

## REVIEW ARTICLE\*

*Torts in the Nineties*, by N MULLANY (ed) (Australia: LBC Information Services, 1997) pp xiv + 342. Recommended retail price \$125.00 (ISBN 0 455 214 379).

I view with dismay the doctrine that the common law should differ in different parts of the Commonwealth ... and anything one can do in this case to bring the various strands together ought to be done.

[I]t is inevitable now that the Commonwealth jurisdictions have gone on their own paths without taking English decisions as the invariable starting point. The ideal of a uniform common law has proved as unattainable as any ideal of a uniform civil law.

These two statements, contradictory on their face, capture a recurrent theme in this collection of essays, *Torts in the Nineties*. The development of the law of torts throughout the Commonwealth has certainly appeared to be anything but uniform during the 1990s. Canada, Australia and New Zealand have gone their own ways, no longer slavishly following English doctrine. England itself has reexamined its own approaches in many areas. Yet reading these essays, one nevertheless comes away with the feeling that our doctrinal differences are ultimately less important than the values we share. Indeed, in the end, the difficult tort questions of our day are increasingly answered throughout the Commonwealth by deliberate exercises of judicial judgment; judicial judgment grounded in a common historical experience of the law and congruent, if not identical, values. The text may vary from country to country, but the subtext of judicial judgment is remarkably uniform. Cooke P neatly captured this theme of unity in diversity.<sup>3</sup>

A broad two-stage approach [as in *Anns*] or any other approach is only a framework, a more or less methodical way of tackling a problem. How it is formulated should not matter in the end. Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the

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\* Madam Justice Beverley McLachlin, Supreme Court of Canada.

1 *Cassel & Co Ltd v Broom* [1972] AC 1027 at 1067-8, per Lord Hailsham.

2 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 at 523, per Cooke P.

3 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 3 NZLR 282 at 294, speaking of the two-stage test in *Anns v Merton London Borough Council* [1978] AC 398, subsequently rejected in England but retained in New Zealand.

truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgement. Formulae can help to organise thinking, but they cannot provide new answers.

The essays Nicholas Mullany has selected for inclusion in this book reflect this theme well. They chart the frontiers of tort law while, at the same time, demonstrating the common roots from which the various journeys began and to which, in many difficult cases, the judge must return.

Most of the essays in this book are directed to specific topics in the law of tort: recovery of economic loss, preventative damages, class actions and remedies, liability for mental suffering and psychiatric disorder; protection of privacy through tort, the relationship between tort and statute, and the modern torts of defamation, false imprisonment and sexual battery. They each offer useful insight into the current state of tort law in their respective areas. Yet their point is never merely to state what the law is. It is rather to explore *why* the law is what it is - to expose the theoretical and policy concerns underlying past and future decision-making in each area. A few of the essays frankly shift the focus from closely examining specific areas of tort law to directly confronting larger jurisprudential issues, such as the debate between incrementalism and deduction from principle and the increasing independence of Commonwealth judges from English precedent. Throughout, however, the focus is always more philosophical than didactic.

A number of themes recur throughout the essays. The first is the theme addressed at the outset of this review: that of finding common ground amidst diversity. Sir Anthony Mason, in his masterful exposition of the cases on recovery of economic loss in tort, concludes that “despite doctrinal differences which have clouded the resolution of challenging problems, the various common law jurisdictions are moving towards a more uniform treatment of claims for the recovery of economic loss” (p 33). Professor Stanton, writing on the incrementalist approach adopted in recent English decisions, confirms that the “English version of incrementalism ... appears to be significantly different from approaches in other common law jurisdictions”. Yet, for all that, he still concludes that “the actual results obtained would not support the contention that the law is developing in radically different directions, in different countries” (p 54). Again, the late John G Fleming, while making the point that common law judges diverge on exactly when anticipatory damages may be awarded, underlines the acceptance in all jurisdictions of the rightness of sometimes extending tort principles to justify the award of such damages.

The impact of American class action thinking on similar developments in Australia is usefully explored by Professor Harold Luntz, and similar instances of cross-fertilisation in the area of recovery for psychiatric disorder are traced by Professor Mullany. On privacy, Professor Stephen Todd concludes that despite different stages of doctrinal development in different countries, “by and large the decisions show a gradually evolving awareness and recognition of a need to give redress for infringements of privacy and of the part the law of tort can play” (p 210). The same themes of unity in diversity recur in Professor Francis A

Trinade's discussion of false imprisonment and restraints of liberty, and Justice Dennis Mahoney's plea for revision of Australian defamation law.

Professor Gerald HL Fridman describes how English judges influence Commonwealth judges and vice versa, suggesting a reality that is closer to judicial dialogue than doctrinal difference. Only Professor Bruce Feldhusen's essay on the Canadian innovation of attempting to find some redress for sexual assault through tort damages strikes a different note. In this area, Canadian law, admittedly in its infancy, has struck out on a course not yet explored in England or Australia. One has the sense from reading the other essays, though, that further expansion of this development, if it proves workable, may be only a matter of time.

A second concern recurring throughout the essays is the methodology of common law tort analysis. Indeed, one cannot speak of negligence law in the 1990s without confronting the tension between the English 'incrementalist' approach, and the broader approach of deduction from general principle applied in Canada, New Zealand and to some degree, Australia - the so-called *Anns-Murphy* debate. The essays in this book usefully situate that debate in its historical context, a context that reveals English vacillation between an initial attraction to reasoning by recourse to general principle (*Donoghue v Stevenson*'s<sup>4</sup> enunciation of the revolutionary neighbour principle, expanded in *Anns*<sup>5</sup> to a general two-part test for the duty of care), and the comfort of conservative, case-by-case incrementalism. One is reminded that it is not just the younger Commonwealth countries that have parted from incrementalism. This said, there is much of value in both traditions. Professor Stanton's essay, for one, suggests that whether one speaks of flexible incrementalism capable of permitting growth, advocated by Professor Stanton, or of principle anchored firmly in policy and precedent, the wisest course may lie between the two extremes. In the end, wise judges everywhere proceed case by case, and labels like 'incrementalist' or 'principled' solve few problems, as Cooke P, has observed.<sup>6</sup>

Beyond the debate about the relative virtues of developing the law through incrementalism or by general principle, other methodological issues are provocatively probed in these writings. To take just two examples: Professor Stanton is critical of "the detailed categorisation which seems likely to afflict Canadian courts in the future" (p 54); and Justice Robert F French usefully explores the benefits and the difficulties entailed in statutory modelling of torts.

A third issue that resurfaces in a number of the essays is judicial activism. The conventional view is that judicial activism reigns in Canada, New Zealand and to a lesser extent Australia, while in England the dominant philosophy is steady adherence to settled precedent. These essays take us beyond the rather facile debates about the extent to which this generalisation actually holds, and provoke us to consider the advantages and disadvantages of each stance. It is of

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4 *Donoghue v Stevenson* [1932] AC 562.

5 *Anns*, note 3 *supra*.

6 *South Pacific*, note 3 *supra* at 295, per Cooke P.

course important that the law be generally certain, and that the consequences of particular conduct be, in some broad sense, predictable. But at the same time, the law must be capable of growth if it is to meet changing economic conditions, social needs and perceptions. Again, the question is not what lies at the extremes of the spectrum that runs between judicial activism and judicial conservatism, but where judges must strike the balance in practice.

This brings us to the fourth theme that runs through the book: the relationship between the law of torts and society. As noted, judges in different countries sometimes apply different formulae to the same tort problems. And while the results are often strikingly similar, sometimes, in the difficult grey areas, they come down on different sides. Why? Is there a relationship between the approach or result a judge of a particular country chooses and the concerns and attitudes of the judge's particular society? Professor Fridman, citing no less an authority than *Cooke P*, thinks so (p 309). On the other hand the recurrence of the same concerns across national boundaries suggests that the connection between nationality and legal outcome can be exaggerated. It is no doubt true that uniquely national concerns may affect the development of the law in a particular area. Canada's exploration of tort damages for sexual assault may reflect a greater concern with this problem in Canada than in other countries, for example. But, as these essays illustrate, it is interesting how often the same 'new' problems surface almost simultaneously in different countries.

Comparative law is a superlative method of teasing out a better understanding of where we have been, where we are, and where we should be going. This book proves that point. It will be useful to practitioners, scholars, students and judges seeking an understanding of how the law is developing in their jurisdiction and, more importantly, why it is moving that way. It will be useful to legislators contemplating statutory change of tort law. And it most certainly will assist judges fixed with the task of deciding cases in the grey areas where precedent offers no clear guide and compelling principles seem to compete.

From a technical point of view, the essays are lucidly eloquent, concise and well edited. They are also, generally, well annotated. The usefulness of the book is further enhanced by a Table of Contents, a Table of Cases – that it runs to 26 closely spaced pages attests to the scholarly quality of the essays – and a comprehensive and well organised index. The essays are introduced by the former Chief Justice of Australia, Sir Gerard Brennan, who states:

This is not a student's textbook, nor a casebook extracting passages from a judgment for use as stand-alone propositions. It is a book for the lawyer who is concerned to understand where the law is at in its development, the interests it is designed to serve and ... the concepts which are guiding that development.

I concur. Nicholas Mullany has engaged some of the best torts thinkers of our time to share their well considered thoughts with us. We, and hopefully the law, are all the better for it.