the Tasmanian definition of "recreational activity". This is not infrequent in Australia. Likewise, there may be a legislative response to a decision which indicates that a provision is uncertain, or needlessly problematic.[103] But the main point is that confining attention to the law-making function of courts only in cases which do not involve statute is like studying the tip of the iceberg which is visible from above, and ignoring the overwhelming majority of the phenomenon.

There is more to judicial law-making than determining novel questions of law. From time to time, courts explicitly invite legislative reform. A court will not infrequently note that a point was *not* argued, and one reason for doing so is to flag that point as a candidate for attention in a later case.[104] French CJ's statement in *Momcilovic v The Queen* that there was "much to be said for the proposition" that State laws applied to courts exercising federal jurisdiction of their own force, rather than (as a series of appellate decisions at that stage held) by virtue of federal statute is an example,[105] which anticipated the reformulation in *Rizeq v Western Australia* considered in Chapter 10 below. The tone with which a point is resolved can, at least to a sophisticated audience, convey strong indications of the court's attitude to that point and likely attitude to similar points in future cases. In short, the law-making aspect of the craft of judging is more nuanced than has been indicated. However, that is outside the scope of this work, which instead takes the same approach as did Cardozo a century ago, concluding the fourth Storrs Lecture delivered to a crowded auditorium at Yale:[106]

> [T]here remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power. It is with these cases that I have chiefly concerned myself in all that I have said to you.

## 1.6 Conclusion

Examples of legal reasoning addressing the interaction of common law, equity and statute could readily be multiplied. Consider the masterly exposition of

103 For example, s 12A of the *Defamation Act 2005* (NSW) confirmed that a statement of claim could not constitute a "concerns notice", overturning what had been held in *Zoef v Nationwide News Pty Ltd* [2016] NSWCA 283; (2016) 92 NSWLR 570 at [92] and *Mohareb v Booth* [2020] NSWCA 49 at [11]. Page 5 of the explanatory note for the *Defamation Amendment Act 2020* (NSW) which made the amendment is explicit as to this.

104 Another may be to ensure that the decision is not regarded as authority for the unargued point.

105 (2011) 245 CLR 1; [2011] HCA 34 at [99].

106 B Cardozo, *The Nature of the Judicial Process* (Yale UP, 1921) 165. See A Corbin, "The Judicial Process Revisited" 71 *Yale LJ* 195 at 197-198 (1961) ("The next day, each student must have brought a friend. The hall was jammed, with many more pushing to get in; and we transferred the lecture to the near-by Lampson Lyceum, with some 500 seats").

the protection at law and in equity of common law leases in light of statutory intervention between 1677 and 1930 by Jordan CJ in *Dockrill v Cavanagh*[107] or the exercise of a power of sale by a mortgagee of land under Torrens title.[108] Even humdrum matters such as the court rules governing the discretion to reopen a judgment entered in the absence of a party reflect the interaction over many decades of common law, equity and statute.[109] The familiar claim of a family member who has remained on a farm and made various sacrifices following statements that he or she would own the land[110] involve the unavailability of contract (not least, because of the Statute of Frauds), the engagement of equitable principle based on the unconscientious exercise of legal rights, the amenability of land held under Torrens title to equitable relief, and an exercise of discretion informed by the unavailability of relief at law, with the possibility of claims under testators family maintenance legislation looming in the background.

That said, most litigation in most courts does not require the sort of analysis given above, or anything like it. Most of the time, the applicable legal rules and principles are agreed, and the question is as to the application of the law to the facts proven by the evidence, and the real dispute is as to those facts, the legal conclusions to be drawn from them (is the defendant liable; is the accused guilty) and the appropriate exercise of a discretion (imposing sentence, assessing damages, granting equitable or statutory relief). It is just as well that is so, otherwise litigation would be slower and more expensive than it is. But this work is directed to that minority of cases where law is made, rather than merely applied. Cardozo's language reflects the measured style of a different age, but his point that law-making is a small constrained aspect of what courts do remains sound:[111]

> Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. … We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgment. Most of us live our lives in conscious submission to rules of law, yet without necessity of resort to the courts to ascertain our rights and duties. Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts. In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.

107 (1944) 45 SR (NSW) 78.

108 *Coroneo v Australian Provincial Assurance Association Ltd* (1935) 35 SR (NSW) 391.

109 See *Pham v Gall* (2020) 102 NSWLR 269; [2020] NSWCA 116 (the statute being rules of court).

110 See for example *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10, *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19 and *Guest v Guest* [2022] UKSC 27.

111 B Cardozo, *The Nature of the Judicial Process* (Yale UP, 1921) 128-129.

This work focuses on the "catastrophic experience" that is litigation, and the "waste spaces" where law is made. Its focus is no different from almost the entirety of decisions on undergraduate reading lists, reported decisions which are taught because they went beyond the ordinary role of courts applying settled law to the facts, and in some way developed the law. But rather than explaining what the law is, the focus of this work is to explain the processes which inform its development.