case is now a major authority in modern discussion of online publication (i.e. a landmark in the evolution of defamation), it also demonstrates superbly a difficulty which defamation law still has to confront: whether an imputation's defamatory character is to be decided by what reasonable members of society *do* think, or by what they *should* think. On this issue, what the courts have said and what they have done are not always one and the same. Until this tension is resolved, we will continue to see even specialist members of the libel bench struggle with difficult questions of social judgment (e.g. *Brown v Bower* [2017] EWHC 2637 (Q.B.), [2017] 4 W.L.R. 197, at [46]–[48]).

In the book's defence, landmarks are not the same yesterday and today and forever. *Byrne v Deane* was barely discussed until the Internet age dawned. *Charleston* reminds us how transient doctrinal boundaries can be within the law of torts. If Counsel's pleadings had only been more ambitious, *Charleston* might well have been the case that set defamation on a path towards a new life as a dignitary tort, not too dissimilar from the Roman *actio iniuriarum*. But such a revolution was not to be; the fate of *Charleston* has been as a less glorious landmark on meaning. The tensions in *Youssoupoff* and *Byrne v Deane* are interesting and require reformers' attention, but whether these cases will endure as landmarks at the boundaries of defamation is less certain.

Whilst a greater engagement with landmarks at doctrinal boundaries could have contributed to the discussion of reform in this field, the book does not claim to have all the answers. *Landmark Cases in Defamation Law* stays true to the historical approach which it (and its predecessors have) set out to follow. Defamation might be an unusual tort, with its origins in a society markedly foreign to ours, but the tort is not on its way out. Reputations are of enduring importance in today's society. An improved understanding of important cases in defamation's history will go a long way to understanding the tort in its modern form.

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The Statutory Foundations of Negligence. By Mark Leeming. [Alexandria, NSW: The Federation Press, 2019. xxx + 194 pp. Hardback $135.00. ISBN 978-1-760-02195-5.]

It has been said that "lawyers love the common law, [and] hate statutes" (p. 2, quoting Kirby J. in *Vigolo v Bostin* [2004] H.C.A.Trans. 107). Certainly when one thinks of the law of negligence, it is often to certain landmark or memorable cases that one's mind initially leaps: the snail in *Donoghue v Stevenson* [1932] A.C. 562, perhaps, or the flying cricket balls of *Bolton v Stone* [1951] A.C. 850. Thoughts are less likely to turn immediately to the many pieces of legislation that form a part of the complex law concerning negligence. Nevertheless, Mark Leeming's work, *The Statutory Foundations of Negligence,* persuasively demonstrates that statute law is an important, and under-appreciated, part of the law of negligence. Indeed, a central claim in this work is that certain pieces of legislation have such a role in, and influence upon, the law of negligence that these statutes may fairly and accurately be described as no less than "foundational" (see e.g. pp. 12, 126, 163).

The author explores several themes in this work (pp. 6–8). First, as already mentioned, the ways in which statute and judge-made law interact. Another is the importance of understanding the context in which a statutory text was enacted

when searching for the legal meaning. A historical analysis is provided for familiar and less-known legislative provisions, considering how the statutes came into being and how courts have approached them. Also explored is the importance of labels and language, often sourced in judge-made law and then used in statute. Finally, the question of how best to understand the nature of a body of law which is made up of both judge-made law and statute. As the author states (pp. 79–80):

> Different modes of reasoning apply when it is sought to extend the operation of a judge-made rule as opposed to a statutory rule: judgments are not to be read as statutes, and statutes are not to be read as if they were judgments. But the distinction is not crisp, and in some cases at least, it may be illusory. The body of law applicable to resolve a dispute is often an amalgam, resulting from a deep interaction between judge-made law and statute.

Where the text of a statute is involved in a court's reasoning, when can the court be said to be "developing the common law", and when is the court instead engaging in statutory construction? (p. 140) This is sometimes difficult to answer.

The significant focus of this work is upon the "entangled" interaction between legislation and judge-made law. This is, says the author, something that has received insufficient attention and is less well understood than it ought to be. Much of the judge-made law is a response to, or consequence of, the existence of a statute, and statutes are often enacted as a reaction to a judgment (pp. 2–3, 8). An example of the former, Leeming suggests that the duties created by statutes, and litigants' submissions based upon these statutes, played a significant role in the formation of the requirement of the duty of care in negligence (pp. 18–21).

The author puts forward numerous thought-provoking ideas and observations about this interaction, accompanied by illustrative examples from case law. For example, is there a general tendency for inattention to statute? In certain areas where a statute has been enacted on a subject previously governed principally by judge-made law, to what extent do academics, litigants, judges and students truly engage with the terms of the statute? One case Leeming notes on this point is *Town of Port Hedland v Reece William Hodder (No. 2)* (2012) 43 W.A.R. 383. The Chief Justice of the Supreme Court of Western Australia there commented (at [47]):

> much tort litigation in this State is being conducted as if the legislation had never been passed, on the basis, as here, that the application of the legislation would make no material difference to the outcome. This has meant that important issues with respect to the interrelationship between the common law and the legislative provisions and as between the particular legislative provisions remain unresolved.

Martin C.J. noted that all parties in that case had proceeded on the basis that there was no difference between the principles of the common law and the provisions of the Occupiers' Liability Act 1985 (WA) and the Civil Liability Act 2002 (WA) which would lead to any difference in outcome on the issues of duty of care, standard of care or causation (at [46]). No submissions had been made as to the interaction between the statutes and the common law. He described this as regrettable, and as the court had not had the benefit of submissions or argument it was deemed to be an inappropriate case for resolution of these issues (at [47]).

However, as Leeming demonstrates, several important pieces of legislation, in particular the civil liability legislation enacted in each state across Australia (with some exceptions, entitled the Civil Liability Acts), have had a significant impact

on the development of the law of negligence in Australia – even in areas on which the statute may be silent. The existence of the civil liability legislation has, for example, entrenched the duty of care requirement (p. 33). Though there is no specific provision dealing with the question of when a duty of care will be owed, Leeming notes that the legislation takes as a starting premise the continued existence of duty of care as an element in negligence (p. 33).

This work offers numerous examples that provide useful insights into the way in which statute has shaped, and continues to be relevant to, the law of negligence. For brevity, a few are discussed below. The question of when a duty has been breached is an area of law in which there has been significant statutory amendment. In all Australian jurisdictions except the Northern Territory, the civil liability legislation contains a section providing "General principles" which apply in most cases and must be considered before a finding of breach can be made (p. 39). At first glance, the relevant provision appears, more or less, to have captured what existed at common law before its enactment, and what still exists in England and Wales today. Leeming, however, notes that there are subtle variations which require careful consideration. A new structure has been imposed on the question of breach; the civil liability legislation requires a threefold structured analysis, where each of the parts must be satisfied before a defendant can be found "negligent" (pp. 45, 54). It turns judicial statements of principle into something altogether more structured (pp. 45–46). In *Wyong Shire Council v Shirt* (1980) 146 C.L.R. 40, 48, Mason J. had explained that a "risk which is not far-fetched or fanciful is real and therefore foreseeable". The statute, however, requires that a risk be "not insignificant" before a person may be found negligent. This is probably slightly more demanding than its predecessor (p. 44). Yet, as Leeming notes, practitioners and judges continue, at times, to apply the old test – "a telling example of Kirby J.'s aphorism that lawyers love the common law and hate statutes" (p. 44). Even so, the fact that these preconditions to breach have been set out in statute is likely to have "anchoring effect" on the development of the law: the words of a statute cannot be slowly expanded or modified in the same way that an expression of principle in a judgment might (p. 47).

Another area particularly relevant to the themes of this work is the law concerning contributory negligence, and its relationship with causation. The availability of the former is often thought of as being grounded in statute, the latter as a common-law concept (p. 79). Leeming persuasively demonstrates the ways in which the development of the law of contributory negligence in the last century has reflected the interaction between judge-made law and statute, and also suggests that, to a significant extent, the statutory reform of contributory negligence has meant a reconsideration of the principles of causation (pp. 56–71). A different but related example of the complex interaction: in *Astley v Austrust* (1999) 197 C.L.R. 1 the High Court of Australia had held (departing from precedents set in other common-law jurisdictions) that damages awarded in a claim in contract could not be reduced for contributory negligence. "Negligence", in the definition contained in the relevant contributory negligence legislation, was confined to negligence giving rise to liability *in tort* (p. 72). The statute was silent as to contract law. This decision, Leeming notes, was criticised for being narrow and backward-looking (p. 72). However, he argues that the issue here was one of interaction between statute and judge-made law. The text of a statute is precise and fixed, and statutes are not to be read as judgments: they are not be read more literally, more formally, and "have an anchoring effect against incremental change" (p. 73). All jurisdictions subsequently enacted legislation to overrule *Astley,* and to extend the availability of apportionment to contributory negligence in contract.

Leeming's work does not extend to all of the law of negligence. Rather, it considers areas where statute law is most significant. Leeming takes his readers through the central elements of a negligence claim: duty of care, breach and causation (dealt with alongside contributory negligence). There are further chapters dealing with the special position of road authorities, cases involving multiple defendants, pure psychiatric injury and the principles concerning damages for personal injury.

While this book is strongly focused on tort law in Australia, and much of it is devoted to consideration of the provisions of the civil liability legislation, it is not limited to Australian law. Several parts of the work prominently feature the law of England and Wales. The book is also aimed at students: those "undertaking an advanced course in tort, or a component of a masters course" (p. 8). Helpfully the author includes, at the end of each chapter, a "Further questions and references" section, containing suggested reading as well as several questions to prompt thinking and discussion. The book, with its emphasis on Australian tort law, is likely to attract most interest from students of the law in that country. That said, it will also appeal to wider readers as the themes covered are relevant to lawyers and teachers of law, in Australia and in the UK. The relationship between the judge-made law and statute law has, as Burrows has noted, been a relatively under-explored topic by commentators (see Andrew Burrows, "The Relationship Between Common Law and Statute in the Law of Obligations" (2012) 128 L.Q.R. 232). This work is therefore a welcome contribution to the field. It is well-researched. The footnotes are generous, with many case references where the ideas considered are brought to life and seen in action.

The reader, certainly, is left feeling that greater attention ought to be given to statutes: their historical context and purpose, their wording and any variation from judicial statements, their anchoring effect. Also, more careful thought ought to be paid to the nature of legal rules and the influences upon their current form. The author expresses the view that, despite the fact that it is more exciting to read a court's decision than a statute, there is no reason to think "that a class of undergraduates might not be engaged by the historical interrelationship between particular doctrines of 'common law' and the statutes by which those doctrines are informed and with which they are enmeshed" (p. 80). After reading this work, I am inclined to agree. Really, we cannot say that we love the common law but dislike statutes, for the former may be born of the latter, and the two are often closely connected.

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Justinian's Digest 9.2.51 in the Western Legal Canon: Roman Legal Thought and Modern Causality Concepts. By WOLFGANG ERNST. [Cambridge: Intersentia, 2019. xii + 177 pp. Paperback €49.00. ISBN 978-1-78068-832-9.]

As any teacher of delict/tort (or criminal law) is aware, the topic of causation often presents challenges to students' comprehension. The difficulties found in the search for a clear and unified approach to causation issues are not new, as Professor Ernst's cogent book investigates.

The book's central question (or *quaestio*) is the supposed controversy between two texts of the Roman *Digest*. The first text (D.9.2.11.3), from the jurist Ulpian, following an earlier view taken by Celsus, notes that where a slave is mortally wounded by an offender, but, before drawing his last breath, is struck and killed