Book Review

The Statutory Foundations of Negligence by Mark Leeming (2019), Federation Press, 224 pp, ISBN 9781760021955

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I Introduction

The title of this book, *The Statutory Foundations of Negligence*,[1] may seem surprising to those afficionados of negligence who are used to thinking of it as a common law concept that has been intruded upon by statute in recent years. This timely and significant book discusses not only the historical foundations of negligence in statute, but the present statutory foundations of negligence as expressed in the civil liability legislation which was introduced in Australian states and territories from 2002.[2] This legislation has forced lawyers and academics to recognise that the common law is expressed both in statute and in cases, and Justice Leeming shows this 'entanglement'[3] goes further back than many of us recognise and creates a richness that should justly be celebrated, rather than resisted. The themes that the book illustrates and reiterates across the chapters include: the notion that statutes often have shaped the law of negligence in ways that have often not been recognised; that the statute–judge-made law relationship is dynamic and continuing; and that it is unfortunate that labels for concepts coming out of statutes often are based on a case, rather than a statute, and this tends to skew the way lawyers think.

Chapter 1 sets out this basic argument and an example of this entanglement in introducing the interaction of statute and case law in causation and contributory negligence. Leeming also considers the statutory framework within which the law of negligence operates in Australia in respect of jurisdiction and applicable law. He argues that this is appropriate as a way of starting 'from the beginning, which is by what authority is a court authorised to decide claims that a defendant was

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1 Justice Mark Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019).

2 The Civil Liability Acts are as follows: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Personal Injuries (Civil Claims) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Personal Injuries Proceedings Act 2002* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

3 Leeming (n 1) 2.

negligent'.[4] The Introduction is followed by chapters each covering an element of the law of negligence: duty, breach and causation. There is a chapter on the treatment of roads authorities and three chapters on damages, in relation to multiple defendants, pure mental harm and personal injury.

II Duty

Many people would suggest that the duty of care has nothing whatever to do with statute, and that even under civil liability legislation it is not affected. Leeming proves them wrong.[5] He notes the impact of the *Common Law Procedure Act 1852*,[6] and that duty of care has been affected by legislation in various states — for example, in occupiers' liability statutes. The curious case of the New South Wales ('NSW') civil liability statute's heading 'Duty of Care' when the subject-matter is breach is lightly touched on, but more importantly he notes that duty as an element is now entrenched by civil liability legislation — not because it is stated there, but because all the statutes 'presuppose that a duty of care is imposed at common law'.[7] Leeming also notes that a duty cannot exist if it is contrary to statute, as shown in *Sullivan v Moody*,[8] for example. In relation to public authorities, of course, statute must be the starting point. All this means that the civil liability legislation raises questions about the approach to any mooted change — should it be treated as statutory construction or as the development of common law principle? This is a major challenge to traditional approaches to the duty of care.

III Breach

One could be forgiven for thinking that breach of duty was a statute-free zone, but this is not so, since the Civil Liability Acts across Australia, save for the Northern Territory, set down text for considering breach. How has this changed the approach that was formerly based on Mason J's judgment in *Wyong Shire Council v Shirt*[9]? One of the major changes in the 20th century has been the shift away from trial by jury and the consequent development of judicial reasons in this area. But this is not the focus of the chapter on breach,[10] which is more concerned with the way that civil liability legislation has created a new way of structuring the analysis of breach. Again, Leeming notes that, as with duty, inconsistency with statute may prevent breach arising, as in *New South Wales v Fahy*.[11] A nice little vignette is made of the special provisions for professional negligence in the civil liability legislation and the significant effect of slight textual variations. It also shows how the statute altered the test and raises the issue about whether this should be seen as a defence or the standard of care — it has been held in three states that it is a defence. The

4 Ibid 12.
5 Ibid ch 2.
6 15 & 16 Vict, c 76; Leeming (n 1) 21.
7 Leeming (n 1) 22.
8 (2001) 207 CLR 562.
9 (1980) 146 CLR 40, 47.
10 Leeming (n 1) ch 3.
11 (2007) 232 CLR 486.

introduction of *Wednesbury* unreasonableness and the question of mandamus as a possible threshold has not only introduced public law notions that some would regard as improperly part of negligence law, but it has also created an awkward and difficult piece of law requiring a complex and nuanced interpretation.

IV Causation and Contributory Negligence

Chapter 4 considers the interaction of causation and contributory negligence and statute. Leeming discusses the legislative responses to some cases such as *Piro v W Foster & Co Ltd*[12] and *Astley v Austrust Ltd*,[13] emphasising that the entanglement of statute and case law goes both ways. The statutory apportionment legislation created some difficulties concerning the meaning of 'fault', which were only resolved in the legislation following *Astley*. Even afterwards, there are significant issues about what enlivens the defence and how the slightly different qualitative assessment of fault in relation to plaintiff and defendant should be managed. The causation regime in the civil liability legislation recalls McHugh J's judgment, rather than the majority's, in *March v E & M H Stramare Pty Ltd*,[14] changing to the two-stage test of 'factual causation' and 'scope of liability', to replace the 'common sense' test. This looks very clear, but in fact scope of liability is not very clear. It seems to refer to duty questions, and may include remoteness, but the fuzziness means that there is constant resort to older cases.

The latter part of Chapter 4 concerns the changes to contributory negligence in motor accident and workers compensation legislation and in the civil liability legislation. In the latter, the same test is apparently to be applied to both parties in relation to fault. This is deeply confusing in light of past views of contributory negligence, and is yet to be clarified satisfactorily. Coming back to his theme, Leeming concludes this chapter by discussing the danger of lawyers' preconception that contributory negligence is statute-based and causation is a common law concept, and notes that this distinction may be illusory. He also suggests that the teaching of statutory interpretation may be at fault and highlights his lack of reference in the chapter to the '"golden rule" or the "mischief rule" or the "literal rule", those mainstays of statutory construction in a traditional undergraduate law course'.[15] My response as a teacher of statutory construction is that those rules are taught only as traditions now, and most law schools are teaching the current statutory construction approach of 'text, context, purpose'.[16] Leeming's note that his chapter has emphasised 'text in its context'[17] reflects that approach, his argument being that this is more likely to lead to a more integrated approach to the relationship of statute and case. He may be pleasantly surprised at the developments in statutory interpretation teaching in law schools.

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12 (1943) 68 CLR 313.
13 (1999) 197 CLR 1 ('*Astley*').
14 (1991) 171 CLR 506.
15 Leeming (n 1) 80.
16 For example, based on Interpretation Acts of various jurisdictions and the High Court's guidance in cases such as *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.
17 Leeming (n 1) 80.

V Roads Authorities

Chapter 5 considers the singular topic of the liability of roads authorities in negligence. It is fascinating to find that the rules about parishioner's obligations to maintain highways go back to the *Statute of Winchester 1285*,[18] well before the development of the tort of negligence. There was an attempt to develop this obligation by analogy to the *Statutes of Hue and Cry*,[19] but this appeared not to be very successful. The point of all this is that there is a statutory basis to rules about liability of roads authorities. In Australia, a major turning point was the decision in *Brodie v Singleton Shire Council*[20] that roads authorities' immunity for non-feasance should no longer be recognised, despite the argument that legislation had continued to back up this rule up until 1993. The 1993 statute (*Roads Act 1993* (NSW)) made the immunity ambulatory — depending on the extent of the common law immunity — so the majority of the High Court of Australia had no difficulty in making its holding. The civil liability legislation has partially reinstated the rule, by in most cases qualifying the immunity by requiring the authority to have 'actual knowledge' of the problem in order to void the immunity.[21] Issues remain because it is unclear what the status of the pre-*Brodie* exceptions to the rule are, there are variations throughout Australia, and it is unclear what is meant by the requirement of knowledge. Again, the entanglement of case law and statute is deep.

VI Damages

Chapters 6, 7 and 8 all concern the impact of statute on damages in an action for negligence, but focus on different issues. Chapter 6 concerns multiple defendants. It begins by noting the massive changes to damages created by mid-20th century statutes — simplifying the traditional rules concerning joint and concurrent tortfeasors.[22] But intricacy has returned with the civil liability statutes and associated legislation such as motor accident legislation, which have reintroduced proportionate liability in some areas, and created a complex scheme of caps and thresholds for damages, made even more complicated by differences across jurisdictions. The changes to the law for multiple defendants have required considerable statutory construction to work out the complexities of matters such as the meaning of 'liability', how immunities such as the spouse immunity (only abrogated in 1964 in NSW) should be managed, and whether there should be immunity where damage was caused by another party who was only liable in contract or equity. There were some unexpected indirect consequences of the legislation. Vicarious liability is another area that remains difficult and controversial. There are many statutes affecting it and multiple views of the doctrine have been set out, notably in *Darling Island Stevedoring & Lighterage Co Ltd v Long*.[23] The liability there arose out of a statute and Mr Long brought two

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18 13 Edw I, c 3.
19 22 Geo 2, c 24.
20 (2001) 206 CLR 512 ('*Brodie*').
21 See above n 2.
22 Leeming (n 1) 100.
23 (1957) 97 CLR 36.

separate actions — for negligence and for breach of statutory duty. This meant that there was a personal duty on the 'person-in-charge', regulated by statute, breach of which would not necessarily be negligent. Questions whether the master was liable for the *acts* rather than the *torts* of the servant existed and this confusion has created a persistent uncertainty about the doctrine.

Chapter 7 concerns damages for pure mental harm. Legislative intervention has occurred several times since the original recognition that liability for pure mental harm could arise. The response to *Chester v Council of the Municipality of Waverley Corporation*[24] was a statute that would allow close relatives to recover, taking away the requirement of the majority in that case that it was always necessary to actually see or hear the victim be killed, injured or put in peril by the defendant.[25] The NSW legislation provided for liability in a class of case, leaving the common law to develop that class of case. Other jurisdictions merely abolished the rule, leaving no room for common law development. The possibility of the common law moving further was removed in the civil liability legislation with the NSW legislation being very restrictive. The differences between the various jurisdictions are highlighted in the cases of *Wicks v State Rail Authority (NSW)*[26] (NSW legislation) and *King v Philcox*[27] (South Australia ('SA') legislation). Mr Philcox was not allowed to apply *Wicks* to his case so that the fact that he had been present at the aftermath of the accident would entitle him to recover. This was because the High Court read the history of the SA legislation as tied to earlier NSW legislation when the phrase 'when the accident occurred' was taken to exclude the aftermath, unlike the later NSW legislative position.[28] This is a cogent example of the complexity of the relationship between statute and common law in this area.

In discussing damages for personal injury in Chapter 8, Leeming considers the range of statutory regimes applying to personal injury damages in NSW as an example — workers compensation, motor accident, Civil Liability Act, offenders in custody, dust diseases, and claims arising out of tobacco use. This is a significant list, not quite the same as the lists in other jurisdictions, but such complexity occurs across most Australian jurisdictions. The amount of damages a person receives for personal injury is a significant issue for them and for insurers. It is arguable that people often receive less than they should and that this is one reason why people run out of lump sum damages.[29] Leeming does not address this issue directly, but his account of the changes to various forms of damages — for lost capacity to provide domestic services, for *Griffiths v Kerkemeyer* damages, for *Sullivan v Gordon* damages, and discount rates for future economic loss (now 5–7% at a time of very low inflation) — by the interaction of statute and case law shows that there is much contestable material and that more recent legislative change seems focused on reducing awards.

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24 (1939) 62 CLR 1.

25 *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4; Leeming (n 1) 127.

26 (2010) 241 CLR 60 ('*Wicks*').

27 (2015) 255 CLR 304.

28 Leeming (n 1) 139–40.

29 See Prue Vines, Matthew Butt and Genevieve Grant, 'When Lump Sum Compensation Runs Out: Personal Responsibility or Legal System Failure?' (2017) 39(3) *Sydney Law Review* 365.

VII Conclusion

The book concludes with an epilogue in which Leeming takes up the differences between statutes with immediate effect (such as to reverse a particular decision) and future-looking effect. The latter (some civil liability legislation being an example) may help or hinder future development of case law directly or indirectly. Leeming then reiterates his four themes: first, the temporal dimension of the dynamic interaction of judge-made and statute law. The second theme is the difference in approach between reading text of case law and text of a statute, the former being far more flexible. Third is the issue of labels that might render the complexity of the statute–common law interaction more opaque. The fourth theme is the need for the legal system, because it is so complex, to be self-referential.

This book explores the extremely important issue of the treatment of different sources of law for academics and lawyers. As a case study of a particular area of law in which both these sources of law apply, it shows us the complex and close connections between common law and statute. Leeming has illuminated this in a way that I would not have thought possible. This book should be on all tort lawyers' shelves, reminding and stimulating us to give equal depth of thought to both sources of law, and to develop the habit of thinking of case law and legislation as dynamic and integrated with each other.