

Conference of Judicial College of Victoria and Melbourne Law School
Taxonomic reasoning

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I begin by expressing my sincere appreciation to the Judicial College of Victoria and the Melbourne Law School for the invitation to speak today. The relationship between the judiciary and the academy in Victoria appears to be one of the strongest in Australia. And the subject about which I have been asked to speak, taxonomic reasoning, is perhaps the most important area of interaction between the judiciary and the academy.

In Australia, as in England, the language of taxonomy in private law is today associated with one person more than any other: the late Peter Birks. Birks' academic writing on taxonomy divided the academy. It divided judges. It divided courts. I will focus today on what Birks taught about taxonomy and why, despite its limitations, there are important lessons which we can draw from it.

Birks proposed a taxonomy of private law which separated legal events from legal responses. It divided common law claims into events of consent, wrongs, unjust enrichment and other events.¹ He represented his taxonomic scheme diagrammatically as follows. The horizontal axis contains legal categories of events. The vertical axis reflects the different goals of remedies given by a court within each legal category.²

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¹ Peter Birks has been compared with Friedrich Karl von Savigny and the modern Pandectist school: See J Getzler '*Am I my beneficiary's keeper? Fusion and loss-based fiduciary remedies*' in S Degeling and J Edelman (eds) *Equity in Commercial Law* (2005 Thomson LBC Sydney) ch10.

² Birks labelled these axes 'events' and 'responses': P Birks 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed) *The Classification of Obligations* (1997 Clarendon Press Oxford) ch 1.

	Consent	Wrongs	Unjust Enrichment	Other Events
Compensation				
Restitution				
Punishment				
Other responses				

Birks' taxonomy of private law attracted furious debate in the academy and the judiciary. One academic objection was to dismiss Birks' work as a Panglossian ordered and formal law that envisages far too little discretion for the judge and which constrains legal innovation by reference to abstract, intangible concepts.³ Similar concerns were expressed in a joint judgment of the High Court of Australia which described Birks' approach to the law concerning restitution of unjust enrichment as 'a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development'.⁴ In another decision, a joint judgment of the High Court in *Bofinger v Kingsway Group Limited*,⁵ responded to Birks' views that there is no place for a separate taxonomical category of 'equity'. Their Honours said that 'the experience of the law does not suggest debilitation by absence of a sufficiently rigid taxonomy in the application of equitable doctrines and remedies.'

It is not my purpose today to attempt to defend Birks' taxonomy. There are real difficulties with it, many of which Birks himself recognised. Let me just identify three problems. One difficulty is that Birks' taxonomy treats wrongs and unjust enrichment as the same type of event. But the law only recognises a wrong if it has already recognised a pre-existing duty. Furthermore, Birks' taxonomy of private law has no place for a person's duty not to assault another, not to commit trespass, not to defame another, and so on. The only 'event' which gives rise to those rights is a person's birth. Birks was left to say that these fundamental rights are 'superstructural' to his taxonomy.

³ See S Hedley 'Rival Taxonomies within the Law of Obligations: Is there a problem?' in S Degeling and J Edelman (eds) *Equity in Commercial Law* (2005 Thomson LBC Sydney) ch4.

⁴ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89, 158 [154].

⁵ [2009] HCA 44; (2009) 239 CLR 269, 300 - 301 [93] (the Court).

A second difficulty is that the taxonomy focuses only upon all 'rights' which arise from consent, unjust enrichment, wrongs, and other events. It does not discriminate between the different types of right: claim rights, immunities, privileges, and powers. The different nature and character of those 'rights' is essential to understand their interaction.⁶

A third difficulty, which Justice Leeming has described,⁷ is the impact and dominance of statute. Legislation need not, and does not always, respect taxonomic boundaries. And legislation and common law are inextricably intertwined. A coherent system of law cannot treat of the two (in Lord Justice Beatson's metaphor) as 'oil and water'. As Justice Gageler observed,⁸ 'the meaning of a statutory text is also informed, and reformed, by the need for the courts to apply the text each time, not in isolation, but as part of the totality of the common law and statute law as it then exists'.

Despite these criticisms, of which Birks was aware, there remains real utility in the taxonomy enterprise provided that its limitations are appreciated. I want to focus on three major benefits of this taxonomy and taxonomies generally.

First, once we turn attention to taxonomy we can immediately see that it is impossible to argue rationally against *any* form of classification or taxonomy. The human mind operates by classifying and comparing. And one aspect of the rule of law requires that like events be treated alike. To have any real understanding of how the law fits together we need a mental taxonomy of the law.

Every law student studies law by reference to some form of taxonomy. Most law schools divide private law into a taxonomy which includes principal subjects of contract, torts, trusts, and property. Putting aside the law of property, Justice Gummow described the three great

⁶ For an important recent example see *Western Australia v Brown* [2014] HCA 8. There is a basic difference between freedoms from liability which almost never conflict (eg from liability for trespass to minerals by a mining licence and freedom from trespass to land by native title) and competing claim rights or claim rights and freedoms (eg to 'exclusive' possession) which almost always do and require one to give way to the other.

⁷ M Leeming 'Theories and Principles underlying the development of the common law' (2013) 36 NSWLJ 1002, 1028.

⁸ Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) Monash University Law Review 1, 2.

sources of obligation in private law as contract, tort and trust.⁹ This is a discontinuous and incomplete taxonomy, as Gummow J would certainly have recognised. This common taxonomy is not continuous because it includes contract alongside trust. A contract could be the source of a trust. Two persons can contract in terms which create a trust. The taxonomy is also incomplete because there are many obligations which arise other than by contract, tortious act, or creation of a trust. One of the most common is the statutory obligation to pay tax. Another example is a unilateral bond or a letter of credit. In relation to unilateral bonds, after the decline of covenant this was one of the most common obligations. The obligation was created by deed which commonly recited, in Latin, 'Know all men etc., that I, AB, am firmly bound to CD in £n to be paid at Michaelmas next following'.¹⁰

Although taxonomy is essential our understanding of it is still very rudimentary. It is unsurprising that our modern taxonomies of private law are underdeveloped. Although the trust arose from the ashes of the executed use in the 16th and 17th centuries,¹¹ the modern law of contract did not completely emerge from its foundations of *assumpsit* until the mid-19th century when, following publication of a translation of Pothier's *Traité des obligations*,¹² key English cases in the mid-19th century such as *Hadley v Baxendale* and *Smith v Hughes*¹³ developed the will theory of contract. And the law of tort, in the form we understand it today, did not emerge until the mid-20th century after *Donoghue v Stevenson*¹⁴ began the process of generalizing a duty of care. The law of unjust enrichment only emerged from the miscellany of other legal obligations in 1987 in Australia¹⁵ and in 1991 in England.¹⁶ In *Equuscorp Pty Ltd v Haxton*,¹⁷ French CJ, Crennan and Kiefel JJ said that unjust enrichment 'has a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another.'

⁹ *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516, 540 [64] (Gummow J).

¹⁰ J Baker *An Introduction to English Legal History* (4th ed, 2002 OUP Oxford) 323.

¹¹ For the evolution of the trust after the *Statute of Uses* (1535) 27 Henry VIII c10 see J.H. Baker, *An Introduction to English Legal History* (4th ed., 2002 Butterworths London) 248-258, 280-297.

¹² W Evans *A Treatise on the law of Obligations or Contracts by M Pothier* (1806 A Strahan London).

¹³ *Hadley v Baxendale* (1854) 9 Ex 241; 156 ER 145; *Smith v Hughes* (1871) LR 6 QB 597. See AWB Simpson, 'Innovation in Nineteenth Century Contract Law', in *Legal Theory and Legal History. Essays on the Common Law* (1987 London Hambledon Press) at 171-202, and D J Ibbetson *A Historical Introduction to the Law of Obligations* (1999 OUP Oxford) chs 12 & 13.

¹⁴ [1932] AC 562.

¹⁵ *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

¹⁶ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

¹⁷ [2012] HCA 7; (2012) 246 CLR 498, 516 [30].

Secondly, in my view, one of the major benefits of Birks' taxonomy was that it was not confined to the jurisdictional source of the obligation. As I explained at the start, the High Court of Australia has suggested that 'the experience of the law does not suggest debilitation by absence of a sufficiently rigid taxonomy in the application of equitable doctrines and remedies.' I do not think that this statement was intended to be understood as suggesting that equitable doctrines and remedies should not be categorised and treated alongside common law categories. That view is very commonly held. But it must be rejected.

Many lawyers think of the law of torts and the law of equity as two mutually exclusive categories. 'Tort' is a French word which describes a common law wrong. It is a French delicacy that had crept into our law by the time that Mrs Donoghue decided to sample a snail, with a little ginger. But why should the law of torts be confined to civil wrongs whose jurisdictional origin is common law rather than equity? Consider, for example, the tort of deceit. It has been recognised for more than a century that the common law tort of deceit is identical to the equitable wrong of deceit. As Lord Chelmsford explained of deceit in equity, '[i]t is precisely analogous to the common law action for deceit. There can be no doubt that Equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at Law and in Equity.'¹⁸ Common lawyers and equity lawyers recognised the common nature of this action for centuries. Indeed, it was because both common law and equity regarded the common law and equity actions for deceit as alike that there was the tussle for centuries between the common law and equity over the fault element required. In *Derry v Peek*¹⁹ the common lawyers temporarily prevailed, although within a century the common law gave way to the old equitable rule.²⁰

At the very least even if all equitable principle were to be treated as part of a discrete and separate category, a taxonomy which has no separate category for equitable principle requires the proponent of a separate equity category to justify its existence. If all the equitable principles that arose in the courts of Chancery are somehow based upon a different 'conscience' or a different discretion then how does that separate conscience operate? If the common law reaches results which the same judge administering equity acknowledges to be unconscionable then should the common law doctrine not be amended? Even when the

¹⁸ *Peek v Gurney* (1873) LR 6 HL 377, 393.

¹⁹ (1889) LR 14 App Cas 337.

²⁰ *Hedley Byrne & Co Pty Ltd v Heller & Partners Pty Ltd* [1964] AC 465.

common law and equity were administered separately some common law courts would recognise uniquely equitable doctrines such as the trust where it was necessary to do so to ensure a just and coherent result.²¹

Thirdly, one of the most powerful benefits which can be derived from consideration of taxonomy is that it forces judges and practitioners to think beyond the narrow confines of the facts before them and to focus upon the coherence of principles across different areas of law. The great jurists of the past were all taxonomers in this respect. Birks' work was far from novel. As Birks acknowledged, his work developed the classificatory scheme of the 18th century jurist and judge Sir William Blackstone. Blackstone's taxonomy itself, and Birks', were both ultimately based on the work of the second century Roman jurist, Gaius.

Little is known about the life of Gaius, but his writing and that of the great Roman jurists working within the Gaian taxonomy, continues today to have direct effect even beyond the enormous indirect effect that Roman law had on English law. As James Lee has observed²² Roman scholarship was directly relied upon in three of the most important private law decisions given by the House of Lords in 2001,²³ 2002²⁴ and 2007.²⁵ In the first case, the late, and brilliant, Lord Rodger drew from the conflicting views of Ulpian and Julian in relation to the complex question of causation in the law of torts. In the second case, Lord Hoffmann and Lord Hope of Craighead drew from Roman law the principles concerning *confusio* (and the writings of Iavolenus and Ulpian) to try to resolve the question of tracing of mixed funds. In the third, Baroness Hale referred to the development in Roman law of the *vindicatio* action in her revolutionary dissent concerning whether conversion as a tort extended to intangibles. To put the influence of these Roman scholars in perspective, it would be as if something that one of us had written today on a single point of law, and published extra-judicially, was relied upon as an important authority by a court in the year 3800.

The Romans did not recognise a divide between the academic and the practitioner. The jurists were the great scholars. They were the law in action. This divide is very recent in the

²¹ See discussion in *Duckworth v Water Corporation* [2012] WASC 30 [68]-[70].

²² J Lee 'Confusio: Reference to Roman Law in the House of Lords and the development of English Private Law' (2009) 5 Roman Legal Tradition 24.

²³ *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22; [2003] 1 AC 32.

²⁴ *Foskett v McKeown* [2001] 1 AC 102.

²⁵ *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 AC 1.

life of our law. Over the last six hundred years the greatest developments in the taxonomy of the common law also came from extra-judicial academic writing mostly by judges. Glanvill, who wrote the first great book on English law in the 12th century was Henry II's Chief Justiciar in the Curia Regis. His foundational book was *Tractatus de legibus et consuetudinibus regni Angliae*: A treatise on the laws and customs of the English Kingdom. Although it is not clear how much of his great work²⁶ was actually written, or edited, by Bracton, there is a consensus that his contribution came before he had turned 30. Bracton started sitting as a judge at 35. Littleton sat as a judge in common pleas. He was writing only a couple of decades after Gutenberg revolutionised printing and his treatise on *Tenures* became the first printed legal book in English, or rather law-French. It was an indispensable work for more than three centuries.

The same pattern has repeated itself again, and again, and again. Sir Edward Coke, who wrote the *Institutes*, was Chief Justice of Common Pleas (and then later the Chief Justice of the King's Bench). Fortescue, from whose great work,²⁷ we know the maxim that it is better that 20 guilty men go free than one innocent man be condemned, was Chief Justice of King's Bench. So too, Blackstone also sat on the King's Bench.

There was once a time when extra-judicial writing was 'better read when dead'. One reason for this was that this scepticism was born of an era long before the professional law schools. Another reason was the liberty of academic authors to change their minds. It was thought that academic writing or extra-judicial writing of a judge was only authoritative after death. In 1936 in the House of Lords, in *Nicholls v Ely Beet Sugar Factory*²⁸ counsel referred the court to the work of Sir Frederick Pollock. Lord Wright remarked, sarcastically, in his speech that he could not refer to this work because, fortunately (Pollock being alive), it was not a work of authority. The remark is not properly reported because the reporter, misunderstanding the remark, described Pollock's work as 'unfortunately' not being a work of authority.

The days of ignoring academic work are now past. One of Australia's greatest judges remarked in 1992 that in some cases there may even be 'an imperative obligation' to consider

²⁶ *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England).

²⁷ *De laudibus legum Angliae* (In Praise of the Laws of England).

²⁸ *Nicholls v Ely Beet Sugar Factory* [1936] Ch 343, 349.

the law periodicals.²⁹ Some of Australia's greatest ever judges have been drawn from the academy or from backgrounds which included sustained periods of academic work. Paul Finn is an example from the Federal Court. Dyson Heydon, who was both an extraordinary academic and barrister, is an example from the High Court. And, in this jurisdiction, the exemplar is Justice Neave.

The beauty of the common law is that it works itself pure. It moves in search of principle. The shape of the common law is not the product of any single court, nor any single writer. The common law is, as the late Lord Rodger said, like a fine wine: 'trying to rush the process will only spoil the vintage'.³⁰ Its shape is ultimately determined by taxonomy. In an era where judges are increasingly specialised, increasingly submerged beneath a sea of ever-expanding judicial decisions with arguments that raise finer and finer points of law, the relationship between the judiciary and the academy is more important today than it ever has been in history. It is the academic branch of the profession which, in the future, will have the time, the focus, and hopefully the vision consistently to refine our taxonomy of law. It is in this third area in which the relationship between the judiciary and the academy is so important.

²⁹ F Kitto, 'Why Write Judgments?' (1992) 66 ALJ 787, 793.

³⁰ Lord Rodger 'An Introduction to *Sempra Metals*' in S Degeling and J Edelman *Unjust Enrichment in Commercial Law* (2008 Thomson Reuters Sydney) 317, 331.