Albany Law Review* 325 and G Gilmore, 'In Memoriam: Karl Llewellyn' (1962) 71 *Yale Law Journal* 813, 814–15, coincidentally noting that: 'Revolutionary as his early writings were thought to be, Karl abhorred abrupt departures, sudden breaks and the revealed certainty of novel illumination. He was a man of tradition, of continuity, of ordered growth and gradual change' (at 814).

[4] PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford, Clarendon Press, 1987) ch 4.

[5] See F Snyder, 'Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code' (2007) 68 *Ohio State Law Journal* 11.

[6] See F Lechner, *The American Exception* (New York, Palgrave Macmillan, vol 1, 2017) 155–56. For Field's influence in England in relation to the Judicature legislation, see M Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery' (2004) 22 *Law & History Review* 389, 565.

contrasted the different roles of statute in those legal systems. They maintained that many US statutes (notably, constitutional statutes) were drafted with 'broad and vague language',[7] while in the UK, legislation was relied upon 'so much more readily to resolve questions that in America are left to the courts'.[8] They also maintained that American courts displayed a greater willingness to engage in purposive rather than textual construction.[9] They contended that 'the English political-legal system relies more heavily than the American on statute law and less on case-law, and that, because statute law is more formal than case-law, this is one factor which makes English law more formal'.[10]

It might be of interest to consider whether, some 30 years later, those distinctions are now as pronounced as they once seemed. Both legal systems have changed. The work of Atiyah and Summers preceded landmarks such as *Pepper v Hart*,[11] the enactment of the Human Rights Act 1998 (UK) and the appointment of Antonin Scalia to the US Supreme Court. The mode of reasoning seen in the UK Supreme Court in much public law litigation (for example, the recent civil partnerships case[12] and, more remarkably, in *Unison*),[13] and the growth of textualism in US courts[14] may have been unanticipated in 1986. But analysis of such matters would make for a different chapter.

This chapter employs Holmes' aphorism as to the need for 'education in the obvious', in an area explored by Atiyah and Summers, namely, the role of statutes in common law legal systems. It focusses upon the diversity of statutes and their dynamic interaction with judge-made law. Most lawyers, practising or academic, instinctively know something of the range of statutes and the ways in which private law is shaped by them. Yet curiously little has been written about this issue, and the learning that exists is often a little simplistic and fails to capture the richness of the interaction.

Statutes are an essential element of any account of a legal system. Of course, it is vital to distinguish between different classes of statutes. For example, many

[7] Atiyah and Summers, above n 4, 101.

[8] ibid 299.

[9] ibid 101–4, concluding: 'It is common for American lawyers to poke fun at seemingly formalistic and wooden decisions by English judges, and at their apparently simplistic faith in the belief that statutes have a simple or plain meaning which can be arrived at by methods of literal interpretation. Conversely, English layers are easily shocked by what they see as the free-wheeling and sometimes "substantivistic" methods of American judges which seem on occasion to pay scant regard to the wording of the legislative text at all' (footnotes omitted). Atiyah and Summers regarded both criticisms as unfruitful.

[10] ibid 298.

[11] *Pepper v Hart* [1993] AC 593.

[12] *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32, [2018] 3 WLR 415 ('strict scrutiny' of justification; four-stage test of proportionality).

[13] *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 (rule of law and access to the courts driving determinations of invalidity of executive action in imposing fees on access to employment tribunals). cf *Commissioner of Corrective Services v Liristis* [2018] NSWCA 143 [75], J Basten, '*UNISON*, The Parole Board and Principle of Legality' (2018) 29 *Public Law Review* 187 and R Rawlings, 'The *UNISON* case: A New High-water Mark' (2018) 29 *Public Law Review* 190.

[14] Indeed, the familiarity of the meme 'we are all textualists now' in US academic literature is itself remarkable: see, eg, J Schacter, 'Text or Consequences?' (2011) 76 *Brooklyn Law Review* 1007, 1008.

statutes are constitutive in the sense of conferring power: rather than imposing norms of conduct and sanctions for their breach, they authorise the creation of companies, or wills, or contracts, or bills of sale, or they create agencies and instrumentalities and corporations with important powers. Those statutes are not of present concern. Large swathes of legislation regulate particular areas of conduct, and within those areas impose norms of conduct and specify sanctions for their breach in ways that resemble judge-made law. And some statutes (probably, only a small minority of the total in this 'age of statutes') achieve their effect through engaging directly with judge-made law. In Australia, notable examples are the Civil Liability Act 2002 (NSW) and its counterparts and some of the consumer protection provisions of the Competition and Consumer Act 2011 (Cth). Those two examples illustrate the distinction drawn by Atiyah and Summers between open- and close-ended statutes: the former closely engaged with the existing law of negligence, while the latter created new norms including those broadly based on unconscionable conduct but left it to the courts to flesh out the details. If one is to analyse the role of statute in common law legal systems, it is important to appreciate this variety. As I have elsewhere said:[15]

> Justice Frankfurter said that 'enactments such as the Sherman Law that embody a felt rather than defined purpose and necessarily look to the future for the unfolding of their content, making of their judicial application an evolutionary process nourished by relevant changing circumstances'.[16] Judge Friendly described such statutes as open- rather than close-ended.[17] Open-ended statutes, which turn on broadly expressed concepts, like 'misleading or deceptive' or 'manner of manufacture',[18] naturally and indeed necessarily attract a more purposive and less minutely textual mode of construction. What is more, different parts of the same statute may be construed differently;[19] consider the general prohibition in the copyright legislation in some jurisdictions against authorising infringing conduct and the narrowly articulated 'safe harbour' provisions which guarantee a defence. Judge Robert Katzmann has said, in his elegant account of judging in the Second Circuit, that 'Statutes vary in design and substance, and so the interpretive task may change and the tools used may vary depending on the particular statutory issue at hand'.[20]

It simply does not do justice to the richness of the legal system to conflate all these categories of legislation as the premise of an argument. There is a real descriptive loss if they are treated as a homogeneous category.

[15] M Leeming, 'Equity: Ageless in the Age of Statutes' (2015) 9 *Journal of Equity* 108, 116–17.

[16] *United States v Union Pacific Railroad Co* 353 US 112, 122 (1957). More recently, see *State Oil Co v Khan* 522 US 3 (1997).

[17] H Friendly, *Benchmarks* (Chicago, The University of Chicago Press, 1967) 204.

[18] See, eg, what Crennan and Kiefel JJ termed the 'celebrated NRDC case' of *National Research Development Corp v Commissioner of Patents* (1959) 102 CLR 252, 262 on the 'concept of patent law ultimately traceable to the use in the Statute of Monopolies of the words "manner of manufacture"': *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50, (2013) 304 ALR 1 [216]. See for a recent example *Research Affiliates LLC v Commissioner of Patents* [2014] FCAFC 150, (2014) FCR 378 [6]–[8] (Kenny, Bennett and Nicholas JJ).

[19] See H Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation*, (Oxford, Hart Publishing, 2014) chs 7–16.

[20] R Katzmann, *Judging Statutes* (New York, Oxford University Press, 2014) 55.

There is also a temporal, or dynamic, dimension to the relationship between statute law and judge-made law and the substance/form distinction to which both contribute. Atiyah said 30 years ago, in an article published shortly before his work with Summers, that 'the relationship between common law and statute law must be seen as the relationship between two developing and moving bodies of law; and the way in which they interact on each other becomes a matter of no little importance'.[21] Some accounts that treat judge-made law and statute as separate systems fail to recognise this important interaction;[22] a well-known article by Burrows is a notable exception.[23] Paradoxically, while it is important to pause before treating the class of statutes (or even the sub-class of norm-creating statutes) as a single homogeneous category, it is also important to bear in mind that the distinction between judge-made law and statute law can itself be illusory when the temporal dimension is considered. Most of the time, as Windeyer J said, 'it is misleading to speak glibly of the common law in order to compare and contrast it with a statute'.[24] As Burrows has put it, 'common law and statute are more fully integrated than has traditionally been thought'.[25]

This chapter presents three examples drawn from the law of obligations, in the areas of contract, tort and equity, illustrating these distinctions. None is unfamiliar, although it is hoped that there are insights in each. Hence the invocation of Holmes. The first example is the divergent approaches in Australia, New Zealand and the UK to whether statutory apportionment is available to reduce a judgment for breach of a contractual duty of care. The second is the divergence between the Australian and English law of exemplary damages for defamation following *Rookes v Barnard*,[26] which was the occasion for pointed observations on how judge-made law was to be read. The third relates to the way in which the already expansive notion of unconscionable conduct in Australia has been altered by a series of statutes in the quarter century between 1986 and 2011.

## I. Statute Treated as Judge-made Law

White and Summers stated provocatively at the outset of their work on the Uniform Commercial Code that 'In our system of law statutory law tends to be transformed into case law'.[27] This is by no means confined to ancient statutes like the Statute of

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

[22] See, eg, R Posner, *The Problems of Jurisprudence* (Cambridge, MA, Harvard University Press, 1990) 247.

[23] A Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *LQR* 232.

[24] *Gammage v The Queen* (1969) 122 CLR 444, 462.

[25] Burrows, above n 23, 233. See further M 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.

[26] *Rookes v Barnard* [1964] AC 1129 ('*Rookes*').

[27] J White and R Summers, *Handbook of the Law under the Uniform Commercial Code* (St Paul, Minn, West Publishing Co, 1972) third sentence of preface.

Elizabeth, which remains a mainstay of the modern law of charity.[28] In modern statutes that tendency is regularly seen when an open-ended statute invites or requires elucidation by courts. But it may also be seen in narrowly drafted statutes. Last week, I heard this exchange:[29]

> SACKVILLE AJA: I'm just wondering whether your construction of s 5D is supported by the authorities. It's not self-evident from the language.
>
> COUNSEL: Well, in fact, the language doesn't use the 'but for' in its terms, but it's accepted that that's what it means; *Adeels Palace v Moubarak* lays it down.

It may seem a little strange that both the statutory defined term 'factual causation' and the perfectly precise statutory language of 'necessary condition' were glossed by a reference to what has been said by a court. The High Court had no difficulty in *Adeels Palace* stating that factual causation required by section 5D(1)[30] was determined by the 'but for' test.[31] What else could the precise language of 'necessary condition' possibly mean in this context? But in a system where a primary mode of advocacy involves persuading a judicial officer that she or he is bound by the decision of a higher court, it is unsurprising that advocates prefer to cite High Court decisions construing a statute rather than relying on the statute itself. That is one 'obvious' way in which statute becomes treated as common law, and this despite the oft-repeated command that one must start with the statute.[32]

Different modes of reasoning apply in a statutory context as opposed to a judge-made law context. A good example is contributory negligence. This neglected area has greatly benefited from recent analyses, extending to legal history[33] and empirical studies.[34] In Australian law, as I have sought to explain more fully elsewhere,[35] it continues to develop – in large measure because of the number of, and latent

[28] In Australia, notably by the modes of analogical and inferential reasoning endorsed in *Incorporated Council of Law Reporting of the State of Queensland v Federal Commissioner of Taxation* (1971) 125 CLR 659 and *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304.

[29] The reference is to the hearing in *Lim v Cho* [2018] NSWCA 145.

[30] s 5D(1) of the Civil Liability Act 2002 (NSW) provides:

> (1) A determination that negligence caused particular harm comprises the following elements:
>
> (a) that the negligence was a necessary condition of the occurrence of the harm ('factual causation'), and
>
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ('scope of liability').

[31] *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48, (2009) 239 CLR 420 [45].

[32] See, eg, *Ogden Industries Pty Ltd v Lucas* [1970] AC 113, 127: 'It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself'.

[33] See, eg, P Mitchell, *A History of Tort Law 1900–1950* (Cambridge, Cambridge University Press, 2015) ch 13.

[34] See, eg, J Goudkamp and D Nolan, *Contributory Negligence: Principles and Practice* (Oxford, Oxford University Press, 2018) 3–4, 77–122; J Goudkamp and D Nolan, *Contributory Negligence in the Twenty-First Century* (Oxford, Oxford University Press, 2019).

[35] M Leeming, 'Statutory Interpretation *as* Private Law' in P Vines and S Donald (eds), *Statutory Interpretation in Private Law* (Alexandria, Federation Press, 2019).

complexity in, statutory amendments. This section of this chapter focusses on just one point: statutory apportionment for contractual claims. The point is reasonably familiar but illustrates as clearly as anything else the distinction I wish to emphasise.

Like many common law jurisdictions, the Australian states enacted legislation in the form of the Law Reform (Contributory Negligence) Act 1945 (UK), which turned on 'fault':

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.[36]

'Fault' was defined to mean 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence'. Note the narrowly prescriptive first clause of the provision, in contrast with the open-ended concluding clause, referring to what a court thinks 'just and equitable'.

The reform was driven by the harshness of the defence of contributory negligence at common law, and the obscurities attending to exceptions to it. But law does not stand still. The expansion of negligence associated with *Henderson v Merrett Syndicates Ltd* has led to a growing overlap in claims which could be framed either in contract or for breach of duty of care.[37] In such cases, could the recovery in a plaintiff's claim in contract be reduced by the statute? How did the statutory text apply in changed circumstances half a century later?

After some decisions pointing in the opposite direction,[38] the English and New Zealand Courts of Appeal sanctioned the availability of the section in some but not all contractual cases.[39] The section was not available where the contractual obligation did not depend on negligence,[40] but was available where the liability in contract was the same as that in tort, or else arose from a contractual obligation to take care even if it did not correspond to an independently existing common law duty.[41] That approach fastened upon the breadth of the term 'fault' in the opening clause and the perceived awkwardness of a plaintiff obtaining different judgments for the same breach of identical duties in contract and in tort. At the same time that construction downplayed the original purpose of the provision, and the limiting

[36] Section 1(1).

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

[38] Notably, the *volte-face* by Neill LJ between *AB Marintrans v Comet Shipping Co Ltd* [1985] 1 WLR 1270 and *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, 875 ('*Butcher*').

[39] *Butcher* [1989] AC 852; *Mouat v Clark Boyce* [1992] 2 NZLR 559, 564–65; *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2011) 11 NZCPR 879.

[40] See *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214.

[41] These three categories were identified by Hobhouse J in *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488 at first instance.

effect of the words 'shall not be defeated by reason of the fault of the person suffering the damage'.

In 1999 the point came before the High Court of Australia, in *Astley v Austrust Ltd*,[42] where the defendant firm of solicitors was subject to concurrent contractual and tortious duties to take reasonable care. The client sued for breach of retainer, and the firm relied on statutory apportionment. The local legislation followed the English text verbatim.[43] Yet the High Court departed from English and New Zealand authority and held that the word 'negligence' in the definition of 'fault' was limited by the words 'which gives rise to a liability in tort',[44] with the result that contributory negligence was not a defence to breach of an implied term to perform services with reasonable care and skill. The majority judgment noted that the 'theoretical foundations for actions in tort and contract are quite separate', with contractual obligations implied at law long preceding the 'imperial march of modern negligence law'.[45] This construction was said best to accord with the purpose of the legislation, which sought to remedy a harshness in the law of tort, and had nothing to say about contract law. The majority judgment was conscious of the inconsistent remedies which would be available in cases of concurrent liability in tort and contract:

> Perhaps the apportionment statute should be imposed on parties to a contract where damages are payable for breach of a contractual duty of care. If it should, and we express no view about it, it will have to be done by amendment to that legislation. If courts are to give effect to the will of the legislature, it is not possible to do so having regard to the terms of apportionment legislation, based on the United Kingdom legislation of 1945, and the evil that it was designed to remedy.[46]

The decision was criticised,[47] and promptly overturned legislatively.[48]

It may be that some of the criticism of *Astley v Austrust Ltd* was misplaced, owing to a misapprehension of the nature of the issue presented on appeal. The position would have been quite different if there had been two parallel developments in *judge-made* law. Suppose the common law had seized upon the considerable deficiencies of the traditional doctrine of contributory

[42] *Astley v Austrust Ltd* [1999] HCA 6, (1999) 197 CLR 1 ('*Astley*').
[43] Wrongs Act 1936 (SA), s 27A.
[44] *Astley* [1999] HCA 6, (1999) 197 CLR 1 [71]–[83].
[45] ibid [48].
[46] ibid [88].
[47] See, eg, J Swanton, 'Contributory Negligence is not a Defence to Actions for Breach of Contract in Australian Law: *Astley v Austrust Ltd*' (1999) 14 *Journal of Contract Law* 251 and J Davis, 'Contributory Negligence and Breach of Contract: *Astley v Austrust Ltd*' (1999) 7 *Torts Law Journal* 117.
[48] See Law Reform (Miscellaneous Provisions) Amendment Act 2000 (NSW); Law Reform (Contributory Negligence) Amendment Act 2001 (Qld); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA); Tortfeasors and Contributory Negligence Amendment Act 2000 (Tas); Wrongs (Amendment) Act 2000 (Vic); Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2003 (WA); Civil Law (Wrongs) Act 2002 (ACT); Proportionate Liability Act 2005 (NT).

negligence, and, perhaps influenced by the position in admiralty and a handful of nineteenth-century jury decisions,[49] developed a doctrine of apportionment for contributing fault.[50] If so, one could advance a powerful argument based on coherence for that *judge-made* doctrine to accommodate itself with the parallel growth of concurrent duties in contract and tort. One basic attribute of the body of judge-made law is to strive against such inconsistencies.[51]

Perhaps because of the thousands of decisions on the discretionary power created by statutory apportionment, focussing on concepts such as 'causal potency' and 'relative culpability' in elucidating the open-ended part of the provision ('as the court thinks just and equitable'), sight was lost of the more narrowly drafted language in which the balance of the section is framed. But the issue in *Astley* remained one of statutory construction, rather than the development of judge-made law. The *relevant portion* of the statutory text was precise, and quite narrowly directed to cases of liability in tort,[52] enacted in a context which pre-dated the expansion of negligence. It is one thing to change the law so as to extend a judge-made rule to circumstances outside its original scope, but which nonetheless fall within its purpose – especially if the need to do so is due to an expansion of that other area of the law. It is an entirely different thing to expand the legal meaning of a fixed statutory text written in prescriptive terms, which ordinarily is to be read literally. Hence the High Court's reference to 'give effect to the will of the Legislature', which continued to speak half a century later in different circumstances. There are occasions when the changed legal landscape causes the legal meaning of a statute to change, but they are rare.[53]

Sir Victor Windeyer memorably captured the distinction in an address delivered in Canada in the year after his retirement after 14 years on the High Court of Australia, which is less well known than it should be:

> The words and phrases in Acts of Parliament have an intractable stubbornness under our traditional system of statutory interpretation. The dictates of Parliament must

[49] A form of apportionment existed in Admiralty for collision cases, which was preserved by the Judicature Act 1873 (36 and 37 Vict c 66) and continued in a modern form under the Brussels Convention on Collisions at Sea (1910), reflecting the influence of civil law: see F Lawson, 'Notes on the History of Tort in the Civil Law' (1940) 22 *Journal of Comparative Legislation and International Law* (3rd series) 136, 142–44. There are also instances of apportionment for contributory negligence in jury verdicts, which were sustained on appeal: see M Leeming, *The Statutory Foundations of Negligence* (Sydney, Federation Press, 2019) ch 5.

[50] This is no idle fancy; it is precisely what occurred in Florida and California in the absence of statutory reform: see *Hoffman v Jones*, 280 So 2d 431 (Fla 1973) and *Li v Yellow Cab Company of California*, 13 Cal 3d 804, 532 P 2d 1226 (1975). The various approaches taken in the US are beyond the scope of this chapter, but see V Schwartz, *Comparative Negligence*, 5th edn (New Providence, NJ, LexisNexis, 2010).

[51] An early contribution to the now burgeoning literature on coherence, directed to this area, is B Hepple, 'Negligence: The Search for Coherence' (1997) 50 *Current Legal Problems* 69.

[52] Contrast the breadth of 'just and equitable', which has led to consideration of the 'relative culpability' and the 'causal potency' of each party's conduct.

[53] An example may be seen in *Daniels v Australian Competition and Consumer Commission* [2002] HCA 49, (2002) 213 CLR 543 [35] (recognition that legal professional privilege is a substantive right, rather than a rule of evidence, altering the construction of 'reasonable excuse' in legislation authorising compulsive examinations).

> be obeyed and applied according to the letter. The words may sometimes take their meaning by an appreciation of the policy and purpose of the statute read against a background knowledge of the mischief it was enacted to remedy. They are not to be glossed, expanded, modified, or explained by a court, in the way that judicial statements of common law may be slowly broadened down from precedent to precedent.[54]

Judgments are not to be read as statutes. Less familiar, but equally true, is the converse aphorism that statutes are not to be read as judgments: 'the judicial task in statutory construction differs from that in distilling the common law from past decisions'.[55] Inevitably, statutes are more formal, more textual, to be read more *literally* (as Windeyer observed, 'to the letter'), and accordingly have an anchoring effect against incremental change. The metaphor employed by Baroness Hale and Lord Reed captures the temporal anchoring of statutes: they deprecated treating judicial statements like statutes which were 'set in stone'.[56]

## II. Judge-made Law Treated as Statutes

Sometimes *principles* from judge-made law are incorporated in terms in statutes. Consistently with one theme of this chapter, that occurs in several different ways. For example, the modern incarnations of the Statute of Frauds recognise the exceptions developed by the courts in cases of resulting and constructive trusts and the doctrine of part performance.[57] The equitable doctrines of applying the statute of limitations by analogy and declining to apply it in cases of concealed fraud are themselves incorporated in some modern statutes of limitation.[58] Sometimes the *text* of a court's reasons is incorporated. An example may be seen in section 5B of the Civil Liability Act 2002 (NSW), which very largely – but not entirely – picks up the language of the so-called 'calculus' in Mason J's judgment in *Wyong Shire Council v Shirt*, save for substituting 'not insignificant' risks for risks which are real in the sense of being neither far-fetched or fanciful.[59] A third form of legislative incorporation occurs when statute overturns a particular decision. Sometimes, as in the reversal of *Astley*, where the issue is binary, the construction of the statute is clear; but sometimes such provisions give rise to large questions of construction. For example, in *Wynbergen v Hoyts Corporation Pty Ltd* the High Court unanimously held that when a defendant had tortiously injured a plaintiff, the damages could not be reduced to zero, a result which was then overturned by

[54] V Windeyer, 'History in Law and Law in History' (1973) 11 *Alberta Law Review* 123, 130–31.

[55] See, eg, *McNamara v Consumer Trader and Tenancy Tribunal* [2005] HCA 55, (2005) 221 CLR 646 [40].

[56] *Woodland v Swimming Teachers Association* [2013] UKSC 66, [2014] AC 537 [38]. See also *NA v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355 [35]–[36].

[57] See, eg, Conveyancing Act 1919 (NSW), ss 23C(2), 54A(2).

[58] See, eg, Limitation Act 1969 (NSW), s 23 and Limitation Act 2005 (WA), s 27. See also P Handford, 'A New Limitation Act for the 21st Century' (2007) 33 *University of Western Australia Law Review* 387, 400–02 and M Leeming, '"Not Slavishly Nor Always" – Equity and Limitation Statutes' in P Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Oxford, Hart Publishing, 2018) 293, 299, 302–03.

[59] See *Bunnings v Giudice* [2018] NSWCA 144 [52]–[53].

legislation enacted by three Australian states and one territory.[60] But it is unclear what principles apply to the new legislation. Statute has overturned the authoritative construction determined by the High Court, but has failed to explain how the newly amended provision is to be applied.[61]

An entirely different phenomenon occurs when judgments are treated as if they were statutes. No legislative activity is present, and it seems necessary to recall that the reasons for judgment are not legislation. As a unanimous High Court recently said,[62] it is necessary to bear in mind that 'the words of a principle stated in a judge's reasons for decision require consideration of what those reasons convey about the principle and are not to be applied literally', citing what had been said by Gummow J in *Brennan v Comcare*:

> The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given.[63]

The caution is 'frequently repeated' because it is so easily forgotten. One striking example arose in *Rookes*,[64] which was argued in the House of Lords over 15 days in July and November 1963, with the main issue being the tort of intimidation and its relationship with the Trade Disputes Act 1906 (6 Edw 7 c 47). All law lords addressed the main issue, which was promptly overturned by statute.[65] Presently relevant is the cross-appeal on exemplary damages, which was addressed only by Lord Devlin, with whom in this respect Lords Reid, Evershed, Hodson and Pearce simply agreed.[66] Lord Devlin identified two categories of case where the common law authorised the award of exemplary damages, and did so in terms which were expressed to be exhaustive.[67] The categories were introduced as 'oppressive, arbitrary or unconstitutional action by servants of the government', and cases where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'.[68]

[60] *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 72 ALJR 65. In New South Wales, Queensland, Victoria and the Australian Capital Territory, s 5S of the Civil Liability Act 2002 (NSW) and its equivalents, enacted in response to the decision, expressly authorise determinations of 100% contributory negligence.

[61] These and other examples are discussed in more detail in Leeming, above n 49.

[62] *Stewart v Atco Controls Pty Ltd (in liq)* [2014] HCA 15, (2014) 252 CLR 307 [32].

[63] *Brennan v Comcare* (1994) 50 FCR 555, 572.

[64] *Rookes* [1964] AC 1129.

[65] Trade Disputes Act 1965 (UK).

[66] *Rookes* [1964] AC 1129, 1179, 1197, 1203, 1238.

[67] Notably, his statement that 'I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range' (*Rookes* [1964] AC 1129, 1226); and 'the judge should not allow [a case for exemplary damages] to be left to the jury unless he is satisfied that it can be brought within the categories I have specified' (*Rookes* [1964] AC 1129, 1228).

[68] *Rookes* [1964] AC 1129, 1226. Goudkamp and Katsampouka in the present volume identify this as one of the best examples of the role of formal reasoning in the law of obligations: J Goudkamp and E Katsampouka, 'Statute Law in the Law of Obligations: Dimensions of Form and Substance', this volume, ch 14.

Lord Devlin seemed to recognise a larger role for aggravated damages for cases which might formerly have been awarded exemplary damages. As a judicial swansong (Lord Devlin had retired 11 days before judgment was delivered),[69] *Rookes* contrasts starkly with his statement in 1962 'I doubt if judges will now of their own motion contribute much more to the development of the law'.[70]

Almost a year before *Rookes* was delivered, a Sydney newspaper published a story which imputed that Tom Uren, a sitting Member of Parliament, had been duped by a Russian spy. At the commencement of the trial, the publisher abandoned its pleas,[71] made an apology and left damages as the only issue for the jury. As is well known, the Australian High Court declined to follow *Rookes*,[72] while the further appeal to the Privy Council (argued over eight days) was dismissed, Lord Morris concluding with the statement that 'Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable'.[73]

Most members of the Australian High Court took Lord Devlin's speech at face value. Not so Windeyer J. Perhaps it was unduly charitable, perhaps with an eye to the inevitability of a further appeal, Windeyer J gave a devastatingly persuasive account of the way in which defamation was historically grounded in crime while at the same time suggesting that the result was merely 'to produce a more distinct terminology'.[74] He emphasised the narrowness of the verbal distinctions: contrast the traditional formulation ('conscious wrongdoing in contumelious disregard') and the essence of Lord Devlin's approach ('cynical disregard of a plaintiff's rights by a calculating defendant').[75] Windeyer J rejected the publisher's submission:

> We were asked to read Lord Devlin's statement of the second category of cases fit for exemplary damages as if it were not descriptive, but exhaustively definitive. We were asked to construe it literally and rigidly as if it were a statute. We were asked to subordinate the statement of principle to an illustration of that principle.[76]

A few years later, the same issue arose in the English Court of Appeal. Lord Denning, unlike the High Court of Australia, was directly bound by *Rookes* yet was unrestrained in his criticism. He said of Lord Devlin's speech that:

> I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by *Rookes v Barnard* are so great that the judges should direct the juries in accordance with the law as it was understood

[69] See *Rookes* [1964] AC 1129 p ix 'Memoranda'.

[70] P Devlin, *Samples of Lawmaking* (London, Oxford University Press, 1962). Indeed, *Rookes* was truly of the Court's own motion – it seems that the reformulation was not the subject of argument.

[71] Litigation at common law proceeded under the unreformed pre-Judicature system associated with the 3rd edition of Bullen & Leake.

[72] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 ('*Uren*').

[73] *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221, 241.

[74] *Uren* (1966) 117 CLR 118, 152.

[75] ibid 164.

[76] ibid 153.

> before *Rookes v Barnard*. Any attempt to follow *Rookes v Barnard* is bound to lead to confusion.[77]

A majority of the House of Lords disagreed. The decision is complex, and for present purposes just one aspect will be mentioned. Lord Reid said that 'It seems to me obvious that the Court of Appeal failed to understand Lord Devlin's speech'.[78] The passage which followed is worth reproducing in full, despite its length:

> The very full argument which we have had in this case has not caused me to change the views which I held when *Rookes v Barnard* was decided or to disagree with any of Lord Devlin's main conclusions. But it has convinced me that I and my colleagues made a mistake in simply concurring with Lord Devlin's speech. With the passage of time I have come more and more firmly to the conclusion that it is never wise to have only one speech in this House dealing with an important question of law. *My main reason is that experience has shewn that those who have to apply the decision to other cases and still more those who wish to criticise it seem to find it difficult to avoid treating sentences and phrases in a single speech as if they were provisions in an Act of Parliament.* They do not seem to realise that it is not the function of noble and learned Lords or indeed of any judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive. *When there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it.* I am bound to say that, in reading the various criticisms of Lord Devlin's speech to which we have been referred, I have been very surprised at the failure of its critics to realise that it was intended to state principles and not to lay down rules.[79]

I do not wish to enter into the debate as to the merits of joint judgments of appellate courts, save to say that it is one thing for there to be a joint judgment with its inevitable compromises of style and substance in an appeal in a settled area of the law which turns on its own facts, while it is another where a question of law is unsettled or developing or, to use Lord Reid's language, there is an 'important question of law'. To return once again to a theme of this chapter, why ever should it be thought that there should be a simple one-size-fits-all answer to a question as basal as whether there should be joint judgments in something as richly complex as the legal system?

One should be cautious to avoid the 'textualisation' of precedent.[80] It is revealing that a judge as sophisticated and experienced as Lord Reid was sufficiently concerned by the misreading of judgments on important questions of law as to recommend separate reasons.

[77] *Broome v Cassell & Co Ltd* [1971] 2 QB 354, 384.
[78] *Broome v Cassell & Co Ltd* [1972] AC 1027, 1084 ('*Broome*').
[79] *Broome* [1972] AC 1027, 1084–85 (emphasis added).
[80] See, eg, *Comcare v PVYW* [2013] HCA 41, (2013) 250 CLR 246 [15]–[16]; P Tiersma, 'The Textualization of Precedent' (2007) 82 *Notre Dame Law Review* 1187.

## III. Statutes Co-existing with Judge-made Law

One focus of Atiyah and Summers' work was §1-103 of the Uniform Commercial Code and its counterparts, which they described as 'extensive provisions enabling whole statutes or programmes to be overridden or modified by substantive considerations at the point of application', and to which there was said to be nothing comparable in England.[81] The section was said to be 'probably the most important single provision in the Code'.[82]

Section 1-103, in the form it then took, provided:

> Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

It bears a close resemblance to section 61(2) of the Sale of Goods Act 1893 (56 and 57 Vict c 71).[83] What does §1-103 add? It is axiomatic that statute always displaces inconsistent judge-made law, so that can scarcely have been its main function. Certainly, the section repels any inference that the statute – which is, after all, described as a 'Code' – is exhaustive in the sense of covering the field to the exclusion of all judge-made law. It then treats the law merchant as included within 'the principles' of law and equity, and then, lest there be any doubt about it, identifies a series of particular doctrines which are expressly preserved, subject to their being displaced by particular provisions of the Code. No express guidance is given as to when a particular provision 'displaces' a principle of judge-made law. This is left to the courts.

Perhaps §1-103 says something about how courts are to interpret the entirety of the Uniform Commercial Code. It is in a sense exhortatory – it encourages a certain curial attitude to the statute. I am speculating, but it may be that the codification movement in the US, which was much more extensive than in England and Australia, would have led to a different approach to construction in the US in the

[81] Atiyah and Summers, above n 4, 113.

[82] White and Summers, above n 27, 6.

[83] 'The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods'. The local counterpart is s 4(2) of the Sale of Goods Act 1923 (NSW). The wider form in the Code, which includes the words 'and equity' means that a large question of construction in the British and Australian legislation does not arise in the US. The issue is mentioned by G Williams, 'Language and the Law – III' (1945) 61 *LQR* 293, 302, reviewed in the New South Wales Law Reform Commission's report *Sale of Goods* (New South Wales Law Reform Commission, *Sale of Goods* (Report 51, 1987) 10–12) and in M Bridge (ed), *Benjamin's Sale of Goods*, 9th edn (London, Sweet & Maxwell, 2014) 11 ('an issue which has never been authoritatively determined in this country').

absence of the express command in §1-103, and for that reason was regarded by White and Summers as being of heightened importance.

An Australian counterpart, which also picks up and encourages the development of judge-made law, whilst at the same time declining to provide how that is to occur, may be seen in the proscription of unconscionable conduct. The legislative history is complex.[84] Complexity is an important part of the theme of this chapter, but it can also distract. Accordingly, what follows is simplified in two respects. I have omitted reference to the parallel state developments under the Fair Trading Acts,[85] and also the parallel federal regulation, insofar as unconscionable conduct relates to the supply of financial services, under the Australian Securities and Investments Acts 1989 and 2001 (Cth),[86] although I cannot avoid the confusion caused by sections being renumbered and statutes being renamed. The account commences in the mid 1980s, when the High Court had given prominence to the equitable principle in *Commercial Bank of Australia Ltd v Amadio*,[87] and similar legislation in some specialist areas was being developed.[88]

## A. 1986 – Unconscionable Conduct Directed to Consumers (s 52A)

A statutory prohibition against unconscionable conduct was first introduced into the Trade Practices Act 1974 (Cth) in 1986.[89] The new section 52A(1) provided that: 'A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable'.

[84] Contrast its counterpart in the Uniform Commercial Code, §2-302 and s 140A of the Consumer Credit Act 1974 (UK), considered in *Plevin v Paragon Personal Finance* [2014] UKSC 61, [2014] 1 WLR 4222.

[85] Broadly speaking, these tended to follow the amendments to the Trade Practices Act (for example, s 43 of the Fair Trading Act 1987 (NSW) mirrored ss 52A and 51AC), but did not extend to forms analogous to s 51AA. They ceased to have a separate existence after the commencement of the Australian Consumer Law.

[86] The Financial Sector Reform (Consequential Amendments) Act 1998 (Cth) introduced equivalents to ss 51AA and 51AB insofar as those norms of conduct applied to financial services: ss 12CA and 12CB of the Australian Securities and Investments Act 1989 (Cth). This seems primarily to have reflected a policy decision confirming ASIC, as opposed to the ACCC, was the regulator for financial services. An equivalent to s 51AC was belatedly added in 2001, at the same time the 1989 Act was replaced by the Australian Securities and Investments Commission Act 2001 (Cth). When s 12CC was introduced into the ASIC Act, a right to damages for breach of each of the prohibitions under ss 12CA–12CC was introduced (under s 12GF).

[87] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 ('*Amadio*').

[88] Notably in employment law, such as the proscription of 'harsh and unconscionable' contracts of work under s 88F of the Industrial Arbitration Act 1940 (NSW) and its successors, which influenced the drafting of the Contracts Review Act 1980 (NSW). See J Peden, *The Law of Unjust Contracts: Including the Contracts Review Act 1980* (Sydney, Butterworths, 1981) 73–74.

[89] By the Trade Practices Revision Act 1986 (Cth), s 22.

Contravention did *not* give rise to a right to damages.[90] Contravention did entitle an application for a range of 'other orders' under section 87, within a two-year time period.[91] Section 52A(2) set out a list of five non-exhaustive factors which could (but need not) be taken into account by the court in considering whether conduct had been unconscionable.[92] The scope of the provision was limited to goods and services ordinarily acquired for personal, domestic or household use or consumption and not for re-supply or being used in some manufacturing process.[93]

Note the complexity on the face of the statute. There were evaluative judgments to be made in relation to the five factors regard to which is authorised by section 52A(2) (which include the 'legitimate interests' of the corporation and whether it employs 'unfair tactics'). The court was then required to make a further evaluative judgment, namely, whether, in those and all other circumstances, the corporation had engaged in conduct that is 'unconscionable'. No express guidance was given as to what amounted to unconscionable conduct, save for the enumeration of the factors to which regard may be had. Thus the statute confirmed a core area of the ambit of the concept, but said nothing expressly as to its outer limits. However, statute chose to label the new norm of conduct by 'unconscionable', which had been given prominence in *Amadio*, and one available construction was that it meant no more and no less than the equitable doctrine.

## B. 1992 – Unwritten Law Unconscionable Conduct (s 51AA)

At first, section 52A was the only provision regarding unconscionable conduct, and it was directed toward consumers. This changed in 1992. Section 52A was renumbered section 51AB. An additional prohibition, section 51AA was added: 'A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories'.[94] Unlike section 51AB (formerly section 52A), section 51AA was not expressly limited by reference to the class of plaintiffs. However, no differently from that section, contravention of the new section 51AA did not entitle a plaintiff to damages.

[90] See s 82(3), amended by the Trade Practices Revision Act 1986 (Cth), s 52.

[91] See the new s 87(1C) inserted by the Trade Practices Revision Act 1986 (Cth), s 55.

[92] The parties' bargaining positions (Trade Practices Act 1974 (Cth), s 52A(2)(a)); whether the consumer was required to comply with conditions not reasonably necessary for the protection of the legitimate interests of the corporation (s 52A(2)(b)); whether the consumer was able to understand the documents relating to the transaction (s 52A(2)(c)); whether there was any undue influence or pressure or unfair tactics (s 52A(2)(d)); and a comparison of the value of the goods and services in the transaction at hand and in the market generally (s 52A(2)(e)).

[93] By the Trade Practices Act 1974 (Cth), sub-ss 52A(5), (6).

[94] By the Trade Practices Legislation Amendment Act 1992 (Cth).

Four points may be made about section 51AA.

1. First, the reference to 'the unwritten law, from time to time, of the States and Territories' does not bear its literal meaning. The implicit contrast with 'written law' reflected the distinction between the *conceptual* system of judge-made law with the *textual* system of statute law. The High Court subsequently held that there was but one common law of Australia, which is reflected in the form now taken by the successor provision (section 20 of the Australian Consumer Law).[95]
2. Secondly, the statute was a legislative imprimatur to equitable doctrine developed at that time, and expressly acknowledged that those equitable principles would develop over time. If there were any doubts as to the relative breadth of the equitable doctrine as formulated by Australian courts, there was nothing in section 51AA to discourage that development.[96]
3. Thirdly, unlike section 51AB, section 51AA was not limited in its terms by statute to consumer transactions (although on one view the application of equitable principle may have supplied similar limits).
4. Fourthly, section 51AA(2) provided that 'this section does not apply to conduct that is prohibited by section 51AB'. Accordingly, section 51AB must be taken to have some meaning separate from the meaning of unconscionability in equitable doctrine, lest it be entirely otiose.

## C. 1998 – Business Unconscionable Conduct (s 51AC)

Section 51AC was added in 1998.[97] It provided:

> A corporation must not, in trade or commerce, in connection with
>
> (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
>
> (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);
>
> engage in conduct that is, in all the circumstances, unconscionable.[98]

The provision did not apply to transactions valued at more than A$1 million. The difference between section 51AB (formerly section 52A) and section 51AC turned upon the monetary cap and the exclusion of listed public companies from the class of applicants who could avail themselves of it. The extrinsic materials stated that

[95] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, (2000) 203 CLR 503.

[96] Coincidentally, judgment in *Louth v Diprose* (1992) 175 CLR 621 was delivered shortly after the bill passed through the Senate, and before assent was given to it.

[97] By the Trade Practices Amendment (Fair Trading) Act 1998 (Cth).

[98] Section 51AC(2) was identical save that it dealt with the supply and acquisition of goods and services to and from a corporation (other than a listed public company) by a person.

'the government has accepted the principle that small business people are entitled to a legal protection against unconscionable conduct which is comparable to that accorded to consumers'.[99] The provision authorised the court to have regard to the same five factors already found in section 51AB, and to six further factors.[100] It probably followed that the form of statutory unconscionability in section 51AC was broader than that in section 51AB.

A much more important difference was in remedy. Section 82 was also amended so that a breach of section 51AC would give rise to a right to damages under that section. That was doubly innovative. Not only does it represent a signal change from the position in equity, where rescission is the standard relief, and monetary relief is problematic,[101] but it also reflected a large departure from the discretionary relief equity would ordinarily order. Particularly in a traditional case involving rescission for unconscientious conduct, discretionary factors (such as delay) might be a powerful factor telling against granting relief. But notwithstanding the value-laden determination of the 11 matters to which courts were authorised to have regard, and the evaluative determination of 'unconscionable', if that determination be made, then a party who could show loss was entitled *as of right* to obtain damages if proceedings were commenced within three years.

There was no equivalent delineation between sections 51AA and 51AC at that stage.[102] It would appear to follow that the same conduct might contravene both sections, although the latter but not the former would give rise to an entitlement to damages. This was addressed in 2001, effectively albeit a little cryptically, by an amendment which inserted three letters and one semicolon into section 82.[103]

## D. 2001, 2007 and 2008 – Monetary Limits Increased

In 2001, the monetary limit for transactions to which section 51AC applied was raised to A$3 million.[104] In 2007, the monetary limit was expanded again to A$10 million.[105] A further factor to which courts were authorised to consider

[99] Commonwealth of Australia, *Parliamentary Hansard*, House of Representatives, 30 September 1997, 8800 (The Hon Mr Reith MP).

[100] Whether the defendant acted consistently in its conduct to the plaintiff and other like counterparties (Trade Practices Act 1974 (Cth), s 51AC(3)(f)); the requirements of codes of conduct applying to particular industries (sub-ss 51AC(g), (h)); whether the defendant had 'unreasonably failed to disclose' to the plaintiff certain risks to the plaintiffs (s 51AC(3)(i)); whether the defendant was willing to negotiate (s 51AC(3)(j)); and whether the parties had acted in good faith (s 51AC(3)(k)).

[101] See *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274 284–286 and *Nadinic v Drinkwater* [2017] NSWCA 334, (2017) 94 NSWLR 518 [34]–[36].

[102] Contrast s 51AA(2), mentioned above.

[103] See Trade Practices Amendment Act (No 1) 2001 (Cth), sch 1, item 18, which inserted '; IVA' after 'Part IV'.

[104] See Trade Practices Amendment Act (No 1) 2001 (Cth), sch 1, item 2.

[105] Trade Practices Amendment Act (No 1) 2007 (Cth), sch 3, items 7 and 8.

was added to unconscionable conduct directed at consumers, namely, whether the defendant had a contractual right to vary a term of the contract unilaterally. Finally, in 2008, the monetary limits were repealed.[106]

## E. 2010 – Re-labelling as the Australian Consumer Law

In 2010 the Trade Practices Act was renamed the Australian Competition and Consumer Act 2010 (Cth).[107] The three statutory norms remained, but were now found in sections 20, 21 and 22 of what was termed the Australian Consumer Law, which was in Schedule 3 to the Act. The reference to the 'unwritten law, from time to time, of the States and Territories' was replaced by 'unwritten law from time to time', catching up with what the High Court had held a decade earlier. The right to damages for breaches of each of sections 20–22 continued.[108] Despite the statute's new name of the legislation, the unconscionable conduct provisions directed to businesses remained. Indeed, a new factor was added to the new section 22 (formerly section 51AC), namely, whether the defendant was willing to negotiate, the terms of the contract and whether those terms had been complied with, and any conduct of the defendant after the entry into the contract.

## F. 2011 – Coalescence of Consumer and Business Unconscionable Conduct

In 2011, sections 21 and 22 were repealed and replaced by a single provision, section 21.[109] The distinction between the former sections 51AB and 51AC was removed, although section 20, the successor to section 51AA, was not amended. There was now a single statutory prohibition on unconscionable conduct in section 21, and a list of factors which could be taken into account in section 22. Those factors were the same as those which could previously be taken into account in assessing section 51AC. Finally, section 21(4)(a) provided that 'It is the intention of the Parliament that this section is not limited by the unwritten law relating to unconscionable conduct'.

[106] Trade Practices Amendment Act 2008 (Cth), sch 3, item 12.

[107] By the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth). For how this works in light of the limitations on federal legislative power, see J Dietrich, 'Service Guarantees and Consequential Loss Under the Australian Consumer Law: The Illusion of Uniformity' (2012) 20 *Competition and Consumer Law Journal* 43.

[108] Australian Competition and Consumer Act 2010 (Cth), s 236.

[109] By the Competition and Consumer Legislation Amendment Act 2011 (Cth).

## G. Effects

What is the effect of this legislative history upon judge-made law? First of all, and unsurprisingly in light of the extent and recency of legislative change, there have been relatively few decisions and fewer appellate decisions. That may also be a consequence of the residual nature of the norm; a plaintiff who has a cause of action in contract, or tort, or breach of fiduciary duty, or for misleading and deceptive conduct is apt to litigate a well-established claim in preference to something more contestable. And it is also probably a consequence of the inherent uncertainty of the language in which it is expressed.[110] The legislation has incorporated the language of 'unconscionable conduct', and it will be recalled that Mason J emphasised at the outset of his judgment in *Amadio* that: 'It goes almost without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct'.[111]

Secondly, what does emerge from the legislative history over a quarter of a century is a steady expansion of the statutory norm, which may be contrasted with the equitable principle. That seems to be clear from (a) the increasing list of factors consideration of which is expressly sanctioned, (b) the extension to 'business' or 'commercial' transactions, (c) the ever-increasing monetary limits upon the conduct to which the provision applied and (d) the fact that the statutory concept has (since 1992) sat alongside a federal law which picked up the 'unwritten law' and (since 2011) has been expressly not limited by the unwritten law. In short, there would seem to be an overwhelming case based on legislative history for an expansionist reading of the provisions. Section 21(4)(a) appears to be even more exhortatory than §1-103.

Thirdly, the legislative text and history make it all the more important to identify some limits to the doctrine. Most famously, attempts have been made to limit its scope to conduct involving a 'high level of moral obloquy'.[112] Whether this is so remains unresolved. There is now some authority to the effect that such a submission is unhelpful,[113] as well as authority that it may be useful, largely to emphasise

[110] See P Strickland, 'Rethinking Unconscionable Conduct Under the Trade Practices Act' (2009) 37 *Australian Business Law Review* 19 and R Baxt, 'What Place Does "Moral Obloquy" Have in the Evaluation of Statutory Unconscionable Conduct?' (2014) 88 *Australia Law Journal* 396.

[111] *Amadio* (1983) 151 CLR 447, 461. See also *Blomley v Ryan* (1956) 99 CLR 362, 405.

[112] These are associated with *Attorney General of New South Wales v World Best Holdings Ltd* [2005] NSWCA 261, (2005) 63 NSWLR 557, although it is far from clear that Spigelman CJ's reasons are so to be read.

[113] See, eg, (and without purporting to be exhaustive) *PT Ltd v Spuds Surf Chatswood Ltd* [2013] NSWCA 446 [101]–[102], *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75, (2017) 251 FCR 404 [52] and *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186, (2016) 249 FCR 421 [54]–[60], [69]–[72], [88]. See also S McLeod, 'Statutory Unconscionable Conduct Under the ACL: The Case Against a Requirement for "Moral Obloquy"' (2015) 23 *Competition and Consumer Law Journal* 123.

the extent of the departure from accepted community standards.[114] But given the text, the legislative history and the nature of the equitable principle from which the statute derives, it seems unlikely that it can readily be circumscribed by curial gloss.

Fourthly, it is to be recalled that language is slippery, and as one distinguished commentator has very recently observed of Hohfeld's campaign for precision in legal language: 'even lawyers are deceived by the two-faced nature of much of legal language, looking in one way at legal usage and in another at the pre-legal ideas that the law intends to regulate'.[115] The distinctiveness of the statutory norm, which is broader than equitable principle and whose contravention now gives rise to a right to damages, provides a further reason to bear in mind whether one is drawing upon equitable principle or is instead engaged in an exercise of statutory construction. That is in one sense helpful. It reminds me of a single lane bridge just around a blind corner near my grandmother's home, which to this day has fended off all attempts to widen it, on the basis that 'It's so dangerous that it's safe'.[116] Sections 20 and, especially, 21 of the Australian Consumer Law bear a similar character. The interrelationship between statute and equity is complex and intertwined and requires careful attention.

## IV. Conclusion

How does this relate to the theme of this book? As has been observed,[117] precise definitions of 'form' and 'substance' are elusive. I have sought to explain that the role of statutes in a legal system answers at least one definition of its 'formality', and so the ways in which statute law is treated as judge-made law, and vice versa, may be said to reflect *dimensions* of the form/substance distinction. Most if not all of the examples in this chapter may be familiar, but that is really the point. Legal reasoning and legal decision-making deals with judgments and statutes all the time, and the roles of judge-made law and statute law and their interrelationship have profound implications on the nature of the legal system. Sometimes it is useful to step back and look again, with fresh eyes, on matters that may seem obvious.

[114] For recent examples see *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15, (2018) 329 FLR 149 [193]–[195] and *Mastronardo v Commonwealth Bank of Australia Ltd* [2018] NSWCA 136 [18]–[22].

[115] F Schauer, 'Hohfeld on Legal Language' in S Balganesh, T Sichelman and H Smith (eds), *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries* (Cambridge, Cambridge University Press, 2019) (forthcoming).

[116] It may be seen on Google Maps (Oatley, south of the Sydney CBD, where Boundary Rd crosses the railway line).

[117] A thoughtful and wide-ranging exploration of the role of form is found in R Summers, *Form and Function in a Legal System: A General Study* (New York, Cambridge University Press, 2006) especially 61–63.