

CASE NOTE

PGA v THE QUEEN*

**MARITAL RAPE IN AUSTRALIA:
THE ROLE OF REPETITION, REPUTATION
AND FICTION IN THE COMMON LAW**

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This case note considers the historical development and validity of the husband's immunity at common law from prosecution for rape in light of the recent High Court case of PGA v The Queen. The original written source of the immunity is examined along with the subsequent treatment of that source in relevant cases and well-known textbooks of criminal law. Despite widely held belief in its validity, it is argued that the immunity was never properly established as a principle of the common law. The case note also considers the fiction of the unity of husband and wife that underpinned the immunity and exposes how the immunity was purportedly maintained into the 20th century despite disbelief in this fiction.

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* (2012) 245 CLR 355.

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I INTRODUCTION

The following passage is contained in *Historia Placitorum Coronae* ('*Pleas of the Crown*') of Sir Matthew Hale:

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract.¹

Sir Matthew Hale was the Chief Justice of the Court of the King's Bench between 1671 and 1676. His famous treatise, the *Pleas of the Crown*, was published in 1736, 60 years after his death in 1676. The above passage is the original written source for what is known in English common law as the husband's 'immunity' from prosecution of rape committed against his wife. The husband's immunity from prosecution of marital rape was widely believed to be a valid legal principle with little question for over 200 years. In 1976, South Australia was one of the first jurisdictions in the world to statutorily reform the husband's immunity. In 1991, the High Court decided the case of *R v L*,² wherein the court observed that, if the husband's immunity was ever part of the common law, it was no longer part of the common law. In 2009, the Director of Public Prosecutions of South Australia charged PGA with a number of sexual and assault offences for conduct allegedly committed against his wife dating back to the 1960s. Two of these offences were rape committed in 1963. In 2012, a majority of the High Court held in *PGA v The Queen*³ that there was no presumption of consent by a wife to sexual intercourse in marriage, and consequently, PGA could be found guilty of the rape of his wife committed in 1963.

This brief outline of the history of the husband's marital immunity spans a time period of close to three hundred years. The marital immunity has been a

¹ Sir Matthew Hale, *Historia Placitorum Coronae* (London Professional Books, first published 1736, 1971 ed) vol 1 629.

² (1991) 174 CLR 379.

³ (2012) 245 CLR 355.

topic of discussion since the late 19th century. It has attracted the criticism of academics and women's groups since the 1960s. It has been the subject of judicial and academic commentary on each occasion that it has come before the courts. It has caused heated and controversial public debates amongst politicians and members of the community, as was particularly evident with the South Australian reform process in 1976. In ways that may never be properly understood, it has affected the lives and experiences of married women in times gone by, leaving them for the most part without remedy by the criminal law. And now, nearly 40 years after the South Australian Parliament recognised and reformed it, the High Court has held that the immunity was not part of Australian common law as of around 1935. Whatever else may be said about it, this is a curious history in an infamous chapter of English and Australian criminal law.

PGA v The Queen is a controversial case on a number of levels. The focus of this case note is the manner in which the majority and dissenting judgments approached the history and development of the common law in answering the easily stated legal question — can a husband be guilty of the rape of his wife committed in South Australia in 1963? Wendy Larcombe and Mary Heath have recently reviewed *PGA v The Queen* and concluded that the majority judgment is unsatisfactory in a number of respects, including what they describe as a selective treatment of the case law on the subject.⁴ This note will demonstrate that the manner in which the majority treated the case law was appropriate and that close analysis of the case law reveals that the marital immunity was never properly established as a principle of the common law. The note will also attempt to explain why the marital immunity was widely believed to exist during the 20th century while as a matter of law it had not been established as a principle of Australian common law. It will do so based on two simple but fundamental concepts — a continual repetition of Hale's proposition in cases and legal texts, coupled with an unquestioned reliance on Hale's reputation as the founding author of the topic.

The case note will commence with an exposition of the judgments of the majority and of Heydon J and Bell J in Part II. The status of the marital immunity in the case law as at around 1963 will be outlined in Part III, the main focus of which will be to demonstrate that the immunity was not established as a binding or settled principle of the common law. The authority and reputation of Hale as a source that fuelled belief in the validity of the

⁴ Wendy Larcombe and Mary Heath, 'Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*' (2012) 34 *Sydney Law Review* 785.

marital immunity will be addressed in Part IV, followed by the treatment of the immunity in some well-known textbooks of criminal law in Part V. The final part of the note, Part VI, will examine critically the role of the fiction of the unity of husband and wife in the life of the marital immunity, highlighting the alternative rationales of this fiction over time and questioning the utility of the fiction in the 20th century. The underlying method of the case note is that of the critical legal historian. The object of this method is to question the popularly held legal belief in the validity of the immunity as an established principle of the common law.

II *PGA v THE QUEEN* IN THE HIGH COURT

A Introduction

The Full Court of the High Court heard the appeal case in *PGA v The Queen*. The court split 5:2 in its decision. The majority, comprising French CJ, Gummow, Hayne, Crennan and Kiefel JJ, held that at common law there was no presumption of consent to sexual intercourse operative as at 1963. Heydon J and Bell J delivered separate dissenting judgments — the focus of their judgments differed somewhat, but in substance both judges rejected emphatically the respondent's argument about the non-existence of the marital immunity prior to its statutory reform in the 1970s. Heydon J and Bell J both held that to declare otherwise was a form of retrospective criminal liability that exposed PGA unfairly to prosecution for something that was not an offence at the time it was allegedly committed. The issue of retrospective criminal liability is a secondary issue to the question that was before the court and as such will not be addressed in this note.⁵

B The Majority Judgment

The underlying premise of the reasoning of the majority was that the common law is not static — it does not remain frozen in time, rather, it is 'a body of law the content of which, having been declared by the courts at a particular time,

⁵ For a discussion of the issue of retrospective liability based on the judgment of the South Australian Court of Criminal Appeal in *R v P, GA* (2010) 109 SASR 1, see Kellie Toole, 'Marital Rape in South Australia: *R v P, GA*' (2011) 35 *Criminal Law Journal* 237. See also *SW v United Kingdom* (1995) 21 EHRR 363 and *R v C* [2004] 1 WLR 2098 on the treatment of the issue by the courts.

might be developed thereafter and declared to be different'.⁶ Another major premise turns on the legal status of married women based on statutory reform — perhaps better described as a statement of judicial method, the very last paragraph of the majority judgment is akin to a postscript note:

it is unnecessary to rely in general terms upon judicial perceptions today of changes in social circumstances and attitudes which had occurred in this country by 1935, even if that were an appropriate exercise of legal technique to do so. The conclusion follows from the changes made by the statute law, as then interpreted by the courts, including this Court, before the enactment of the [Criminal Law Consolidation] Act.⁷

The majority exposed some obvious difficulties in treating Hale's proposition as an unequivocal and universal proposition. They cited the fact that marriage was constituted by the consent of the parties as required by the law, but that there was no legal requirement for consummation to complete the marriage, and nor did the ecclesiastical courts ever enforce any duty of sexual intercourse between husband and wife.⁸ So the point is made that sexual intercourse between husband and wife was not an essential prerequisite to complete a lawful marriage and that neither party could be compelled by law to engage in sexual intercourse. The majority next observed that the character of Hale's proposition was unclear — was it to do with the elements of the offence of rape, was it a defence available to a husband or was it immunity from prosecution?⁹ They pointed out that Hale did not 'refer to any prior cases which might be said to illustrate and support the proposition',¹⁰ although he did cite the 1631 state trial of Lord Audley¹¹ as an example of the proposition that a husband may be found guilty of the rape of his wife as a principal where he aids and abets her rape by another person. These observations led the majority to conclude that the status of Hale's proposition was open to question and that 'whatever its character in law, Hale's proposition was not framed in absolute terms'.¹²

⁶ *PGA v The Queen* (2012) 245 CLR 355, 371 [23] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁷ *Ibid* 384 [65].

⁸ *Ibid* 376 [41].

⁹ *Ibid* 376–7 [42].

¹⁰ *Ibid* 376 [42].

¹¹ *R v Lord Audley* (1631) 3 St Tr 401.

¹² *PGA v The Queen* (2012) 245 CLR 355, 377 [43] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

The majority considered developments in matrimonial law since the 17th century. They noted that while the English common law was received in the Province of South Australia with effect on 19 February 1836, that law was not applicable in its entirety — there were particular parts of the English common law that were inapplicable to local conditions.¹³ In particular, the received common law did not include matrimonial law, that is, the jurisdiction of the ecclesiastical courts. The majority found that this appears to have been a deliberate decision by the Imperial authorities with the important consequence that ‘the jurisdiction with respect to matrimonial causes, as well as divorce, which has been exercised by the colonial and State courts always has been derived from local statute law, not received “common law”’.¹⁴ Local statute law on matrimonial causes was introduced in the colonies in different phases following the introduction of the *Divorce and Matrimonial Causes Act 1857*.¹⁵ Unlike in Hale’s day, where the process of divorce by private statute was only just beginning, husbands and wives in the colony of South Australia could file petitions for divorce on the various grounds set out in the s 12 of the *Matrimonial Causes Act 1858* (SA). An important plank in the reasoning of the majority was that the conception of marriage in the mid-19th century, and the regulation of its lawful termination, was vastly different from that which prevailed at the time Hale wrote during the late 17th century.¹⁶

Complementing developments in matrimonial law, the majority also drew on other important legal developments of the late 19th century that reformed the status and rights of married women. They highlighted the statutory reforms commonly described as the ‘Married Women’s Property Legislation’.¹⁷ These were laws introduced both in the United Kingdom and in the Australian colonies to confer on married women important legal rights such as the ability to acquire, hold and dispose of real or personal property. The majority briefly adverted to a decision of the English Court of Appeal in 1891 wherein it was held that habeas corpus would issue to free a wife confined by her

¹³ Ibid 371–2 [25], [26], citing Alex C Castles, *An Australian Legal History* (Lawbook, 1982) 140–2 and J M Bennett, ‘The Establishment of Divorce Laws in New South Wales’ (1963) 4 *Sydney Law Review* 241, 242.

¹⁴ *PGA v The Queen* (2012) 245 CLR 355, 372 [27] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also at 372 [26].

¹⁵ 20 & 21 Vict, c 85.

¹⁶ *PGA v The Queen* (2012) 245 CLR 355, 382–4 [58]–[65] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

¹⁷ *Married Women’s Property Act 1893* (NSW); *Married Women’s Property Act 1890* (Qld); *Married Women’s Property Act 1883–84* (SA); *Married Women’s Property Act 1883* (Tas); *Married Women’s Property Act 1884* (Vic); *Married Women’s Property Act 1892* (WA).

husband in his house in order to enforce restitution of conjugal rights.¹⁸ They cited some well-considered statements of former judges of the High Court regarding the restitution of conjugal rights and the fact that the ecclesiastical courts never could order a spouse to engage in or resume marital sexual intercourse.¹⁹ And, finally, they referred briefly to the introduction of universal adult suffrage in Australia in 1902 and South Australia's having introduced suffrage for women in 1894.²⁰

Although not so starkly summarised in their judgment, the factors taken into consideration by the majority in reaching their conclusion came down to these: the uncertain character of Hale's proposition,²¹ the nature of marriage according to ecclesiastical law, the fact that ecclesiastical law did not impute general consent to sexual intercourse in the marital relationship nor compel the performance of sexual intercourse thereto,²² the statutory reform of divorce law²³ and the introduction of the Married Women's Property Legislation in the late 19th century,²⁴ and the introduction in Australia of suffrage for women.²⁵ Drawing on all of these considerations, the majority concluded as follows:

By the time of the enactment in 1935 of the [*Criminal Law Consolidation Act 1935* (SA)], if not earlier (a matter which it is unnecessary to decide here), in Australia local statute law had removed any basis for continued acceptance of Hale's proposition as part of the English common law received in the Australian colonies. Thus, at all times relevant to this appeal, and contrary to Hale's proposition, at common law a husband could be guilty of rape committed by him upon his lawful wife. Lawful marriage to a complainant provided neither a defence to, nor an immunity from, a prosecution for rape.²⁶

¹⁸ *PGA v The Queen* (2012) 245 CLR 355, 379 [49] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), citing *R v Jackson* [1891] 1 QB 671.

¹⁹ *PGA v The Queen* (2012) 245 CLR 355, 379–80 [50]–[52] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), citing *R v L* (1991) 174 CLR 379, 393 (Brennan J) and *Bartlett v Bartlett* (1933) 50 CLR 3, 15–16 (Dixon J), 18 (Evatt JJ).

²⁰ *PGA v The Queen* (2012) 245 CLR 355, 384 [62] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

²¹ *Ibid* 376–7 [40]–[43].

²² *Ibid* 376 [41], 379–80 [49]–[52].

²³ *Ibid* 380–2 [53]–[57].

²⁴ *Ibid* 378 [46].

²⁵ *Ibid* 384 [62].

²⁶ *Ibid* 384 [64].

C *The Dissenting Judgments*

Heydon J delivered a powerful dissenting judgment. He maintained in strong terms the validity of Hale's proposition since its first publication and its operation in Australia well into the 20th century, and certainly during the 1960s. His judgment provides a detailed critique structured around the written submissions of the respondent. Heydon J dismissed in a summary fashion the issues surrounding the interrupted revision and posthumous publication of Hale's *Pleas of the Crown*, remarking that, '[t]here is no reason to suppose that, had he revised the relevant part of his work, he would have considered it desirable to change it'.²⁷ He considered there was nothing defective about Hale not citing any authority in support of his proposition — he stated that '[t]he modern approach to precedent was only struggling to be born in Hale's day'²⁸ and that it is questionable whether there were authorities of any kind to be cited in support of the proposition.²⁹

Heydon J dealt with the significance of ecclesiastical law in relation to the validity of Hale's proposition. He expressed caution and concern with the Court embarking on an investigation into ecclesiastical law in the 17th century 'without expert assistance'.³⁰ But his main criticism of ecclesiastical law turned on its lack of relevance. His reasoning was that, given Hale's proposition is one of criminal law based on the common law, the need to consider the ecclesiastical conception of marriage is limited:

while the civil law of marriage was a matter for the ecclesiastical courts, the criminal law was a matter for the common law courts. Thinking in the ecclesiastical courts does not necessarily vitiate an account of the criminal law as administered in the common law courts.³¹

Heydon J spent much time canvassing the treatment of Hale's proposition by judges and textbook writers since Hale's day. Reminding us of Hale's great reputation, he cited East in 1803 along with modern 20th century textbook writers, observing that Hale's proposition 'garnered massive support from professional writers after 1803' and that the leading textbooks on criminal law in the 20th century have 'acknowledged the correctness of Hale's proposition'.³²

²⁷ Ibid 387 [80].

²⁸ Ibid 387 [81] (citations omitted).

²⁹ Ibid 378–8 [82].

³⁰ Ibid 388 [87].

³¹ Ibid 388 [87].

³² Ibid 389 [92].

The treatment of the textbooks is followed by a review of a classic line of authorities dealing with the marital immunity. He embarked on an analysis of the famous case of *R v Clarence*³³ and the handful of mid-20th century English cases,³⁴ along with a decision of the Victorian Court of Criminal Appeal in 1982,³⁵ that cited but modified Hale's proposition. The result of this analysis, he said, proves that Hale's principle was properly recognised and declared by the courts as a principle of the common law down to as far as 1991.³⁶ He cited the decision of *R v Miller*³⁷ in refuting the respondent's submission that there was no authoritative declaration of the common law on the subject, remarking that '*R v Miller* was a binding precedent in England until 1991'.³⁸

Heydon J took great umbrage at the respondent's relying on the statement of Lord Lowry in *C (a minor) v DPP (UK)*, namely that 'Hale's doctrine had not been given the stamp of legislative, judicial, governmental and academic recognition'.³⁹ Heydon J was highly critical of the respondent's reliance on Lord Lowry's statement, and implicitly, of Lord Lowry himself for making the statement. Referred to on four separate occasions in his judgment,⁴⁰ he used the statement to structure his critique of the respondent's case about the lack of recognition of Hale's proposition by the four mentioned sectors of the legal community. So far as governmental recognition goes, he cited the 1976 report of the Criminal Law and Penal Methods Reform Committee of South Australia, commonly known as the 'Mitchell Report',⁴¹ as instance of indirect governmental recognition. He said 'that report acknowledged that Hale's proposition represented the common law'.⁴² As a further instance of indirect governmental recognition, he also highlighted the absence of any prosecu-

³³ (1888) 22 QBD 23, discussed at *ibid* 390–1 [95]–[96].

³⁴ *R v Clarke* [1949] 2 All ER 448; *R v Miller* [1954] 2 QB 282; *R v O'Brien* [1974] 3 All ER 663; *R v Steele* (1976) 65 Cr App R 22, discussed at *PGA v The Queen* (2012) 245 CLR 355, 391 [97].

³⁵ *R v McMinn* [1982] VR 53.

³⁶ It was fortuitous that in 1991 the English Court of Appeal in *R v R* [1990] 2 WLR 1065, the House of Lords in *R v R* [1992] 1 AC 599 and the High Court of Australia in *R v L* (1991) 174 CLR 379 declared that the husband's marital immunity was no longer a principle of the common law.

³⁷ [1954] 2 QB 282.

³⁸ *PGA v The Queen* (2012) 245 CLR 355, 392 [99].

³⁹ [1996] AC 1, 38.

⁴⁰ *PGA v The Queen* (2012) 245 CLR 355, 386 [74], 390 [94], 394 [104], 395 [108].

⁴¹ Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report: Rape and Other Sexual Offences* (1976) ('Mitchell Report').

⁴² *Ibid* 394 [106].

tions in South Australia (and ‘many other places’) of husbands raping their wives, noting in this regard that the Court ‘was not told of any prosecutions having been brought in England between Hale’s time and 1949’.⁴³ He considered this was a relevant consideration given that ‘[w]hat the prosecution assumes about the law is not decisive as to what the law is. But it is some guide as to the thinking of experienced criminal lawyers. That thinking can be highly persuasive as to what the law is’.⁴⁴ And in terms of legislative recognition, he cited South Australia’s legislative reform of 1976,⁴⁵ which removed any presumption of consent to sexual intercourse upon marriage and enacted aggravated offences of marital rape in answer to the blanket operation of the marital immunity. Heydon J agreed with a central argument of the appellant, namely that the statutory reform of the husband’s immunity ‘assumed the immunity existed at common law’,⁴⁶ hence an important element of legislative recognition of Hale’s proposition.

Marshalling all the public law figures and law-makers who have cited, quoted and repeated Hale’s proposition for over two hundred years, Heydon J concluded with this statement:

It was inherent in South Australia’s first submission that all the writers, all the judges, all the government officials, all the law reformers, all the public servants advising Ministers, all the prosecution authorities and all the legislatures who wrote or acted on the assumption that Hale’s proposition was the law were wrong. South Australia explicitly adopted a statement to this effect in the Full Court of the Supreme Court of South Australia. I flatly disagree.⁴⁷

The opening paragraph of the judgment of Bell J sets out her overall view of the matter and reveals how, from the outset, she effectively assumed as correct the very topic of contention in the appeal — the validity of the husband’s immunity as at 1963:

It cannot be sensibly suggested that the appellant would have been prosecuted for those offences, had the allegations come to the attention of the authorities in 1963. That is because at that time it was understood that the crime of rape could not be committed by a husband against his wife with whom he was living

⁴³ Ibid 395 [107].

⁴⁴ Ibid.

⁴⁵ Ibid 395–6 [110].

⁴⁶ Ibid 395 [110].

⁴⁷ Ibid 397 [113].

(the immunity). A husband was amenable under the criminal law for any other offence of violence committed against his wife.⁴⁸

Bell J took a straightforward approach as to whether Hale's proposition was ever a principle of the common law. She started with the premise that the laws and statutes of England applicable to the province of South Australia were received on 19 February 1836. She then noted that '[i]t is not in question that, if Hale's statement of the immunity was a rule of the common law in 1836, it was part of the laws of England received in South Australia'.⁴⁹ From 1836 she moved to 1976, the year South Australian Parliament reformed the law of rape, and said that, in light of the history of that reform

there can be little doubt that the common law of Australia was understood as embodying a rule that a husband was not amenable to conviction for the rape of his wife. It is also evident that, by 1976, the justification for that immunity was not perceived to depend upon the concept of irrevocable consent to intercourse, since the Parliament of South Australia abolished that presumption while maintaining the immunity save for offences committed in circumstances of aggravation.⁵⁰

The reasoning of Bell J thus turned on the following. Hale was a great master of the criminal law whose major work, the *Pleas of the Crown*, was a great authority,⁵¹ and whose statement about the husband's immunity was accepted as authoritative by all the leading text-writers on criminal law.⁵² The widely held understanding or belief during the 1960s was that a husband could not be guilty of the rape of his wife. The South Australian Parliament took steps to reform the marital immunity in 1976, thus confirming the belief in the existence of the immunity. The absence of a binding decision on the existence of the immunity does not detract from its existence.

III THE MARITAL IMMUNITY: A SETTLED PRINCIPLE OF THE COMMON LAW?

The question as to whether the marital immunity was ever a settled principle of the common law was a major issue in *PGA v The Queen*. The majority

⁴⁸ Ibid 415 [164].

⁴⁹ Ibid 425 [196].

⁵⁰ Ibid 425 [197].

⁵¹ Ibid 427–9 [201]–[206].

⁵² Ibid 433 [215].

adverted to the lack of exposition of Hale's proposition in the case law but did not delve into the issue. Larcombe and Heath regard the majority's treatment of the relevant case law as being 'partial' and 'unsatisfactory', particularly given the 'case law is the premier source and site of common law development' and the majority's pivotal finding that the statutory reform of married women's rights eroded the common law.⁵³ Heydon J reviewed the relevant case law and found the marital immunity was the subject of binding precedent until 1991. In contrast, while Bell J found that Hale's proposition came to be accepted as a settled principle of the common law, she conceded there was an absence of a binding decision on the subject but she asserted that 'does not mean that a rule stated in authoritative texts and accepted and acted upon by the legal profession over many years may not acquire status as law'.⁵⁴

So the majority did not explore the issue, Heydon J asserted the existence of binding authority on the subject, and Bell J contradicted Heydon J. One may well wonder why three different approaches emerge on a simple but fundamental question. If the marital immunity was apparently such an entrenched principle of the common law, what were the cases that established that principle? If it was not properly established in the case law, how can it be said it was a settled principle of the common law? Why is there such controversy when the simple question is posed about the source of the marital immunity?

The majority were sceptical as to whether the marital immunity was ever part of the common law of Australia.⁵⁵ This same scepticism was shared by the majority in *R v L*, for whom it was unnecessary to decide the point.⁵⁶ On the other hand, Brennan J in *R v L* and Doyle CJ in the South Australian Court of Criminal Appeal in *R v P, GA* proceeded on the basis that the immunity was believed and accepted as a principle of the common law, despite its questionable basis.⁵⁷ Notwithstanding scepticism about its origin and incorporation into the common law, the majority in *PGA v The Queen* did not doubt or deny that Hale's proposition was accepted and believed to be accurate, hence their conclusion that local statute law had 'removed any basis for *continued acceptance* of Hale's proposition'.⁵⁸

⁵³ Larcombe and Heath, above n 4, 800–1.

⁵⁴ *PGA v The Queen* (2012) 245 CLR 355, 437 [222].

⁵⁵ *Ibid* 369 [18].

⁵⁶ (1991) 174 CLR 379, 388–90 (Mason CJ, Deane and Toohey JJ).

⁵⁷ *R v L* (1991) 174 CLR 379, 399 (Brennan J); *R v P, GA* (2010) 109 SASR 1, 37–8 [149]–[153] (Doyle CJ).

⁵⁸ (2012) 245 CLR 355, 384 [64] (emphasis added).

This approach of the majority would appear to explain their supposed partial or inadequate treatment of the case law. They did not delve into the case law because, for the purpose of their analysis, they were prepared to find that the immunity was certainly accepted as a valid principle of the common law. But this still leaves unanswered the important question as to whether the marital immunity was indeed ever a settled principle of the common law. An important distinction prevails in this area — the existence of the immunity as a *settled principle* of the common law based in case law as compared with the *widely held belief* in the existence of the immunity without foundation in the case law. Put simply, was the immunity properly founded in case law or was belief in the immunity based on some other source?

The scepticism of the majority as to whether the marital immunity was ever part of the common law turns on the original source of the immunity in Hale's text:

This draws attention to a difficulty in the appellant's reliance in this case upon a principle of the common law based on a statement in a text published in 1736, many years after the death of the author, without citation of prior authority and lacking subsequent exposition in cases where it has been repeated.⁵⁹

The majority did not elaborate on this pithy statement. It draws attention to important issues concerning the authorship and publication of the *Pleas of the Crown*, coupled with the subsequent 'exposition' of Hale's proposition in the case law. The question of authorship and publication may be treated briefly.⁶⁰ The *Pleas of the Crown* had been designed as three books — the first on capital offences, the second on non-capital offences and the third on misdemeanours, franchises and liberties. Only the first book had been completed. The first book was the subject of revision by Hale at the time of his death on 25 December 1676. The revisions, some of which were extensive, had only gone as far as ch 27;⁶¹ the law of rape was contained in ch 58. In 1680, the House of Commons ordered the publication of Hale's work. Following editing by Sollom Emlyn, a barrister of Lincoln's Inn, the first edition of the work was

⁵⁹ Ibid 371 [22] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁶⁰ See Sollom Emlyn, 'The Preface' in Sir Matthew Hale, *Historia Placitorum Coronae* (London Professional Books, first published 1736, 1971 ed) vol 1, i, xv; P R Glazebrook, 'Introduction' in Sir Matthew Hale, *Historia Placitorum Coronae* (London Professional Books, first published 1736, 1971 ed) vol 1; William Holdsworth, *A History of English Law*, (Methuen & Co and Sweet & Maxwell, first published 1924, 1987 ed) vol 4, 584, 589–90; *R v R* [1992] 1 AC 599, 604 (Lord Lane CJ).

⁶¹ Emlyn, above n 60, xvi.

published in 1736. The interrupted process of revision and the posthumous publication of the work 60 years after the death of its author raise obvious concerns about the accuracy and currency of the work as at the date of its first publication. Added to these concerns was the author's own injunction against publication: by his will, Hale had prohibited the publication of his unfinished treatises.⁶² There are different views as to why Hale did not seek to publish his legal manuscripts during his lifetime and why he did not want them published after his death. One commentator said that most of his unpublished manuscripts 'convey the impression of being an aid to private meditations'.⁶³ Another commentator asserted that, in difficult times of legal change, Hale took 'great pains ... to insulate himself from trouble' and his failure to publish his legal writings 'was not a matter of modesty or self-effacement'.⁶⁴

Bell J was justified in recognising that the marital immunity was not the subject of any binding precedent. The contrary finding of Heydon J does not, with great respect, bear proper scrutiny. Between the publication of the *Pleas of the Crown* in 1736 and the alleged rape offences committed by PGA in 1963, there are only three reported cases that touch on the marital immunity: *R v Clarence* in 1888,⁶⁵ *R v Clarke* in 1949,⁶⁶ and *R v Miller* in 1954.⁶⁷ The judges in each of these cases were judges of the Queen's Bench division of the English and Wales High Court. None of these cases established the marital immunity as a binding principle of the common law.

R v Clarence contains the first known judicial consideration of the marital immunity. This was a special Crown Case Reserved matter that was presented before all thirteen judges of the Queen's Bench. The case considered the propriety of a husband's convictions for inflicting grievous bodily harm and assault occasioning bodily harm after infecting his wife with a venereal disease following consensual sexual intercourse. The ultimate question was whether the convictions should stand on the basis that, had the wife been aware of the existence of the venereal disease, she would not have consented to sexual intercourse. The relevant legal issue was thus one of fraud or deceit accompanying an apparently consensual act of sexual intercourse. A majority of nine judges upheld the appeal and quashed the convictions.

⁶² Holdsworth, above n 60, 583.

⁶³ Alan Cromartie, *Sir Matthew Hale 1609–1676: Law, Religion and Natural Philosophy* (Cambridge University Press, 1995) 6.

⁶⁴ G Geis, 'Lord Hale, Witches, and Rape' (1978) 5 *British Journal of Law and Society* 26, 28.

⁶⁵ (1888) 22 QBD 23.

⁶⁶ [1949] 2 All ER 448.

⁶⁷ [1954] 2 QB 282.

R v Clarence involved a detailed examination of the issue of consent to sexual intercourse in marriage which provided the context for consideration of Hale's marital rape proposition. The judicial opinions touching on the marital rape proposition are technically obiter dicta,⁶⁸ hence the uncertainty that has surrounded the case as an authority on the issue. Both Heydon J and Bell J touch on *R v Clarence*.⁶⁹ A detailed analysis of the voluminous judgments in *R v Clarence* was undertaken competently by Jocelyne Scutt in 1977 which need not be repeated here.⁷⁰ Scutt's analysis was adopted by the respondent in its written submissions, the latter having been branded by Heydon J as 'very misleading'.⁷¹ But Scutt's analysis was sound. Out of the thirteen judges, seven declined to comment on the marital rape proposition.⁷² Of the remaining six judges, three of them — Wills J, Hawkins J and Field J — doubted the absolute operation of Hale's proposition.⁷³ The were only two judges who agreed with Hale's proposition without reservation or modification, namely Smith J, who dwelt on the concept of unrevoked marital consent,⁷⁴ and Pollock B, who asserted the wife 'is in a different position from any other woman, for she has no right or power to refuse her consent'.⁷⁵

The judgment of Stephen J contains an interesting feature. He found that the only forms of fraud that vitiate consent and thereby give rise to the offence of rape are fraud as to the nature of the act performed or the identity of the person by whom it is done.⁷⁶ It was this reasoning that led to the quashing of the husband's convictions and rendered it unnecessary for Stephen J to consider Hale's proposition. However, he did not resist the opportunity to advertise the alteration to the 1877 first edition of his *Digest of the Criminal Law* touching on the marital immunity:

⁶⁸ *R v Miller* [1954] 2 QB 282, 288 (Lynskey J); Jocelyne A Scutt, 'Consent in Rape: The Problem of the Marriage Contract' (1977) 3 *Monash University Law Review* 255, 257.

⁶⁹ *PGA v The Queen* (2012) 245 CLR 355, 390–1 [95]–[96] (Heydon J), 434–5 [216]–[218] (Bell J).

⁷⁰ Scutt, above n 68, 257–61.

⁷¹ *PGA v The Queen* (2012) 245 CLR 355, 390 [96].

⁷² Lord Coleridge CJ, Huddleston B, Grantham, Manisty and Mathew JJ (quashing the conviction); Charles and Day JJ (dissenting and upholding the conviction).

⁷³ Wills J (quashing the conviction); Hawkins J and Field J (upholding the conviction). Day J concurred with Hawkins J and Charles J concurred with Field J.

⁷⁴ *R v Clarence* (1888) 22 QBD 23, 37.

⁷⁵ *Ibid* 64.

⁷⁶ *Ibid* 43–4.

I wish to observe on a matter personal to myself that I was quoted as having said in my *Digest of the Criminal Law* that I thought a husband might under certain circumstances be indicted for rape on his wife. I did say so in the first edition of that work, but on referring to the last edition it will be found that that statement was withdrawn.⁷⁷

The withdrawn statement, originally a footnote in the rape section of Stephen's *Digest of the Criminal Law*, was excerpted by Bell J in her judgment:

Hale's reason is that the wife's consent at marriage is irrevocable. Surely, however, the consent is confined to the decent and proper use of marital rights. If a man used violence to his wife under circumstances in which decency or her own health or safety required or justified her in refusing her consent, I think he might be convicted of rape, notwithstanding Lord Hale's dictum. He gives no authority for it, but makes the remark only by way of introduction to the qualification contained in the latter part of clause (1), for which *Lord Castlehaven's Case* (3 St Tr 402) is an authority.⁷⁸

The reason for the omission of the footnote was not explained but its content is perhaps more telling than the fact of its omission. Bell J did not comment on the substance of the omitted footnote, which is worth musing upon. The reference to 'decent and proper use of marital rights' highlights the relevance and importance of marital rights on the validity of the marital immunity. It indicates that around 1877 — the time of the reform of married women's rights — there were recognised boundaries of propriety for sexual relations between a husband and wife. This reinforces the legitimacy of the majority's treatment of the topic of ecclesiastical law. Stephen J was of the view that a husband did not have an absolute sexual right to his wife — in certain circumstances, he could be liable for rape for acts of non-consensual sexual intercourse. In this way, he had obviously doubted the fiction of irrevocable marital consent that was so casually asserted by Pollock B. But aside from its substance, it is noteworthy that Stephen J in his footnote referred to Lord Hale's 'dictum' and highlighted how it was unsupported by authority.⁷⁹ The 'dictum' was but an introduction to the topic of the husband's liability for aiding and abetting the rape of his wife, for which surely enough, there was an authority available for citation. The fact of this bare assertion of 'dictum'

⁷⁷ Ibid 46 (citations omitted).

⁷⁸ *PGA v The Queen* (2012) 245 CLR 355, 435 [217], quoting Sir James Fitzjames Stephen, A *Digest of the Criminal Law (Crimes and Punishments)* (Macmillan and Co, 1877) 172 n 1.

⁷⁹ Stephen, above n 78, 172 n 1.

without authority — which also caused Field J to ‘hesitate’ before adopting it⁸⁰ — is the very thing the majority in *PGA v The Queen* cited as a matter of concern in their judgment.⁸¹ It is a proper matter in considering whether the marital immunity was a settled principle of the common law. Blackstone’s treatment of rape contained many references to Hale’s work,⁸² but notably, he did not refer to the marital immunity. Stephen J expressed well-founded concern as at 1877⁸³ and many others since then have expressed similar concerns.

Chapter 58 of the *Pleas of the Crown*, like so many other chapters of the treatise, is replete with references to cases and statutes. That is in part what makes the *Pleas of the Crown* such a great work: Hale had a commanding knowledge of the history of the common law and was no stranger to citing authorities and examples in support of propositions set out in his work. In this regard, Heydon J was unduly soft on Hale when he queried whether there were any authorities available to be cited and stated that the modern method of citing precedents was then in its infancy.⁸⁴ The *Pleas of the Crown* certainly bears no resemblance to such modern texts as those of Archbold of the 19th century or Glanville Williams of the 20th century, however, it emerged as the first authoritative and comprehensive text of its kind that paved the way to modern legal textbook writing. Legal authorities for citation were plentiful in the 17th century — the modern system of precedents had begun.⁸⁵ It just so happened there was no legal authority for the marital immunity. This points to the probable truth of the matter: the immunity was born of Hale’s unsupported ‘dictum’.

What is the final upshot of *R v Clarence*? It seems that Smith J and Pollock B were the first judges to commence the regrettable pattern of citing and repeating Hale’s proposition without thought or question. The obiter of the three judges⁸⁶ who commented on the marital immunity expressed serious doubts about the source and validity of the immunity and suggested that a wife could lawfully refuse to engage in sexual intercourse with her husband.

⁸⁰ *R v Clarence* (1888) 22 QBD 23, 57.

⁸¹ *PGA v The Queen* (2012) 245 CLR 355, 376–7 [40]–[42], 383 [61] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁸² See William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69) bk 4, 210–15.

⁸³ *R v L* (1991) 174 CLR 379, 401.

⁸⁴ *PGA v The Queen* (2012) 245 CLR 355, 387–8 [81]–[82].

⁸⁵ W S Holdsworth, ‘Case Law’ (1934) 50 *Law Quarterly Review* 180, 181–2.

⁸⁶ *R v Clarence* (1888) 22 QBD 23, 33 (Wills J), 51–2 (Hawkins J), 57 (Field J).

And apart from Stephen J who adverted to the removal of the footnote from his textbook without any explanation for so doing, the remaining seven judges who participated in the case did not comment on the matter. Far from declaring or deciding it, *R v Clarence* reveals scepticism and uncertainty about the source and validity of the marital immunity.

From *R v Clarence* in 1888 we move to the case of *R v Clarke* in 1949.⁸⁷ This was a rape trial conducted at the Leeds Assizes of July 1949. The law report contains the ruling of Byrne J, the trial judge, on what the headnote describes as a '[m]otion to quash a count in an indictment'. In today's parlance, we would call it a preliminary application or an application to stay an offence. This oft cited case is thus the published ruling of a trial judge on a preliminary legal application arising in a trial. Byrne J did not appear to hesitate when he said, '[a]s a general proposition it can be stated that a husband cannot be guilty of a rape on his wife'.⁸⁸ Introducing the concept of ordinary marital relations, he developed the fiction of irrevocable or implied marital consent accordingly:

No doubt, the reason for that is that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them. The marital right of the husband in such circumstances exists by virtue of the consent given at the time of the marriage and not by virtue of a consent given at the time of each act of intercourse as in the case of married persons. Thus, the intercourse is not by virtue of any special consent, but is based on an obligation imposed on the wife by reason of the marriage.⁸⁹

This was immediately followed by the citation of vol 1, page 629 of Hale's *Pleas of the Crown*. No other authority was cited. *R v Clarence* is one of the six cases listed in the headnote under the 'cases referred to' but strangely there is no mention of it or any other case in the ruling. Byrne J went on to dismiss the motion on the basis that, at the time of the alleged offence, the wife had obtained a legal order that she was no longer bound to cohabit with her husband. By setting up the dichotomy of ordinary versus legally altered marital relations, Byrne J was able to create an exception to Hale's proposition: the legal order absolving the wife's obligation to cohabit with her husband

⁸⁷ [1949] 2 All ER 448.

⁸⁸ Ibid 448.

⁸⁹ Ibid 448.

‘revoked’ the fictional, perpetual consent conferred by marriage.⁹⁰ The creation of the exception was commendable but the unquestioned Hale citation was regrettable. The founding of the exception saw Byrne J paraphrasing and further developing Hale’s proposition — creation of the legal exception reinforced the fictional rule. The fiction of the wife giving up herself to the husband upon marriage and her consequent conferral of perpetual and irrevocable sexual consent was rationalised in the middle of the 20th century.

The doctrine of precedent operates so that every court is bound to follow any case decided by a court above it in the hierarchy; the doctrine is regulated through the appellate process which enables a superior court to correct the decisions of lower courts.⁹¹ A fundamental consequence of this doctrine is that the rulings of trial judges do not constitute binding precedents. They do not, of themselves, have the force of a binding precedent. Even less so may a trial ruling be said to be declaratory of the common law. According to basic principles of precedents, a trial ruling does not have a greater role or status beyond its function as a ruling on a point of law in the trial process. This is not to deny the complex fabric of common law reasoning and the possibility of a trial ruling acquiring greater force or having some persuasive appeal in another court hearing. A point of law which is the subject of a trial ruling may be developed into a rule or principle upon consideration and adoption by an appellate court. A trial ruling may also be useful to another trial judge considering the same or similar legal point in another case. It cannot be put any higher than ‘useful’. The other trial judge might agree with the previous ruling and decide to follow suit. But he or she may also disagree with it or distinguish it and thereby decide the point in a different way. This is all very trite. But so is the fact that *R v Clarke* could not represent an authoritative judicial statement on the marital immunity. The rudiments of common law reasoning dictate as much. It is perhaps no small wonder then, that the majority in *PGA v The Queen* did not waste ink on analysing *R v Clarke*. Apart from a meagre reference to its citation in a leading Australian textbook on criminal law,⁹² nor did Heydon J and Bell J spend time on *R v Clarke* — they relegated it to their footnotes in citation of the exception to the marital immunity based on legal separation.⁹³ Notwithstanding its subsequent citation, *R v Clarke* was of no great moment in the development of the marital

⁹⁰ Ibid 449.

⁹¹ *Viro v The Queen* (1978) 141 CLR 88, 93 (Barwick CJ), 120 (Gibbs J), 129 (Stephen J), 151 (Jacobs J), 173–4 (Aickin J).

⁹² *PGA v The Queen* (2012) 245 CLR 355, 442 [238] (Bell J).

⁹³ Ibid 391 [97] n 211 (Heydon J), 418 [174] n 355 (Bell J).

immunity at common law. Byrne J did little more than Smith J and Pollock B did in *R v Clarence* in repeating without question Hale's proposition.

R v Miller is the third case in the trio of relevant cases between 1736 and 1963. This too was a trial matter conducted before Lynskey J and a jury in December 1953. The husband was charged with rape and assault causing actual bodily harm against his wife. Unlike the legal status of the victim in *R v Clarke*, the wife in this matter had filed a petition for divorce which had been adjourned and thus left undecided. Dealing with a submission of no case to answer at the close of the Crown case, Lynskey J upheld the defence submission and ruled there was no evidence on which the jury could convict of rape. He directed the jury accordingly and in the end the husband was found guilty of assault only. The reasons given by Lynskey J were detailed. His treatment of Hale's statement about the wife's irrevocable consent is insightful:

At that time it was no doubt considered that that consent, once given, could never thereafter be retracted. One can well imagine that, in the days when that book was written by Sir Matthew Hale, that was the accepted view of the law, because at that time a valid marriage could not be dissolved except by death, and the only way in which a marriage could be avoided was by a private Act of Parliament. It was not an act of the judiciary, but of the legislature. As far as the law was concerned there was no power to avoid a marriage. Since then there have been numerous departures from that view of marriage. But the position as outlined by Hale, so far as I can see, has never in terms been overruled: it has been criticized by some judges, and approved by others, but the curious fact is that in the many years since Hale's *Pleas of the Crown* was written there is no recorded case of a man being prosecuted for rape of his wife during marriage until *Rex v Clarke* before Byrne J in 1949.⁹⁴

This passage demonstrates a number of things. First, Hale's proposition was probably valid based on the concept of marriage during his day. A wife in the 17th century was apparently little more than the sexual chattel of her husband when it came to intimate relations based on the fiction of unity of person. Secondly, there had been 'numerous departures' of the view of marriage since Hale's day: that is what the respondent submitted, and the majority accepted, in *PGA v The Queen*. Stated so simply and casually in 1953, this did not appear to be a controversial or questionable proposition. Thirdly, Hale's proposition, according to Lynskey J, had not been overruled. But as we have just seen, nor had it been established or declared as principle of the

⁹⁴ *R v Miller* [1954] 2 QB 282, 286 (Lynskey J).

common law. Why did Lynskey J treat it as ‘an authority’ that had not been overruled? *R v Clarence* had been argued before him and in his ruling he outlined the key aspects of its judgments concerning Hale’s proposition. His view ‘of the dicta of the judges in *Regina v Clarence* is that the statement of the law in Hale was still accepted by them because their observations were only obiter dicta’.⁹⁵ But as Scutt queried, how do the statements and criticisms of Hale’s proposition, being merely obiter dicta, confirm the authority of Hale and constitute ‘an acceptance’ of his rule?⁹⁶ Applying once again basic principles of precedent, do not obiter dicta call into question the acceptance of the rule? They query the binding status of the rule rather than establish it with a proviso of doubts and criticisms. Scutt was correct when she observed that *R v Clarence* was ‘not the bulwark of the irrevocable consent argument’.⁹⁷ Lynskey J’s treatment of the status of Hale’s proposition in *R v Clarence* was flawed. But even if it were not so, the point about the majority in *PGA v The Queen* not wasting ink on superfluous case analysis remains: the ruling in *R v Miller* was just that, a trial judge’s ruling on a no case submission. Contrary to the analysis of Heydon J,⁹⁸ it is plain that *R v Miller* was not an authoritative declaration of the common law. It was not a binding decision in England or Australia at any time — it was incapable of being such. Its status was not different to, or greater than, that of *R v Clarke*.

This foregoing analysis of *R v Clarence*, *R v Clarke* and *R v Miller* demonstrates a number of things. From 1736 until 1953 the marital immunity was not declared or established as a settled principle of the common law. There was no case that established it as a binding authority. And ‘apart from authority, it is difficult to see how any common law proposition can be formulated’⁹⁹ and treated as an established principle. Aside from the critical treatment it received by some of the judges in *R v Clarence*, Hale’s proposition was cited and repeated without question. This process of recital and repetition fuelled belief in the marital immunity as an established principle of the common law. The recitals and repetitions continued after 1963 in a string of cases that carried on the tradition of the three foregoing cases.¹⁰⁰ In these

⁹⁵ Ibid 288 (citations omitted).

⁹⁶ Scutt, above n 68, 262–3.

⁹⁷ Ibid 261.

⁹⁸ *PGA v The Queen* (2012) 245 CLR 355, 392 [99].

⁹⁹ *Donoghue v Stevenson* [1932] AC 562, 577 (Lord Buckmaster).

¹⁰⁰ *R v O’Brien* [1974] 3 All ER 663, 664–5 (Park J); *R v Steele* (1976) 65 Cr App R 22, 24–5 (Geoffrey Lane LJ); *R v C* [1981] 3 A Crim R 146, 148 (O’Brien CJ); *R v McMinn* [1982] VR 53, 55 (Starke ACJ).

subsequent cases, Hale's proposition coupled with *R v Clarke* and *R v Miller* are the recurring authorities that are treated as validly binding authorities. By way of example, in 1981, the Full Court of the Victorian Supreme Court was content to assume the validity of Hale's proposition even though it was thought to be 'out of tune with modern thinking'¹⁰¹ and an 'unsatisfactory and artificial doctrine'.¹⁰² But even with these significant concerns, coupled with the keen observation that Hale's proposition 'runs oddly counter to modern notions of marriage',¹⁰³ the Victorian Supreme Court was not prepared to question or cast aside Hale's dictum. The cases that have cited and created exceptions to the marital immunity were not binding authorities on the subject. They simply entrenched a tradition of respectful repetition of Hale's dictum.

The analysis of the trio of cases between 1736 and 1963 refutes the criticism of Larcombe and Heath about the majority's selective and partial treatment of the case law. It was not necessary for the majority to undertake the kind of analysis given here for their critique of Hale's proposition. But given the differing views of Heydon J and Bell J as to whether the marital immunity was the subject of binding authority, the foregoing analysis may be useful in clarifying the position on the case law. The analysis also vindicates the observation of Doyle CJ in the South Australian Court of Criminal Appeal that a respectable challenge to Hale's proposition could have been mounted in 1963.¹⁰⁴ The paucity of cases on the topic, coupled with their lack of binding authority, would have made such a challenge compelling. By the 1960s, married women's rights had been reformed for over half a century, the reforms having been recognised by at least one Justice of the High Court as early as 1930.¹⁰⁵ Reference has been made already to Lynskey J's remark in 1953 about the 'numerous departures' from the 17th century conception of marriage. It is plainly incorrect to say the relevant social conditions had changed not long before 1991.¹⁰⁶

The decision of the English Court of Appeal in *R v Jackson*,¹⁰⁷ which received little attention in *PGA v The Queen*,¹⁰⁸ suggests the relevant social

¹⁰¹ *R v McMinn* [1982] VR 53, 55 (Starke ACJ).

¹⁰² *Ibid* 59 (Crockett J).

¹⁰³ *Ibid* 61 (McGarvie J).

¹⁰⁴ *R v P, GA* (2010) 109 SASR 1, 13 [66].

¹⁰⁵ Isaacs J in *Wright v Cedzich* (1930) 43 CLR 493, 505 cited by the majority in *PGA v The Queen* (2012) 245 CLR 355, 384 [63] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

¹⁰⁶ *PGA v The Queen* (2012) 245 CLR 255, 393–4 [103] (Heydon J).

¹⁰⁷ [1891] 1 QB 671.

change was ripe at the end of the 19th century. *R v Jackson* was decided just three years after *R v Clarence*. The Court held a husband was not entitled to confine or imprison his wife to enforce an order for the restoration of conjugal rights. The husband applicant argued that he had dominion over his wife, including the right to chastise and confine her; Hale's marital rape proposition also got a mention.¹⁰⁹ The wife was coming out of church on a Sunday afternoon when she was forcibly seized and driven away in a carriage while struggling to resist her capture, to which Lord Esher MR remarked, '[c]ould anything be more insulting?'¹¹⁰ He said that if the principles and authorities cited by the husband were true, it would make an English wife the 'abject slave' of her husband.¹¹¹ In this way, Lord Esher MR rejected emphatically the legal notion that a husband has the 'custody of his wife'.¹¹² In a similarly passionate tone, Lord Halsbury LC rejected the notion 'of the absolute dominion of the husband over the wife'.¹¹³ He declared that a husband was not entitled to seize and imprison his wife to enforce the restoration of conjugal rights. He referred to the overriding concern to ensure that 'where the wife has a complaint of or reason to apprehend ill-usage of any sort, the Court will never interfere to compel her to return to her husband'.¹¹⁴

Dealing with the restoration of conjugal rights in the context of behaviour amounting to assault and false imprisonment, *R v Jackson* does not provide a direct answer to the marital rape problem. But it would have posed a significant hurdle for proponents of Hale's proposition.¹¹⁵ Lord Halsbury LC at the outset of his judgment 'confess[ed] that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England'.¹¹⁶ He went on to mention the example of slavery but not the husband's marital immunity: one can only wonder whether he also had Hale's proposition in mind. But the importance

¹⁰⁸ (2012) 245 CLR 355, 379 [49] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), 393 [101] (Heydon J), 438 [225] (Bell J).

¹⁰⁹ *R v Jackson* [1891] 1 QB 671, 675 (Lord Halsbury LC).

¹¹⁰ *Ibid* 683.

¹¹¹ *Ibid* 682.

¹¹² *Ibid*.

¹¹³ *Ibid* 679.

¹¹⁴ *Ibid* 680.

¹¹⁵ See the comments of Judge LJ, Nelson and McCombe JJ in *R v C* [2004] 1 WLR 2098, 2101 [11]: 'We also believe that Hale's proposition would have been pressed to withstand the approach of the Court of Appeal in *R v Jackson*'.

¹¹⁶ *R v Jackson* [1891] 1 QB 67, 678.

of the case lies in the fact that both the Lord Chancellor and the Master of the Rolls cast aside the concepts that a husband *possesses the custody* or *exercises dominion* over his wife. This was the derogatory rationale that was explicit in Hale's proposition — *the wife hath given up herself unto her husband*. Whether it was two persons being moulded (or smothered) to become one — usually referred to as the doctrine of unity of person — or the wife being enslaved legally and subject to the custody and protective dominion of her lord husband, they are tantamount to the same thing. They are metaphors that sought to illustrate and rationalise the legal control and authority of the husband over his wife. John Stuart Mill referred to it as 'the legal subordination of one sex to the other'.¹¹⁷ Virginia Woolf described it as 'the safety and prosperity of the one sex and of the poverty and insecurity of the other'.¹¹⁸

Blackstone articulated it this way when writing in 1765 of the rights of husband and wife:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.¹¹⁹

Hale did not refer to 'coverture' or provide such an expansive statement as that given by Blackstone.¹²⁰ It is clear, however, that Blackstone's statement is an elaboration — or further rationalisation — of Hale's metaphor of the wife giving herself unto her husband. Both of these eminent masters of the common law were carving out the same elaborate fiction. It was probably not a controversial submission on the part of the respondent in *PGA v The Queen* to say that Hale's proposition was based on coverture — the very thing, it was argued, which had been statutorily eroded as of the end of the 19th century and certainly well before 1963. The significance of the reform of married women's rights is perhaps enhanced when considered in light of Blackstone's colourful collection of 18th century wings, covers and barons that dominated

¹¹⁷ John Stuart Mill, 'The Subjection of Women' in Stefan Collini (ed), *On Liberty* (Cambridge University Press, 1989) 119.

¹¹⁸ Virginia Woolf, *A Room of One's Own* (Penguin Books, 1945) 26.

¹¹⁹ William Blackstone, *Commentaries on the Laws of England* (1765–69) bk 1, 430 (emphasis in original) (citations omitted).

¹²⁰ See *PGA v The Queen* (2012) 245 CLR 355, 397–8 [118] (Heydon J).

and 'protected' the legal life of a wife. If it is going too far to say that *R v Jackson* rejected by implication the validity of the husband's rape immunity, it is certainly fair to say that it rubbed out the fairy tales of unity of person and coverture that underpinned the immunity. When *R v Jackson* is considered as a legitimate litmus test of late 19th century social values and legal perceptions of the rights of married women, the ex post facto forecast of Doyle CJ about a successful challenge to Hale's proposition emerges as both modest and plausible.

IV THE REPUTATION OF HALE

Counsel for Mr Clarence made the submission that Hale's proposition 'would seem to have been always generally accepted'.¹²¹ One of the judges who received that submission, Field J, remarked that 'the authority of Hale, CJ, on such a matter is undoubtedly as high as any can be'.¹²² A century later, the English Court of Appeal and House of Lords noted how in the 20th century 'courts have been paying lip service to the Hale proposition'.¹²³

If there was a paucity of authority on the marital rape question around the mid-20th century, and there was a good case for challenging Hale's proposition, why did no one take up the challenge? How did Hale's proposition endure so long given its fictional foundation and lack of support in binding authority? In 2004, the English Court of Appeal in *R v C* provided an answer to the latter question consistent with the analysis of the relevant cases given in the previous Part of this case note:

The obstructed development of the common law, and the delayed identification of Hale's proposition as a fiction is readily understood. The issue was never taken to conclusion in a higher court. Faced with a count of rape by a husband on his wife, the court would be invited to quash the count, or to uphold a submission that there was no case for him to answer. If it did, or accepted the submission, the prosecution did not then enjoy any right of appeal. And even if a judge allowed the case to proceed to the jury, it still could not reach the Court of Appeal unless there was a conviction. So, by a series of decisions which did not re-

¹²¹ *R v Clarence* (1888) 22 QBD 23, 24.

¹²² *Ibid* 57. However, it should be noted that Field J went on to say, 'but no other authority is cited by him for this proposition, and I should hesitate before I adopt[] it': at 57.

¹²³ *R v R* [1992] 1 AC 599, 610 (Lord Lane CJ). See also at 620 (Lord Keith).

quire the principle to be addressed in this court, a number of exceptions were grafted onto the principle for which Hale provided the untested authority.¹²⁴

But what of the enduring force of Hale's 'untested authority'? Why did courts and legal commentators continue to pay 'lip service' to the authority of Hale? The answer must lie in his great reputation.

Hale was 'a philosophic jurist, a first-rate legal historian, and a master of the common law'.¹²⁵ He has been described as 'a figure whose reputation, in itself, would justify a study of his career'¹²⁶ and whose 'peculiar combination of qualities makes him one of the most interesting characters to be found in our legal history'.¹²⁷ Holdsworth provides a convenient biography of Hale's life and overview of his works. Genuine piety, honesty and sincerity, lack of interest in pecuniary gain coupled with extraordinary generosity, along with being 'distinguished for his humanity, and scrupulous fairness to prisoners' emerge as some of Hale's prominent virtues.¹²⁸ Holdsworth described him 'as a consummate master of English law on all sides',¹²⁹ referring to both his superiority as a barrister and his excellence as a judge. His wide range of studies and interests outside of the courtroom made him a 'scientific jurist' — he was 'more than a mere common lawyer'.¹³⁰

The *Pleas of the Crown* is a work of great authority. Sollom Emlyn in his original preface to the treatise noted that it 'stands in need of no other recommendation, than what [Hale's] great and good name will always carry along with it'.¹³¹ It is described as having become 'an unchallenged authority on English criminal law'.¹³² To merely assert the greatness of the work does not do it justice nor assist in understanding its enduring authority. Holdsworth's summary of the achievement of the *Pleas of the Crown* is worth extracting:

The subject had been carefully studied by Hale all through his professional career; and we shall see that he had summarized it at an earlier period. This book, so far as it extends, gives a complete presentment of this branch of the law, both

¹²⁴ [2004] 1 WLR 2098, 2102 [15] (Judge LJ).

¹²⁵ Frederick Pollock, 'Sir Matthew Hale on Hobbes' (1921) 37 *Law Quarterly Review* 274, 278.

¹²⁶ Cromartie, above n 63, 1 (citations omitted).

¹²⁷ Holdsworth, above n 60, 574.

¹²⁸ *Ibid* 576–7.

¹²⁹ *Ibid* 581.

¹³⁰ *Ibid* 582.

¹³¹ Emlyn, above n 60, i.

¹³² Cromartie, above n 63, 6.

in its development and in its condition at Hale's own time. It was a branch of the law which could not then be adequately described without a very complete knowledge of the history of the law; and, partly because it contained very ancient ideas and rules, partly because it had been added to, and in many details modified, by a variety of statutes, it greatly needed systematic treatment. Coke, Staunford, and Pulton, had summarized it, in a somewhat unsystematic form. Hale, because he was a competent historian, jurist, and lawyer, did the work which they endeavoured to do infinitely better. Ever since its first publication it has been regarded as a book of the highest authority.¹³³

The history of the marital rape immunity reveals a strong current of judicial appraisal and the celebration of great judges and their reputations. Reputation and authority come to influence and bolster judicial decision-making. Absence or paucity of binding judicial authority is overcome by relying on the greatness of Hale's authority. In very simple terms, the marital rape immunity had to be a valid rule of the common law because it was stated by Hale. It did not bear questioning: it came from Hale. This may sound too simplistic. But it is this underlying thinking — or very often, explicit reasoning — that can be traced through most of the cases and legal commentaries that have cited and repeated Hale's proposition without question. The towering strength of Hale's authority probably explains why judges in the past were hesitant to discard or overrule his authority even when faced with its unique location in history, its fictitious basis and its peculiar publication history.

Taking a historically critical approach to the marital rape problem,¹³⁴ the majority in *PGA v The Queen* did not engage in the tradition of Hale's great authority nor did they pay lip service to his reputation. But the tradition was proudly upheld by Heydon J and Bell J. Heydon J referred to Hale's 'high reputation' for research into the criminal litigation of his day¹³⁵ and cited Lord Denning's reference to 'the great Chief Justice Sir Matthew Hale'.¹³⁶ He referred to the 'massive support' that Hale's proposition garnered from both professional and academic writers.¹³⁷ In a similar fashion, Bell J cited the praises of Hale by Blackstone, Stephen and Maitland and then excerpted the

¹³³ Holdsworth, above n 60, 590 (citations omitted).

¹³⁴ For an overview of the differing uses of history in the reasoning of the High Court, see Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20 *University of Tasmania Law Review* 129, 140–57.

¹³⁵ *PGA v The Queen* (2012) 245 CLR 355, 387 [82] (Heydon J).

¹³⁶ *Sykes v Director of Public Prosecutions* [1962] AC 528, 558 quoted in *PGA v The Queen* (2012) 245 CLR 355, 389 [92].

¹³⁷ *PGA v The Queen* (2012) 245 CLR 355, 389 [92] (Heydon J).

passage above from Holdsworth's history.¹³⁸ She referred to Hale's 'commanding knowledge of the work of the courts administering criminal justice'¹³⁹ in support of the proposition that marital rapes were not prosecuted in the period before the publication of his criminal treatise. Hale's reputation, incidentally, is not the only one referred to by the judges. Footnote 211 of Heydon J's judgment paid respect to the great reputation of Byrne J to bolster the authority of *R v Clarke*:

The judge was Byrne J, of whom Owen J said in *R v R* [1991] 1 All ER 747 at 749: 'Those who appeared before him will know that he was a judge of the highest repute. As a criminal lawyer, there were not many to excel him in his day.' In *R v Miller* [1954] 2 QB 282 at 289 Lynskey J concurred with *R v Clarke*.¹⁴⁰

And Bell J referred to Stephen J being a 'great master of the criminal law'¹⁴¹ in the context of discussing his judgment in *R v Clarence* and his influence in the drafting of rape legislation that excluded marital rape.

The reputation of Hale assumes an important place in the judgments of Heydon J and Bell J. They praise his reputation and repeat his authority as an essential element in upholding the enduring validity of the marital immunity. They perpetuate the concept of the unchallenged status of Hale's authority. That unchallenged authority is evidenced by the litany of cases and commentaries that have repeated his authority without question and the reform of Parliaments that were premised on the apparently enduring validity of that authority. The essence of this reasoning turns on not questioning that which has not previously been questioned. It is this reasoning that influenced Heydon J and Bell J's particular approach to answering the appeal question. By emphasising his high reputation and treating the greatness of his authority as a focal point, both judges assumed in Hale the very thing in contention and thereby avoided a critical analysis of the origin and enduring effect of his work.

In trying to console Cassio deceitfully, Iago remarked that, '[r]eputation is an idle and most false imposition, oft got without merit and lost without deserving'.¹⁴² Nothing could be further from the truth in Hale's case. There is

¹³⁸ Ibid 428–9 [203]–[206].

¹³⁹ Ibid 430 [209].

¹⁴⁰ Ibid 391 [97] n 211.

¹⁴¹ Ibid 435 [219].

¹⁴² William Shakespeare, *Othello* (Cambridge University Press, 1984) 107.

no doubting his authority and reputation generally, his contribution to understanding the historical development of criminal law, and his having paved the way towards a coherent theory of laws and legal process. Holdsworth quite properly pointed out how fortunate succeeding generations of lawyers have been that Hale's injunction against the printing of his treatises was disregarded.¹⁴³ To thus rely on Hale's great reputation and assert his marital rape proposition as an arguably valid legal statement for his day is one thing.¹⁴⁴ Reliance on the same reputation, however, coupled with the non-critical citation and repetition throughout the 19th and 20th centuries of Hale's proposition without regard to the time and place of its genesis, resulted in an irrational and anachronistic blot on the history of the common law of rape.

V MARITAL RAPE IN THE TEXTBOOKS

The rulings and decisions of judges were not the only legal sources that perpetuated belief in the validity of the marital immunity. Textbook writers and commentators on criminal law also played their part in the tradition of Hale repetition. In support of his central argument about the operation of the marital immunity in 1963, PGA submitted that 'an examination of the text books reveals a similar position, namely the acceptance of Hale's proposition that a husband could not be charged with the rape of his wife'.¹⁴⁵ The majority referred briefly to three criminal treatises of the 19th century — those of East, Chitty and Russell — and made the observation that the proposition was repeated but without any 'statement and analysis of reasoning which might have supported the statement by Hale and its continued acceptance'.¹⁴⁶ On the other hand, Bell J claimed that Hale's statement 'was taken as an authoritative statement of the law by all the leading text-writers',¹⁴⁷ and Heydon J maintained that certain leading text writers — Glanville Williams, Smith and Hogan, and Cross and Jones — 'acknowledged the correctness of Hale's proposition'.¹⁴⁸ Bell J did not traverse the writings of any of the text-writers,

¹⁴³ Holdsworth, above n 60, 584.

¹⁴⁴ See *R v R* [1992] 1 AC 599, 604 (Lord Lane CJ), 616 (Lord Keith); J L Barton, 'The Story of Marital Rape' (1992) 108 *Law Quarterly Review* 260, 261–2.

¹⁴⁵ PGA, 'Appellant's Argument', Submission in *PGA v The Queen*, No A15 of 2011, 6 July 2011, 5 [6.16].

¹⁴⁶ *PGA v The Queen* (2012) 245 CLR 355, 365 [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

¹⁴⁷ *Ibid* 433 [215].

¹⁴⁸ *Ibid* 389 [92].

instead, she provided an extensive footnote that catalogued a great number of texts on criminal law ranging from East's treatise of 1803 to Howard's *Australian Criminal Law* of 1965.¹⁴⁹

The criminal law textbooks provide an interesting contrast to treatment of the marital immunity in the cases. They demonstrate that PGA's submission on the textbooks was too general and oversimplified the matter. It is instructive to provide a sample from some of the leading textbooks of the 20th century. Kenny gives a statement of the 'general rule' that a husband cannot be guilty of the rape of his wife, prefacing the statement with the phrase, 'it has been stated' and citing '1 Hale PC 629'.¹⁵⁰ Hamilton and Addison also give a simple statement of the immunity, but instead cite *R v Clarence* in its support.¹⁵¹ In Russell's work the immunity is announced with the phrase 'it has been said' and a citation of Hale; this is followed by an excerpt of the judgment of Wills J from *R v Clarence* and the remark, '[a]s to the correctness of this view there is some difference of judicial opinion'.¹⁵² Archbold too cites '1 Hale 629' in support of the immunity but immediately qualifies this by referring to 'the remarks of the judges in *R v Clarence*' and saying 'it would seem that the proposition does not necessarily extend to every possible case'.¹⁵³ A similar pattern of giving the 'general rule' and qualifying it with footnote references to *R v Clarence* appears in *Halsbury's Laws*,¹⁵⁴ which provides a good example of how the subtext of the footnote qualifies the general rule given in the main text. And in a similar fashion, Roulston cites Hale's proposition as the 'traditional view' on the matter but goes on to say 'doubts have been expressed more recently as to the absolute nature of this proposition'.¹⁵⁵

The textbooks referred to so far reveal a number of things. Some texts are content to cite Hale in support of the general proposition without more. Hale's proposition is regarded as the 'general rule' or the 'traditional view' and some

¹⁴⁹ Ibid 433 [215] n 456.

¹⁵⁰ J W Cecil Turner, *Kenny's Outlines of Criminal Law* (Cambridge University Press, 19th ed, 1966) 200–1 [143], 200 [143] n 7.

¹⁵¹ C E Weigall and R J McKay, *Hamilton and Addison: Criminal Law and Procedure* (Lawbook, 6th ed, 1956) 88.

¹⁵² J W Cecil Turner, *Russell on Crime* (Sweet & Maxwell, 12th ed, 1964) vol 1, 708.

¹⁵³ T R Fitzwalter Butler and Marston Garsia (eds), *Archbold: Pleading, Evidence and Practice in Criminal Cases* (Sweet & Maxwell, 36th ed, 1966) 1081 [2880].

¹⁵⁴ Viscount Simonds (ed), *Halsbury's Laws of England* (Butterworth and Co, 3rd ed, 1955) vol 10, 746 [1437] n l.

¹⁵⁵ R P Roulston et al, *Introduction to Criminal Law in New South Wales* (Butterworths, 2nd ed, 1980) 167–8 [1204].

writers draw particular attention to Hale as the person who ‘said’ or ‘stated’ it — the process of repetition is very explicit. The mixed interpretations of *R v Clarence* also become readily apparent: one writer cites it in support of the immunity, two others cite it by way of qualifying it. However, apart from the few who repeat the Hale proposition without more, most of the writers take some steps to qualify it or point out that it is open to doubt or question. As one would expect in an academic or educational work, although the tradition of Hale repetition is upheld, significant questions are posed and critical commentary emerges which call into serious question the enduring validity of the immunity in the 20th century.

The questions and critical commentary on Hale’s proposition intensify in five other well-known textbooks on criminal law. Stephen and Sturge’s *Digest of the Criminal Law* in 1947 contains the line, ‘[a] husband [it is said] cannot commit rape upon his wife’¹⁵⁶ with a prefatory footnote that restored with slight variation the previously omitted 1877 footnote.¹⁵⁷ Brett and Waller’s *Cases and Materials* in 1965 contained lengthy excerpts of the judgments in *R v Clarence* followed by a series of tutorial-style questions including the following on the fiction of perpetual marital sexual consent:

(a) What is involved in the notion of a consent which is given in advance, and by way of implication only, to a series of transactions extending over an indefinite period, and which cannot be retracted by the party giving it? Is this not a completely fictional notion? And is it not thus more accurate and sensible to base the analysis of the husband-wife sexual relationship upon the notion of a privilege conferred by the law, as Hawkins J, suggests?¹⁵⁸

Williams said the husband was legally incapable of perpetrating rape on his wife and footnoted this statement with a comment about the ‘division of opinion in *Clarence*’.¹⁵⁹ He described the ‘reason traditionally given’ for the immunity as being ‘the totally unconvincing one that the wife’s consent is given on marriage, and she cannot revoke it. It would be an understatement to say that this authentic example of male chauvinism fails to accord with current opinion as to the rights of husbands’.¹⁶⁰ Howard gave the general

¹⁵⁶ Sir James Fitzjames Stephen and Lewis Frederick Sturge, *A Digest of the Criminal Law (Indictable Offences)* (Sweet & Maxwell, 8th ed, 1947) 273.

¹⁵⁷ See above n 78.

¹⁵⁸ Peter Brett and Peter L Waller (eds), *Cases and Materials in Criminal Law* (Butterworths, 2nd ed, 1965) 298.

¹⁵⁹ Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons, 1st ed, 1978) 195 n 7.

¹⁶⁰ *Ibid* 195 (citations omitted).

statement of the immunity with the standard exceptions based on legal separation and prefaced his commentary on the subject with this poignant observation: 'Since there is no decision on the point in the Australian common law, the basis and merits of the husband and wife rule require discussion'.¹⁶¹ He went on to stamp the standard '1 Hale PC 629' citation in support of the 'traditional view' and then embarked on this insightful commentary:

Since, however, there has never been any question that V may and often does withdraw her consent in fact, either temporarily or permanently, for one reason or another, this is hardly an adequate ground on which to base the law at the present day. Indeed, that part of the law which is most directly concerned with the marital relationship, matrimonial law, recognises many occasions when V may withdraw her consent to intercourse and thereby produce consequential effects on the legal positions of both parties to the marriage. The question therefore becomes whether it is wise as a matter of policy to apply the law of rape to certain situations between husband and wife.¹⁶²

Smith and Hogan state '[t]he common law rule almost certainly was that a husband could not be convicted of raping his wife as a principal in the first degree'.¹⁶³ They quote the Hale proposition and opine that his view of the law 'seems to have been so generally accepted that there was no recorded prosecution of a husband for himself committing rape upon his wife until 1949' with *R v Clarke*.¹⁶⁴ They go on to say:

Though doubts were expressed by some of the judges in *Clarence*, the rule as stated by Hale has been generally accepted for so long, not only in England, but in other common law jurisdictions that, for practical purposes, it must be taken to be the common law.¹⁶⁵

Most of the textbooks appear to characterise Hale's proposition — the 'general rule' or 'traditional view' — as a relic of the past, and yet one that still has currency. The very phrases 'general rule' and 'traditional view' and references to the proposition in the past tense exemplify this tension. The issues and questions outlined by the writers, considered individually and collectively, certainly reveal great concerns about the enduring validity of the

¹⁶¹ Colin Howard, *Australian Criminal Law* (Lawbook, 1st ed, 1965) 145.

¹⁶² *Ibid* 145–6.

¹⁶³ J C Smith and Brian Hogan, *Criminal Law* (Butterworths, 5th ed, 1983) 405.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid* 406.

marital immunity around the mid-20th century. The restored footnote in Stephen's edited text reinstates concerns about the origin and basis of the immunity. Brett and Waller expose the fiction underlying the immunity and question whether the topic is not better treated as a legal privilege. The comments of Williams require no elaboration but may be seen, in a very general way, as an emotive summary of aspects of the reasoning of the majority in *PGA v The Queen*. The commentary of Howard adverts to the reality of husband-wife sexual relations and highlights the significance of matrimonial law on this reality which, as we know, assumes an important place in the judgment of the majority in *PGA v The Queen*.

Smith and Hogan probably make an assumption about the status of the law based on the absence of evidence of a prosecution. The absence of a prosecution is an equivocal factor and does not necessarily entail that police and Crown prosecutors were turning away forthcoming complainants of marital rape based on an acceptance of Hale's dictum.¹⁶⁶ Putting this to one side, the excerpted commentary from their work is very telling and touches on the main thesis of this case note. Notwithstanding a lacuna of binding authority, Hale's proposition came to represent the common law for what Smith and Hogan casually describe as 'practical purposes'.¹⁶⁷ We have thus touched upon a startling frank explanation that goes to the crux of the status of the marital immunity. Hale's proposition was taken to represent the common law based on an easy reliance on his great reputation coupled with a sufficient history of repetition of his proposition.

There is another important legal commentary on the marital immunity worthy of attention: the *Special Report — Rape and Other Sexual Offences* by the Criminal Law and Penal Methods Reform Committee of South Australia. Commonly known as the 'Mitchell Committee', its three core members were Justice Roma Mitchell, Colin Howard and Mr David Biles, assistant director of the Australian Institute of Criminology. The Mitchell Report was requested by the Attorney-General Peter Duncan in December 1975 and was produced by the Committee shortly after in March 1976. The Mitchell Report was not confined to the issue of marital rape, rather, it had a broad mandate on all aspects of substantive law, evidence and procedure concerning rape and other

¹⁶⁶ At least one reason for a lack of forthcoming complainants may have had to do with prevailing marital sexual culture which was characterised by a lack of meaningful dialogue between husbands and wives about sexual relations, female sexual passivity and a sense of wifely conjugal duty: see, eg, Simon Szreter and Kate Fisher, *Sex Before the Sexual Revolution: Intimate Life in England 1918–1963* (Cambridge University Press, 2010) 317–63.

¹⁶⁷ Smith and Hogan, above n 163, 406.

sexual offences.¹⁶⁸ Based on the policy that ‘it is only in exceptional circumstances that the criminal law should invade the bedroom’, the Mitchell Report recommended that a husband be indicted for rape of his wife committed when living apart under different roofs.¹⁶⁹ This recommendation sought to strike a balance between protecting the wife in certain circumstances of separation and preserving the sanctity of the institution of marriage. Consideration of the propriety of this policy, along with the social and political context surrounding the commission of the Mitchell Report and a critique of what the Parliament ultimately made of the Committee’s recommendation, fall beyond the scope of this case note and have been dealt with elsewhere.¹⁷⁰

As the legal research paper that underpinned a major statutory reform, the treatment of the binding source of the marital immunity in the Mitchell Report is baffling. Heydon J in *PGA v The Queen* said the report ‘acknowledged that Hale’s proposition represented the common law’¹⁷¹ and suggested this was an instance of ‘indirect governmental recognition’ of the immunity.¹⁷² However, the Mitchell Committee devoted only a single sentence in analysing the substance of the common law rule: ‘The principle at common law was that a husband could not be guilty of a rape upon his wife’, which was accompanied by the familiar Hale citation.¹⁷³ The expression of the principle in the past tense and the citing of Hale alone in support of it have been touched on already. To say treatment of the topic was scant is to understate the matter. Given the range of issues surrounding the topic, and given the amount of critical commentary that had been gathering in the textbooks, one cannot help but wonder why the Mitchell Committee dealt with the status of the

¹⁶⁸ See Peter Sallman and Duncan Chappell, ‘Rape Law Reform: A Study of the South Australian Experience’ (Report, Australian Criminology Research Council, 1980) 18–22.

¹⁶⁹ Mitchell Report, above n 41, 14–15.

¹⁷⁰ On the social and political climate, see Susan Magarey, ‘Sex and Citizenship: From Ballot Boxes to Bedrooms’ in Robert Foster and Paul Sendziuk, *Turning Points: Chapters in South Australian History* (Wakefield Press, 2012) 63–76; Helen Jones, *In Her Own Name: Women in South Australian History* (Wakefield Press, 1986) 140–61; Sallmann and Chappell, above n 168, 1–18. On the question of the recommendation of the Special Committee and the legislation that was finally enacted, see Scutt, above n 68, 275–87. For a broader overview of marriage trends and the rights and interests of woman throughout the history of South Australia, see Ken Elford, ‘Marriage and Divorce’ in Eric Richards (ed), *The Flinders History of South Australia — Social History* (Wakefield Press, 1968) 312–32; Carol Bacchi, ‘The “Woman Question” in South Australia’ in Eric Richards (ed), *The Flinders History of South Australia — Social History* (Wakefield Press, 1986) 403–32.

¹⁷¹ *PGA v The Queen* (2012) 245 CLR 355, 394 [106].

¹⁷² *Ibid* 394 [105].

¹⁷³ Mitchell Report, above n 41, 13.

immunity in such a perfunctory way in their report. In particular, recalling the poignant observation in his textbook that there was no decision on the point in the Australian common law, one may well wonder why Howard did not cause this to be taken up in the Mitchell Report. Why was no mention made about the lack of binding authority to settle the matter for Australian law?¹⁷⁴ Why did the Mitchell Committee not explore the applicability of the immunity in Australia as at 1976? The subject appeared to have been glossed over and critical engagement in it avoided. We find yet another episode in the history of the marital immunity where the making of assumptions and the avoidance of critical questions are the norm. Consistent with the theme revealed in many of the textbooks, the Mitchell Committee characterised the immunity as a thing of the past but was content to regard it as a thing of the present.

The legislative reform of the marital immunity in South Australia was a major focus of PGA's argument in both the South Australian Court of Criminal Appeal and the High Court. The statutory reforms were said to be compelling evidence of the state of the common law and so confirmatory of the valid operation of the immunity. Bell J found this argument highly persuasive and a 'good reason' for the Court not to declare the law to have been otherwise. She found distasteful the idea that all the parliaments around the country reformed the immunity 'upon a wrong understanding of the law'.¹⁷⁵ Heydon J characterised the statutory reform in a similar way when he said, 'there is South Australian legislation recognising Hale's proposition in the sense that it did not interfere with it when there was an occasion to do so'.¹⁷⁶ The reliance on the significance of the statutory reform process by Heydon J and Bell J draws attention to the fundamental principle about the role of the courts in pronouncing the content of the common law and the irrelevance of the views of the legislature thereto. This aspect of their reasoning also calls into question the cogency of the Mitchell Report's treatment of the marital immunity and the extent to which the South Australian Parliament relied on the Report. The legal connection between the content and recommendation of the Report and the resultant legislation hardly needs repeating — both the Mitchell Committee and the Parliament assumed the

¹⁷⁴ At the time the Mitchell Report was being prepared, it appears that one of the first Australian cases to touch on the issue by way of obiter dicta was *R v Brown* (1975) 10 SASR 139, 141 (Bray CJ), 153 (Wells J), but this case did not affect the cogency of the observation given in the 1965 ed of Howard's textbook nor did it purport to decide or settle the matter.

¹⁷⁵ *PGA v The Queen* (2012) 245 CLR 355, 443–4 [244].

¹⁷⁶ *Ibid* 395 [109].

valid existence of the immunity. But the substance of this connection was probably not as simple and straightforward as was argued by PGA and assumed by the two dissenting judges.

The manner in which the debates about the immunity unfolded in Parliament¹⁷⁷ had little to do with the dictum of Hale and the currency of some old rule of the common law. The main substance of the parliamentary debates turned on questions of public policy, such as the ‘invasion’ of the criminal law into the marital bedroom, the preservation of the institution of marriage and measures to protect wife rape victims both within and outside of the criminal law. Interestingly, one member who debated the matter in the House of Assembly questioned whether the anachronism of a wife being bound to submit to marital intercourse was ‘already embodied in the law’.¹⁷⁸ That question may have occurred to other members. These observations are merely indicators of the social and political aspects of the legislative process. The social realities and political exigencies of the legislative process are one of the main reasons why courts do not usually defer to the legislature to ascertain the state of the law. To rely on the statutory reform process in a general blanket-fashion as evidence of the validity of the immunity, without regard to the context and complexities of the legislative process, is to reason on an unsteady foundation. Considering the nominal attention that was given to the source and legal currency of the immunity in the Mitchell Report, coupled with the controversial and politicised nature of the parliamentary debates that ensued, there is good reason for pause and scepticism when considering the South Australian statutory reform process as a relevant source on the legal validity of the marital immunity.

¹⁷⁷ See South Australia, *Parliamentary Debates*, House of Assembly, 19 October 1976, 1611–13; South Australia, *Parliamentary Debates*, House of Assembly, 2 November 1976, 1819–42; South Australia, *Parliamentary Debates*, Legislative Council, 9 November 1976, 1942–4; South Australia, *Parliamentary Debates*, Legislative Council, 11 November 1976, 2089–2102; South Australia, *Parliamentary Debates*, Legislative Council, 16 November 1976, 2129–49; South Australia, *Parliamentary Debates*, Legislative Council, 17 November 1976, 2213–19; South Australia, *Parliamentary Debates*, Legislative Council, 23 November 1976, 2348–52; South Australia, *Parliamentary Debates*, Legislative Council, 23 November 1976, 2406–12; South Australia, *Parliamentary Debates*, House of Assembly, 24 November 1976, 2471–74.

¹⁷⁸ South Australia, *Parliamentary Debates*, House of Assembly, 2 November 1976, 1822 (Harold Allison).

VI THE FICTIONAL FOUNDATION OF THE MARITAL IMMUNITY

The fictional foundation of the husband's marital rape immunity is well-established. The immunity was based on the legal fiction of the unity of husband and wife. Reference has been made already to the treatment of the fiction by Hale and Blackstone. The biblical origin of the fiction is well known. The Book of Genesis talks of how husband and wife 'shall be one flesh'.¹⁷⁹ Williams explained how '[t]here can be no doubt that it was this theological metaphor that produced the legal maxim' which was passed down through Bracton, Littleton and Coke until it became 'part of the stock-in-trade of the common lawyers'.¹⁸⁰ Writing in 1947, Williams pointed out how judges came to deal with applications of the fiction 'with some caution' and how the fiction 'is an imperfect representation of the common law'.¹⁸¹ After reviewing the role of the fiction in the various departments of evidence, criminal law and tort, Williams concluded it could not be simply said that the fiction was or was not part of modern English law, instead, all that could be said by way of generalisation

is that the fiction has been applied in certain contexts, but that in almost all of them it has subserved public policy, or at least humanitarianism. A doctrine that thus enables Judges to mould other rules of law in accordance with public policy or humanitarianism is not lightly to be cast aside; but it is submitted that it ought to be used only to bolster up a decision arrived at on other grounds, and it is not in itself a satisfactory basis of decision.¹⁸²

The 'humanitarian' aspect of this critique is questionable when juxtaposed with the operation of the marital rape immunity, however, Williams did not deal with the law of rape in his review of the fiction in criminal law. But his opinion that the immunity is only valuable to bolster a decision arrived at on other grounds, and as being unsatisfactory in and of itself as a basis for a decision, provides an important model for assessing the foundation and operation of the marital immunity.

Lon Fuller's classic analysis of the legal fiction affords another useful model for considering the fiction of the unity of husband and wife in the marital rape

¹⁷⁹ 'Therefore shall a man leave his father and his mother, and shall cleave unto his wife; and they shall be one flesh': *Genesis* (King James Version, 2005 ed) 2:24.

¹⁸⁰ Glanville L Williams, 'The Legal Unity of Husband and Wife' (1947) 10 *Modern Law Review* 16, 16–17 (citations omitted).

¹⁸¹ *Ibid* 17–18.

¹⁸² *Ibid* 31.

immunity. Writing in the early 1930s, Fuller defined a legal fiction as ‘either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognised as having utility’.¹⁸³ The first element distinguished a fiction from a lie in that it is ‘not intended to deceive and did not deceive anyone’,¹⁸⁴ that is, the fiction ‘has never been made with the intention of producing belief in *its* truth’.¹⁸⁵ The second element distinguished the fiction from an erroneous conclusion as ‘it is adopted by its author with knowledge of its falsity’ with the recognition that it has ‘a certain utility’.¹⁸⁶ According to Fuller, the utility of a legal fiction turns on the realisation of its falsity: ‘A fiction taken seriously, ie, ‘believed,’ becomes dangerous and loses its utility’.¹⁸⁷ Inversely, ‘[a] fiction becomes wholly safe only when it is used with a complete consciousness of its falsity’.¹⁸⁸

How does the marital rape immunity fare when considered in light of the critique of Williams and the model of Fuller? It becomes readily apparent that the answers to this question depend on how, and at what point in time, one characterises the immunity.

Hale cast the marital rape immunity in absolute terms. He articulated it as a principle of universal application. There was no question about the content of the proposition or any contingency as to its effect — a husband could not be liable for the rape of his wife. The key words — ‘husband’, ‘rape’ and ‘lawful wife’ — were plain English words that were apparently static in their meaning and required no definition. The application of the proposition did not admit qualification or exception. In its original formulation, it was an absolute proposition of universal application. The original formulation was cast in metaphorical language — the metaphor of a wife ‘giv[ing] up herself’ to her husband as a result of the marital contract conjures colourful imagery.¹⁸⁹ Fuller pointed out how the device of metaphor gives legal fiction its persuasive effect.¹⁹⁰ An interesting question arises: did Hale regard his marital rape proposition metaphorically or did he mean it literally? Or to paraphrase

¹⁸³ Lon L Fuller, *Legal Fictions* (Stanford University Press, 1967) 9. The book reproduces, ‘in only slightly altered form’, three articles originally published in vol 25 of the *Illinois Law Review* (1930–31).

¹⁸⁴ *Ibid* 6.

¹⁸⁵ *Ibid* 7 (emphasis in original).

¹⁸⁶ *Ibid* 7, 9.

¹⁸⁷ *Ibid* 9–10.

¹⁸⁸ *Ibid* 9–10.

¹⁸⁹ Hale, above n 1, 629.

¹⁹⁰ Fuller, above n 183, 10, 14–15, 24.

Fuller, did he 'believe' in his fiction? Taking a historical perspective, there is good reason to support the literal view.

Hale was an ecclesiastic. He was educated in Puritan principles — he studied theology and held deep religious convictions.¹⁹¹ Holdsworth notes that, '[Hale] was sincerely religious, and he thought and wrote much upon theological questions', and in this regard, 'some of the most broadminded and learned churchmen of the day were his friends'.¹⁹² One should also not overlook that, in 1662, Hale presided over a witchcraft trial which saw him sentence two women to death.¹⁹³ The famous trial provides a good example of the extent of Hale's religious convictions and the interrelationship between law and religion in 17th century England.¹⁹⁴ Holdsworth tells us that the trial took place 'at a time when the rationalizing and sceptical spirit of the day was beginning to cause the more enlightened to doubt the existence of witchcraft', however, we are also told that the sentence passed by Hale was 'in accordance with the law and that the existence of witches was vouched for by the Bible'.¹⁹⁵ Hale also touched on witchcraft in his chapter on homicide in the *Pleas of the Crown* — describing it as one of the 'secret things [that] belong to God', he pointed out that witchcraft as a cause of disease and death cannot constitute murder or manslaughter as it does not involve the performance of an 'external act of violence'.¹⁹⁶

The case of *R v Clarke* and the string of cases that followed it have been described as creating a legal exception to a fictional rule. These 20th century cases established that the immunity ceased to operate when the legal relation that conferred perpetual sexual consent was terminated. By the time of the 20th century, as revealed in the relevant cases and textbooks on criminal law, the legal fiction underpinning the marital immunity was not taken literally. This signifies an important shift in thinking from the time Hale

¹⁹¹ Holdsworth, above n 60, 574–5.

¹⁹² *Ibid* 578.

¹⁹³ *A Tryal of Witches, at the Assizes Held at Bury St Edmunds for the County of Suffolk; on the tenth day of March, 1664 — Before Sir Matthew Hale Kt Then Lord Chief Baron of His Majesties Court of Exchequer* (William Shrewsbury, 1682) 58; William Renwick Riddell, 'Sir Matthew Hale and Witchcraft' (1926) 17 *Journal of the American Institute of Criminal Law and Criminology* 5; Geis, above n 64, 26.

¹⁹⁴ See David Saunders, 'The Judicial *Persona* in Historical Context: The Case of Matthew Hale' in Conal Condren, Stephen Gaukroger and Ian Hunter (eds), *The Philosopher in Early Modern Europe: The Nature of a Contested Identity* (Cambridge University Press, 2006) 140–59.

¹⁹⁵ Holdsworth, above n 60, 578–9. Both of these points were made by Hale in his summing-up to the jury: Geis, above n 64, 34–5.

¹⁹⁶ Hale, above n 1, 429.

wrote: the metaphor supporting the immunity was regarded as fiction. But recognition of the fiction did not detract from the assumed validity of the immunity. The courts did not question or discard the immunity despite its dubious fictional foundation, which was inconsistent with the modern legal concept of marriage. Applying Fuller's model, then, it can be seen how the fiction underpinning the immunity started its life with a literal or religious conception that over time came to be acknowledged as fictional. So the 'danger' initially presented by the fiction dissipated over time with the disbelief that went with it. But to what end did the product of the fiction remain? The immunity product, according to the critique of Williams, came to rest on a singularly unsatisfactory basis. The end or 'utility' of the immunity could hardly be seen as an instance of 'humanitarianism' — on the contrary, Williams aptly described the stark utility of the immunity as 'an authentic example of male chauvinism'.¹⁹⁷

PGA v The Queen exhibits two fundamentally different approaches to the relationship between the fiction of the unity of husband and wife and the validity of the marital immunity. The majority found that the immunity ceased to exist around 1935 in part due to its abrogation by statute. The underlying premise of this aspect of the majority's reasoning turns on the cessation of a common law rule whose basis no longer exists:

To these steps may be added one which is determinative of the present appeal. It is that where the reason or 'foundation' of a rule of the common law depends upon another rule which, by reason of statutory intervention or a shift in the case law, is no longer maintained, the first rule has become no more than a legal fiction and is not to be maintained.¹⁹⁸

This method of legal reasoning is based on the legal maxim, *cessante ratione legis cessat ipsa lex*. Tracing this back to Coke's *Institutes*,¹⁹⁹ Broom translated the maxim to mean, '[r]eason is the soul of the law, and when the reason of

¹⁹⁷ Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons, 1st ed, 1978) 195; Glanville Williams, 'The Problem of Domestic Rape' (1991) 141 *New Law Journal* 205, 206. It should not be overlooked that Williams drew a distinction between 'stranger rape' and 'domestic rape' (involving the cohabiting husband) and considered the offence of rape should not apply to the latter offence category but that an alternative, lesser offence should have been devised: at 206. This view, however, does not detract from his critique of the traditional reason given for the basis of the immunity.

¹⁹⁸ *PGA v The Queen* (2012) 245 CLR 355, 373 [30] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (citations omitted).

¹⁹⁹ Sir Edward Coke, *The First Part of the Institutes of the Laws of England; Or, A Commentary upon Littleton* (Johnson and Warner, and Samuel R Fisher Jr, 1812) vol 1 [70b].

any particular law ceases, so does the law itself'.²⁰⁰ The 'cessante ratiōne' maxim is not a 'universal legal talisman',²⁰¹ however, it has been cited and applied from time to time to consider whether a certain law should be discarded or distinguished.²⁰² Although the majority did not coin the Latin, their underlying premise as stated above is a plain English articulation of the maxim. It is this logical and pragmatic approach in reasoning which explains the conclusion of the majority in terms of Australian statute law having 'removed any basis for continued acceptance of Hale's proposition'.²⁰³ The same reasoning purports to explain the lack of any need 'to rely in general terms upon judicial perceptions today of changes in social circumstances and attitudes'.²⁰⁴ The statutory reform of married women's rights resulted in the death of the fictions of unity of person and coverture. The fundamental legal implication of the death of those fictions for the cessation of the marital immunity is compelling. The legal foundation of the immunity had been removed. This reasoning should not be dismissed as 'judicially dishonest' or an instance of 'judicial slight of hand'.²⁰⁵

²⁰⁰ Herbert Broom and R H Kersley, *A Selection of Legal Maxims* (Sweet & Maxwell, 10th ed, 1939) 97 (citations omitted).

²⁰¹ *DPP v Shannon* [1975] AC 717, 765 (Lord Simon).

²⁰² See, eg, *Eather v The King* (1914) 19 CLR 409, 423–7 (Isaacs J); *Edwards v Porter* [1925] AC 1, 10 (Viscount Cave); *Rees v Hughes* [1946] 1 KB 517, 523–6 (Scott LJ); *Shaw v Ipatoff* (1957) 97 CLR 248, 258 (Dixon CJ, Kitto and Taylor JJ), quoting *In re Connor* (1919) 1 IR 361, 376–7 (Sir James Campbell C); *McKendrick v Sinclair* 1972 SLT 110, 117 (Lord Simon); *Schorsch Meier GMBH v Hennin* [1975] QB 416, 424–5 (Lord Denning MR); *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, 471–6 (Lord Simon); *Lamb v Cotogno* (1987) 164 CLR 1, 10–11 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *R v James* (1983) 36 SASR 215, 240 (Wells J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 615 [145] n 207 (Kirby J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 72 [206] (Kirby J); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 107–8 [343] (Kirby J).

²⁰³ *PGA v The Queen* (2012) 245 CLR 355, 384 [64] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). A good example of the application of this reasoning is to be found in *Rees v Hughes* [1946] 1 KB 517, which concerned a financial dispute between a husband and his deceased wife's estate over payment of the wife's funeral expenses. The wife's estate founded its claim against the husband on the husband's duty at common law to bury his wife, however, given the introduction of the *Married Women's Property Act 1882*, Scott LJ found the common law duty no longer existed and held at 523: '[t]he very foundation of the duty, the foundation which gave rise to the common law doctrine, has completely gone, and has taken with it the superstructure which the common law had erected on it.' See also at 525–6 (Scott LJ).

²⁰⁴ *PGA v The Queen* (2012) 245 CLR 355, 384 [65] (Heydon J).

²⁰⁵ Richard Sletvold, 'PGA v The Queen: Do Laws Just Disappear?' (2012) 33 *Adelaide Law Review* 573, 579. For an alternative critique of the judgment of the majority regarding its treatment of the legal fiction inherent in the marital immunity in the context of the declaratory theory of judicial method, see generally Ngaire Naffine and Joshua Neoh, 'Fictions and Myths in *PGA v The Queen*' (2013) 38 *Australian Journal of Legal Philosophy* 32.

Heydon J did not delve into the world of legal fiction given his characterisation of the immunity as an absolute and immutable rule coupled with his treatment of *R v Miller*²⁰⁶ as a binding authority on the subject. The other approach to the fiction of the unity of husband and wife was dealt with in the second minority judgment. Bell J was able to easily divorce the rationale of the husband's immunity from its existence and operation. The immunity can have — and did have — a valid existence separate from the reason given for it by Hale. For Bell J, '[a]t issue is the existence of the immunity, not whether the reason given for it is flawed or has, over time, ceased to provide a principled basis for it'.²⁰⁷ By divorcing Hale's original rationale for the immunity from its operation throughout the 20th century, Bell J asserted that 'the existence of the immunity does not appear to have been seen as inconsistent with the recognition of the equal status of married women'.²⁰⁸ Reiterating the two key pillars of her judgment, namely the significance of the South Australian Parliament reforming the immunity and the widely held belief in the ongoing existence of the immunity despite the fiction that originally underpinned it, Bell J referred to the 'curious spectacle' permeating the respondent's case and the modified basis for the marital immunity:

There is the curious spectacle in this appeal of the respondent and the Attorney-General for South Australia contending that the maintenance of the immunity by the mid-twentieth century was inconsistent with the rights and privileges of married women, notwithstanding that as late as 1976 the Parliament of South Australia chose to preserve it.

By the mid-twentieth century, the notion that the immunity depended on the wife's irrevocable consent to intercourse may no longer have been seen as the justification for it. However, this is not to accept that the immunity had 'crumbled to dust'. The contemporary evidence suggests that the immunity was a recognised and accepted feature of the law of rape, albeit that the rationale supporting it may have changed.²⁰⁹

If by 'contemporary evidence' Bell J was referring to the 20th century cases and commentaries on the topic, it is clear this evidence does not provide a coherent or unequivocal answer to the problem. In any event, what was the rationale for the immunity by the time of the 1960s and 70s? Echoing the

²⁰⁶ [1954] 2 QB 282.

²⁰⁷ *PGA v The Queen* (2012) 245 CLR 355, 432 [214].

²⁰⁸ *Ibid* 441 [235].

²⁰⁹ *Ibid* 441 [235]–[236] (citations omitted).

policy view of the Mitchell Committee that ‘it is only in exceptional circumstances that the criminal law should invade the bedroom’,²¹⁰ Bell J opined that ‘the justification for the immunity may have come to rest more upon the notion that the criminal law ought not to intrude into the marital bedroom’.²¹¹ The underlying premise of this view is based on the ‘special position’ of the married couple and that in ‘the eyes of the Church, the law, and, in general, the parties, marital intercourse is of the essence of marriage’.²¹²

The approaches of the majority and Bell J on the fictional foundation of the marital immunity each have their merits and shortcomings. The majority’s approach has a pragmatic appeal based on logic and reason as ‘the soul of the law’.²¹³ Lord Devlin once said that ‘[t]he common law is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not got logic at the root of it’.²¹⁴ The approach of the majority has logic at the root of it. Can a legal rule truly exist or persist when the foundation of the rule has gone? And does the answer to this depend on whether or not the rule has — rightly or wrongly — been assumed to be correct regardless of its questionable legal foundation? The answers to these questions go to the heart of the reasoning of the majority and their conclusion that the marital immunity ceased to exist by the early 20th century. The perceived weakness in the reasoning of the majority is the retrospective review of what has always been considered an established principle. In this regard, it is suggested there is nothing inappropriate about an appellate court reviewing the history of a legal topic several decades after well-entrenched views have been formed about it. It is proper for an appellate court to form its own view of a topic in the absence of any relevant binding authority.²¹⁵ The implication of a parliamentary ‘error’ or mistake about the belief in the validity of a law is not a legitimate factor or ‘good reason’ in a court’s assessment of the history and status of that law. ‘A mistaken understanding by Parliament of the state of the common law when it enacts a statutory measure changing that part of the common law

²¹⁰ Mitchell Report, above n 41, 14.

²¹¹ *PGA v The Queen* (2012) 245 CLR 355, 417 [173].

²¹² Norval Morris and A L Turner, ‘Two Problems in the Law of Rape’ (1954) 2 *University of Queensland Law Journal* 247, 259. This view of marriage given in 1954 reflects traditional patriarchal views of marriage and the role of women and the family, exemplified especially in the 18th century political thought of Jean-Jacques Rousseau: see generally Susan Moller Okin, *Women in Western Political Thought* (Virago, 1980) 99–196.

²¹³ Broom and Kersley, above n 200, 97.

²¹⁴ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 516.

²¹⁵ *Giannarelli v Wraith* (1988) 165 CLR 543, 584–5 (Brennan J).

is no more than that, a mistaken understanding.²¹⁶ The ‘curious spectacle’ referred to by Bell J only arises when the assumption is made about the valid existence of the immunity.

The reasoning espoused by Bell J, that the rationale for the marital immunity may have changed throughout history, is both valid and questionable. There is no doubt that there were alternative rationales for the marital immunity over time. The South Australian statutory reform process proved as much — the parliamentary debates brought to the fore competing public policy views of the matter. In a paradoxical way, the result of the South Australian statutory reform process saw a distinction drawn between non-aggravated and aggravated offences of marital rape and the law was reformed to permit prosecutions for aggravated offences.²¹⁷ However, the point remains that the immunity was justifiable in ways different from the legal fiction employed by Hale. This is illustrated in the commentary of some of the criminal law textbooks excerpted in Part V of the case note. The availability of alternative justifications of the immunity as a matter of public policy is one matter, but are courts and judges supposed to be in the business of picking and choosing satisfactory rationales for legal rules? If PGA had been prosecuted in the 1960s and his case went on appeal back then, would have an appeal court engaged in the same kind of reasoning as that of Bell J? There is something arguably contrived about an appellate judge speculating about appropriate bases to rationalise retrospectively a legal rule whose original foundation emerged as illogical and anachronistic at a time well before the occurrence of the conduct alleged to attract its operation.

In his work on legal fictions, Fuller touched on the unity of husband and wife:

Some of the hoariest of our fictions are statements that have been made by courts and that plainly refer, not to facts, but to legal relations. The fiction that ‘husband and wife are one’ — which so puzzled Austin that he could only explain it as an expression of ‘sheer imbecility’ — is an outstanding example.²¹⁸

Fuller considered whether the unity of husband and wife was indeed a fiction. As a statement of legal relations taken and enforced literally, it would not be a fiction. Fuller made the same point made by Williams, namely that ‘[t]he

²¹⁶ *R v P, GA* (2010) 109 SASR 1, 8 [37] (Doyle CJ).

²¹⁷ The amendment was effected by the *Criminal Law Consolidation Act Amendment Act 1976* (SA) s 12. The history of this legislative reform is outlined by Doyle CJ in *R v P, GA* (2010) 109 SASR 1, 5–7 [12]–[27]. See also Scutt, above n 68, 275–84.

²¹⁸ Fuller, above n 183, 33.

courts did not, in actuality, treat husband and wife as “one”. The statement was misleading as a description of their legal situation.²¹⁹ And so Fuller concluded that the unity of husband and wife, being ‘so inadequate and misleading’ as an existing and enforced legal relation, was indeed a fiction.²²⁰ Returning, then, to Fuller’s definition of a legal fiction, what do we find? Hale propounded the marital immunity with a belief in the truth of the unity of husband and wife — the so-called ‘dangerous’,²²¹ literal view of the fictional basis of the immunity. Over time, the falsity of the fiction was recognised but courts in the 20th century still adhered to and purported to uphold the validity of the immunity despite its fictitious basis. So the fictional foundation of the immunity was recognised with a certain ‘utility’.²²² Williams described the traditional rationale for the immunity as ‘an authentic example of male chauvinism’.²²³ The philosophy of the feminist movement and the radical reform agenda of the Dunstan Labor Government in South Australia in the 1970s supported the ‘male chauvinist’ view. Considered in this light, it is difficult to resist a gender-based perspective of the immunity and its fictional foundation. The marital immunity was born of the dictum of a 17th century male master of the common law, and was expounded upon by 19th and 20th century male judges, for the benefit or ‘utility’ of the married man.

VII CONCLUSION

The easily stated appeal question that arose in *PGA v The Queen* was the product of the interplay of many things: ranging from the timeless appeal of one of the most preeminent masters of the common law, the uncanny precedent effect of the published rulings of trial judges, the tenuous characterisation of the marital immunity as a contemporary relic of the past, the legislative reform of married women’s rights and the purported legislative reform of the immunity itself. All of these factors came into play as a result of a necessarily retrospective examination of rape at common law triggered by the South Australian Parliament abolishing the time limitation on prosecu-

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid 9.

²²² Ibid.

²²³ Williams, above n 159, 195.

tions for historical sexual offences.²²⁴ The manner in which the appeal question was resolved between the majority and minority judgments is likely to be explored and debated for some time to come — the questions and issues posed by this case note are but a prelude to such exploration and debate. An interesting feature of *PGA v The Queen* lies in its historical exploration of a legal concept whose sources have usually been assumed to be beyond reproach. In a vein similar to Hamlet's instruction to the players 'to hold, as 'twere, the mirror up to nature',²²⁵ the analyses of all the justices in *PGA v The Queen* cover a very broad and realistic legal stage, revealing problems and paradoxes in the common law history of a scene in criminal law formerly thought to be well-settled.

In an interview given in September 2000, Alex Castles emphasised the need in legal history to 'go back to primary sources and start at the beginning':

The primary sources must be preeminent, because so often in the history of the law you can find time and again people will repeat and repeat and repeat as though something is the truth — what's being decided or what is the law, and sometimes you go back and you read the original documents, and even the original cases, and find it is not like that at all.²²⁶

This statement about the importance of examining primary legal sources and the concept of misinformed historical repetition captures the essential method of this case note. Sir Matthew Hale was the preeminent written source of the husband's marital immunity, whose high authority and great reputation contributed to the widely held belief in the existence of the marital immunity in Australia down to the late 20th century despite its not having been authoritatively declared as such by an appellate court in England or Australia. Hale's unsupported dictum on the subject, contained in a text that was never intended for publication, came to represent the law based on what Smith and Hogan labelled as 'practical purposes'.²²⁷ The timeless authority and reputation of Hale is a remarkable phenomenon that is still alive to this day. The minority judgments of *PGA v The Queen* demonstrate how compelling arguments for the existence of the immunity in the 20th century can be made

²²⁴ *Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003* (SA) s 3. See generally *R v P*, GA (2010) 109 SASR 1, 5–7 [12]–[27] (Doyle CJ).

²²⁵ William Shakespeare, *Hamlet* (Oxford University Press, 2008) 248.

²²⁶ Annesley Athaide, 'Alex Castles on the Recognition of Australian Legal History 1955–1963' (2003) 7 *Australian Journal of Legal History* 107, 128.

²²⁷ Smith and Hogan, above n 163, 406.

based on that authority and reputation. And the judgment of Bell J raises the interesting and debatable concept of a legal rule taking on an existence independent of its founding basis, a concept that calls into question the very nature of law and common law reasoning.

In abolishing the marital immunity in *R v R*, the English Court of Appeal referred to the 'legitimate use of the flexibility of the common law which can and should adopt itself to changing social attitudes'.²²⁸ In arriving at their conclusion, however, the majority in *PGA v The Queen* expressly denied the role of social change in Australia as a legitimate method of legal reasoning. The basis of their decision being informed largely by legal changes that affected the social status and rights of married women in society, there is something curious about this approach that may spark fresh debate in the study of the law-making role of judges in the community. By questioning the significance of changes in social circumstances and attitudes as 'an appropriate exercise of legal technique', it appears the majority deliberately resisted a robust characterisation of their achievement. In a manner that arguably understates the importance of their achievement, it appears the majority downplayed in form what in substance was legal reasoning based on fundamental social change.

Writing extra-curially in 1992 as the President of the New South Wales Court of Appeal,²²⁹ Justice Michael Kirby had occasion to review the abolition of the marital immunity by the English appeal courts with the decision of *R v R*.²³⁰ Justice Kirby cited the common law reform of the marital immunity as a compelling example of the judiciary 'developing and adjusting the judge-made law to apply to new and different social circumstances'.²³¹ His critique of the English case is illuminating on a number of levels and calls into question the approach of the majority in *PGA v The Queen* in denying any legal significance in perceived changes in social circumstances and attitudes:

By this decision of the House of Lords, the English judges have declared a new rule. It is one applicable not only for the future but retrospectively. This was done by the judges in precisely the way it has been done by their predecessors for centuries. It was done to keep the common law in harmony with the values

²²⁸ [1992] 1 AC 599, 610 (Lord Lane CJ for Lord Lane CJ, Sir Stephen Brown P, Watkins, Neill and Russell LJ).

²²⁹ Justice Michael Kirby, 'In Praise of Common Law Renewal: A Commentary on P S Atiyah's "Justice and Predictability in the Common Law"' (1992) 15 *University of New South Wales Law Journal* 462.

²³⁰ [1992] 1 AC 599; [1991] 2 WLR 1065.

²³¹ Justice Kirby, above n 229, 481.

of the society it serves. It was done with attention to what the judges perceived to be the demands of society. On this occasion, it was done to achieve in the English law the application of basic principles of human rights and equality before the law. The change was not apparently felt to be a matter for embarrassment or apology or even explanation. It was simply part of the exercise by English judges of the judicial function reserved to them by the common law which their predecessors invented and have practiced day by busy day in the courts.²³²

This critique by Justice Kirby helps illustrate and put into context the achievement of *PGA v The Queen* in terms of 'basic principles of human rights and equality before the law'.²³³ The marital immunity, underpinned by the fiction of unity of husband and wife, was the legal device that saw married women treated unfairly in the event of non-consensual sexual relations with their husbands. There may have been a time and place when such treatment was considered acceptable and hence the possibility of a positive public policy for the marital immunity. But that time had well and truly passed in Australia as at 1963. The decision of the majority in *PGA v The Queen* is a praiseworthy declaration to this effect based on a detailed inquiry that revealed a lack of relevant binding authority on the subject and which recognised changes in the conception of marriage and the legal rights and status of married women in Australia into the 20th century.

²³² Ibid.

²³³ Ibid.