Relation between common law and statute in England and Wales

We critically discuss in this paper the relationship between common law and statute throughout the development of the law of obligations (i.e. contract and tort) in England and Wales and consider whether there are any areas of contract and/or tort law where further statutory intervention would be desirable

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1) Statutes and common law

In the English legal system, common law and statutes are both sources of law, amongst other sources such as equity or EU Law. Common law is built up out of precedent. Statutes are made by the Parliament, which is the supreme lawgiver, and the judges must follow statutes[1]. Supremacy of the Parliament is one of the fundamental principles of the so-called "unwritten" Britain's constitution, together with the separation of powers which defines a clear distinction in between the legislative power of the Members of Parliament who are elected by the citizens, and the judicial power of the judges, who are unelected. Judicial and legislative powers are then meant to operate independently, and this is seen as a necessity to ensure that society as a whole runs satisfactorily, with enough powers and counter-powers allocated.

It may be construed from the above that judges and common law operate very distinctly from the Parliament and its statutes. Judges deliver justice based on, inter alia, common law and statutes, but the latters may possibly ignore or even reject each other.

> Sixteenth-century common law judges…looked upon statutes as a gloss upon the common law, even as an intrusion into their domain.[2]

Could this be considered a persistent situation up to our present time, i.e. with common law and statutes being viewed as "unmixed oil and water" to paraphrase the above statement, or as actually operating in an integrated manner, nurturing each other in defining what the law is ?

[1] Smith & Keenan, *English Law* (17th edition, Pearson 2013) [38]

[2] Elmer Driedger, *The Construction of Statutes (*Second Edition. Toronto: Butterworths, 1983), [74-75]

I shall analyse this question in the light of an example: the development in the UK of the law of obligations, i.e. contract law and tort law, across the last hundred and fifty years.

2) Development of the law of obligations to date – operation of statutes and common law

The doctrine of privity of contract, stemming from the common law, defines that a person who is not party to a contract cannot sue under that contract even if h/she is named as beneficiary thereunder. It works closely with the rule that consideration must move from a promisee to the promissor in order to define a contract. Two principal cases have shaped these doctrines.

First *Tweddle v Atkinson*[3] in 1861, where it was held that the beneficiary, William Tweddle, of a promise made between his father and his father-in-law to each pay him a sum for his marriage, could not sue his father-in-law for his breach of the promise because consideration had not moved from him but from his father John.

Second is *Dunlop Pneumatic Tyre Co Ltd v Selfridge* [4]in 1915. Dunlop sold products to a dealer under a promise that they would obtain written undertaking, from anyone to whom they would in turn sell Dunlop's products, not to sell those at less than the price list defined by Dunlop. The defendant buying from the dealer nevertheless then sold them at less than the price list. It was held that Dunlop could not have an action against the defendant, since they were not party to the contract between them and the dealer. And since consideration had not moved from Dunlop to the defendant against his undertaking, there was no contract. Viscount Haldane from the House of Lords stated in that judgment:

> My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract… A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor…

Privity and consideration were seen as closely connected as two obstacles to surmount by any person wishing to enforce by law someone else's promise – even if the doctrine of privity had been

[3] (1861) 1 B. & S. 393 (QB)
[4] [1915] A.C. 847 (HL) 853

abrogated, the rule that consideration must move from the promisee to the promissor would not have allowed the claimants to succeed in those cases.

Both doctrines went however under growing criticism in the legal system across the 20th century.

Privity was found to lead to results being fundamentally unjust, and that it was failing to give effect to the intention of parties. Denning LJ said, in *Drive Yourself Hire Co. (London) LD. v Strutt*[5]:

> In 1861, however, came the unfortunate case of *Tweddle v. Atkinson,* in which the Court of Queen's Bench departed from the law as it had been understood for the previous 200 years and held quite generally that no stranger could take advantage of a contract, though made for his benefit: and that was assumed, without argument, to be the law by the House of Lords in *Dunlop Pneumatic Tyre Co. Ld. v. Selfridge & Co. Ld.*

Denning LJ also expressed criticism against the consideration rule in *Central London Property Trust Limited v High Trees House Limited*[6], opposing to it that a promise is binding despite lack of consideration in certain circumstances.

He took support in his judgment in the Sixth Interim Report of the Law Revision Committee issued in 1937, advocating for a statutory revision of the consideration and privity doctrines. The Report was however not acted upon by the Parliament at the time.

The House of Lords also criticized both consideration and privity at several instances[7], or voiced those concerns with one of the most recent example being in 1995 and the *White v Jones* case where Lord Goff stated[8]*:*

> It is true that our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by the presence of an unnecessary doctrine of consideration and (through a strict doctrine of privity of contract) stunted through a failure to recognise a jus quaesitum tertio.

The doctrine of privity was nevertheless reaffirmed in 1962 by the House of Lords, through the *Midland Silicones Ltd v Scruttons Ltd*[9] case, with Lord Denning dissenting and Viscount Simonds stating:

> The law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of those principles is the task not

[5] [1954] 1 Q.B. 250 (CA) 273
[6] [1947] – K.B. 130 (HC)
[7] See *Beswick v Beswick* [1968] AC 58 (HL) 72; and *Woodar Investment Developments Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, 291, 297-298, 300
[8] [1995] 2 AC 207 (HL) 262-263
[9] [1962] AC 446 (HL) 468

> of the courts of law but of Parliament…If the principle of jus quaesitum tertio is to be introduced into our law, it must be done by Parliament after a due consideration of its merits and demerits

Taking due regard to this growing concern from the common law as to these doctrines, statutory exceptions to the privity rule increased: Law of Property Act 1925, Road Traffic Act 1972, or Carriage of Goods by Sea Act 1992 for instance. Handling this matter in law was becoming an increasingly complex task, due to this growing number of exceptions to the doctrine of privity, such as when a trust of the promise is created in favour of a third party, where there are covenants on land for the benefit of third parties, where there is an agent-principal relation, etc.

Finally, the Contracts (Rights of Third Parties) Act 1999 came into force to provide global remedies to what was seen as a long-lasting deficiency, although not reforming the rule of consideration but giving a clear entitlement for a third party to enforce contractual terms. The actual application of this Act in turn requires that common law exists so as to define what a contract, a term and a party to it, are.

Many other examples can be given of the interactions in between common law and statutes in contract law, such as with statutory implied terms (Supply of Goods and Services Act 1982, Late Payment of Commercial Debts (Interest) Act 1998), statutory limitations for bringing an action (Limitation Act 1980 - affecting also tort claims) or statutory exclusion of unfair terms (Unfair Contract Terms – UCTA - Act 1977), defining new streams of law to be applied by common law judges, and where these acts were progressively established based on evolving needs of the society as reflected by common law judges.

There are similar interactions in between statutes and common law in tort law. Rules of causation in tort of negligence have indeed evolved in recent cases, with in particular the debate about equating an increased exposure to risk to an actual loss or damage when proving causation. In the case of *Fairchild v Glenhaven*[10], two employers of a worker, who died from mesothelioma, had negligently exposed him to substantial inhalation of asbestos. But it could not be proved which one of them caused, on the balance of probabilities, this damage (his disease then death) because of this negligence. The Court of Appeal accordingly denied any possible cause of action for the claimant. The House of Lords took a different view, and allowed the appeal, with Lord Bingham stating[11]:

[10] [2002] UKHL 22, [2003] 1 A.C. 32
[11] (n 10), page 44[D] and page 67 [F]

> Had there been only one tortfeasor, C would have been entitled to recover, but because the duty owed to him was broken by two tortfeasors and not only one, he is held to be entitled to recover against neither, because of his inability to prove what is scientifically unprovable… I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim.

The creation/aggravation of a material risk of mesothelioma, and not mesothelioma itself hence the damage, was found sufficient for liability, which was a significant departure from the rule of causation applied to that date. In a subsequent case, *Barker v Corus UK*[12], the House of Lord could not define joint and several liability of the tortfeasors, but only several liability, to which Lord Rodger dissented. As highlighted by Lord Walker, his dissenting opinion was taken on board by the Parliament and became section 3 of the Compensation Act 2006 which imposes on each tortfeasor joint and several liability for the whole of the damage caused by mesothelioma, hence being the result of a "*combination of common law development and statutory extension*"[13].

3) Conclusion and the way forward – any further desirable statutory intervention in the law of obligations ?

The examples given above illustrate how statutes and common law have worked together in an integrated manner over the years to surmount legal hurdles in contract and tort laws. Common law judges have regularly alerted legislators about current flaws in the common law, which alone they could not resolve, and when a new Act ought to be formed. Although they may sometimes be tempted to fill the gaps themselves, or to actually create law and then "usurping" the role of legislator (the oppositions in between Lord Denning and Viscount Simonds were well illustrative of that bipolarity[14]), any major departure from a current course of law can only be made by way of enactment. Legislators have then enacted remedies.

Statutes define a new stream of law to which common law judges will conform. But statutes then in turn depend on the survival/preservation of common law, as judges are also called to settle disputes as to the meaning of words in statutes – with statutory aids such as the Interpretation Act 1978, preambles and/or interpretation sections of an Act, or specific rules such as the mischief rule, the literal rule, the golden rule and others. Or to work out the details stemming from the

[12] [2006] UKHL 20, [2006] 2 A.C. 572

[13] Lord Walker, 'Developing the Common Law: How far is too far?' (2012) <www.supremecourt.uk/docs/speech-120901.pdf >

[14] See for instance *Magor and St Mellons Rural DC v Newport Corp* [1952] A.C. 189 (HL) 190-191

application of an Act, within the frame defined by the Act (see the "reasonableness test" and its guidelines in Schedule 2 of the UCTA).

It is accordingly difficult to see statutes and common law as "unmixed oil and water", but rather as integrated and complementary means to make law and deliver justice. In a similar way as DNA (statutes) expresses itself through RNA (common law) to deliver proteins (decisions) in living body cells (society) to make them work properly, and where DNA/statutes can mutate/change from time to time, through feedback from RNA/common law in particular, so as to adapt to new circumstances in the body/society and its environment.

As to the way forward, the Third Parties Act, although still underused, appears to produce clear long term benefits for commercial parties[15]. Doctrine of consideration was however not reformed. As it is not found as such in other EU continental jurisdictions, where on the other hand notions such as good faith or co-operation are part of civil codes, there might be a harmonization attraction so as to foster commercial trades in between EU members, as highlighted in 2010 by Lord Hope from the Supreme Court[16]. It can also be noted that one of the most popular standard form of construction contract in the UK, namely the NEC3[17], has introduced in its latest editions the notion of mutual trust and co-operation in between parties its standard Clause 10.1. There has been also work and debates at EU level as to the possible harmonisation of Private Law across the EU, reflected under a Draft Common Frame of Reference (DCFR)[18] and even thoughts given as to a European Civil Code[19]. Core principles of justice, security and efficiency, which drive our democratic regimes across the EU, and the corresponding expectations of businesses and citizens will undoubtedly contribute to nurture further debates and evolutions in the sphere of private law.

Finally, I would also highlight the perceived need to adapt UCTA in the view of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). The latter was initiated based on EU Law, and the two together appear, though being of different scope, to overlap and give rise to complexity and inconsistency that has been subject to severe criticism[20]. A Consumer Rights Bill, though not seeming to cover the whole scope of the Law Commission report[21], in particular for small

[15] McKendrick, *Contract law* (10th edition, Palgrave MacMillan 2013) [140]
[16] Lord Hope of Craighead, 'The Role of the Judge in developing Contract Law' (2010) <www.supremecourt.uk/docs/speech_101015.pdf>

[17] *NEC3 Engineering and Construction Contract* (April 2013 Edition, ICE Publishing)
[18] DCFR, 2010 <ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf>
[19] Study Group on a European Civil Code - <www.sgecc.net/>
[20] Law Commission, *Unfair terms in contracts* (Law Com No. 292, 2005) para 1.4
[21] (n 20)

businesses, was introduced and is now at the stage of consideration of amendments at Parliament, where it is incidentally interesting to note that the House of Lords comments[22] required the replacement of wording such as "*contract for which there is no consideration*" by "*gratuitous contract*"…

[22] <www.publications.parliament.uk/pa/bills/cbill/2014-2015/0134/15134.1-7.html>

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