Chapter 3

Statutory Interpretation *as* Private Law

The Hon Mark Leeming[*]

Introduction

This chapter illustrates aspects of the interrelationship between statute law and private law. It is based on an extended example, the law of contributory negligence. It takes that course because law is complex. Sir Robert Goff observed, in his insightful 1983 Maccabean lecture, 'The Search for Principle':[1] 'Law is not only difficult, but extremely complex; and our vision of law is constantly changing.'

Law's complexity is no new thing. Indeed, Goff may have been echoing Coke's admonition that *cognitio legis est copulata and complicata*.[2] This is a constant, yet under-appreciated, challenge in the exposition of legal principle. Simple examples, such as are commonly found in works of legal theory, will mostly fail to disclose the true complexity of the legal system, although the complexity is scarcely surprising if one bears in mind the centuries of history of judge-made and statute law which may bear on many novel problems and the self-selected difficult cases which occupy appellate courts.

The modern law of contributory negligence has developed over the last century, in a range of areas (in admiralty, in tort and in contract) but always involving statutes. Those statutes speak with a variety of voices, and have prompted different curial responses. Perhaps most obvious is the contrast between the mid-20th century apportionment legislation, which uses the language of the law of negligence and is directed to altering elements of the defence of contributory negligence,[3] and the 21st century civil liability legislation, which speaks more generally to facts giving rise to a cause of action (thus conduct may be 'negligent' for the purposes of the civil liability legislation even if the cause of action relied upon is in nuisance, or trespass, or indeed

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1 (1983) 69 *Proceedings of the British Academy* 169.

2 A loose translation (which fails to capture the meanings of 'cognitio' fully), is 'The comprehension of law is interconnected and complex': E Coke, *First Part of the Institutes of the Law* (London, 16th ed, 1809) section 283.

3 For example, the definition of 'fault' in the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) as originally enacted was 'negligence, or other act or omission which gives rise to a liability in tort or would, apart from this Part, give rise to the defence of contributory negligence but does not mean or include a breach of statutory duty'.