

TORTS TOMORROW – A TRIBUTE TO JOHN FLEMING EDITED BY NICHOLAS J MULLANY AND ALLEN M LINDEN [LBC Information Services, 1998, xxxiii + 355 pp (including index). Hardback: A\$143]

THIS book was first planned as a way of bringing together various eminent tort scholars in order to honour the late Professor John Fleming (who was then already very ill) for his immense contribution to the field of tort law. The plan was that at least some of the authors of the seventeen essays which are contained in the book would visit Professor Fleming and that they would present these essays to him orally in anticipation of the book's publication. However, Professor Fleming's death, in September 1997, occurred before this plan could be put into effect. The project nevertheless proceeded as a tribute to the great man's impact on the development of modern tort law.

In their preface, the editors refer to two particular aspects of Professor Fleming's scholarship. One is that, having been born in Germany, but

having spent most of his life living first in Britain, then Australia, and finally the United States (with visits to many other countries), he was firmly of the view that no legal system is inherently superior to any other – a view which was apparent in his comparativist approach to law. The other is that he fervently believed that tort law must constantly evolve to meet the demands of the time and the needs of an ever-changing society. The editors observe in their preface that the essays reflect both these concerns. The contributors are based in countries as diverse as Australia, England, Canada, New Zealand, the United States and Israel, and the essays cover a wide spectrum of torts, many of them relating to new or developing areas of the law.

Unsurprisingly, several of the essays relate to various aspects of negligence, which is, without a doubt, the single most significant and wide-reaching tort of our times. The Honourable Justice Beverley McLachlin, of the Supreme Court of Canada, contributes a clear and insightful essay on “Negligence Law - Proving the Connection”, which focuses on the inadequacy of the but-for test in determining causation and the attempts which have been made in various jurisdictions to develop a fairer basis for deciding whether and when one person can be deemed to have caused another’s damage. The Honourable Justice Robert Brooking of the Victorian Court of Appeal writes on recovery for economic loss in cases involving defective buildings in “*Bryan v Maloney* – Its Scope and Future,” while Professor Stephen Todd of the University of Canterbury contributes a piece entitled “Liability in Tort of Public Bodies,” which is primarily concerned with the liability of such bodies in the tort of negligence (although it also discusses actions for misfeasance in public office). And Professor Nicholas J Mullany, who is Adjunct Professor of Law at the University of New South Wales (and one of the book’s two co-editors), provides a detailed and thought-provoking analysis of the law relating to nervous shock in his essay “Negligently Inflicted Psychiatric Injury and the Means of Communication of Trauma – Should It Matter?”.

The growth of negligence has seen a decline in other torts, particularly those imposing strict liability, and this is something which is examined in essays by Professor James LR Davis and Professor Keith M Stanton. In his contribution, entitled “Farewell to the Action for Breach of Statutory Duty?”, Professor Davis (of the Australian National University) advocates the complete abolition of the tort of breach of statutory duty as a separate ground of liability in Australia, while Professor Stanton (of the University of Bristol) adopts a slightly different view in arguing that, although “The Legacy of *Rylands v Fletcher*” as a strict liability tort has absorbed too many commentators for too long, there are nevertheless some aspects of strict liability – notably claims relating to breach of statutory duty in situations involving industrial safety legislation – which remain of value and significance.

Another area in which negligence has effectively ousted the role of other torts (in this instance, battery) is that of medical treatment and patient

autonomy, and on this subject the Honourable Justice Izhak England of the Supreme Court of Israel offers his essay, "Informed Consent – the Double-faced Doctrine".

Several of the essays are concerned to one degree or another with compensation under tort law for personal injuries. In "Personal Injury and Social Policy – Institutional and Ideological Alternatives," Professor Stephen D Sugarman of the University of California, Berkeley, drawing on the views of Professor Fleming (who, of course, was also at Berkeley for the greater part of his career) argues that the role of tort law in accident compensation will – or, at least, should – decline in the coming years to be replaced by some form of centralised system for compensating accident victims who sustain personal injuries. The Honourable Justice Allen M Linden of the Federal Court of Canada (and the second of the book's co-editors), writing the concluding chapter, "Torts Tomorrow – Empowering the Injured," agrees that the role of tort law in compensating accident victims might well decrease if social insurance continues to expand. However, Justice Linden considers it more likely that social insurance will actually shrink, making the compensatory function of tort law even more significant, and his essay is therefore concerned with the need to make both the law itself and the legal process more accessible to those who suffer personal injuries as a result of accidents.

In other areas, two informative essays on products liability, the first on "New Directions in Products Liability" and the second on "Product Liability in International Markets" are contributed by Professor Stephen M Waddams of the University of Toronto and Professor Martin Davies of the University of Melbourne. Professor Michael Tilbury, also of the University of Melbourne, offers a fascinating analysis of defamation in "Uniformity, the Constitution and Australian Defamation Law at the Turn of the Century" and Professor Andrew Burrows of University College, London, (and also Law Commissioner for England and Wales) asks "Should One Reform Joint and Several Liability?".

The contributors who focus specifically on newer and developing torts include Professor Bruce Feldthusen of the University of Western Ontario, who considers the issue of "Vicarious Liability for Sexual Torts" and who argues that the general unwillingness of the courts thus far to hold employers liable for such torts cannot be justified. Professor Gerald H L Fridman QC, FRSC, Emeritus Professor of Law at the University of Western Ontario, chooses the broad subject of "The Evolution of New Torts". Sharing Professor Fleming's views that tort law should continually develop and evolve, Professor Fridman examines such evolutionary torts as those offering remedies for harassment, discrimination, interference with trade or business and failure to deal in good faith. His conclusion is that there is a place for tort law to branch into new areas, and that it should not certainly not be restricted or "downsized".

In contrast, referring to another of Professor Fleming's philosophies – that in order to allow for an economically sensible system of compensation

tort law must decide which losses it will be responsible for and which should be the responsibility of other agencies of loss distribution – Professor Lewis Klar, of the University of Alberta, contributes an essay entitled “Downsizing Torts”. Professor Klar argues that, in the areas of personal injuries and economic loss, tort law should observe its boundaries and not expand unnecessarily to cover new ground. Where personal injuries are concerned, he argues that this means that tort law should go back to the days when fault was a “meaningful prerequisite to recovery” and in cases involving economic loss, it requires that tort law should not undermine developments in other branches of the law.

Although many of the essays refer to Professor Fleming’s views and accomplishments, the first, “Comparativism, Realism and the Economic Factor – Fleming’s Legacies,” by the Honourable Justice Michael D Kirby AC CMG, of the High Court of Australia, is the only one to be entirely focused on his phenomenal contribution to tort law. In this essay, Justice Kirby writes of the immense scope of Professor Fleming’s influence – both geographically and jurisprudentially – and he places particular emphasis on Professor Fleming’s concerns for comparativist analysis, realist thinking and the economic consequences of legal development. Justice Kirby concludes his examination of Professor Fleming’s achievements by referring to his immeasurable influence on tort law – an influence which Justice Kirby concludes is destined to continue.

This book is a wonderful testament to Professor Fleming’s legacy as one of the greatest tort lawyers of the twentieth century. The scholarship and insight contained in the various essays will be of immense interest to anyone who possesses even a passing interest in tort law. Moreover, there is little doubt that Professor Fleming – who was always open to change and development – would have been delighted by the forward-looking nature of the tribute. The title “Torts Tomorrow” is a fitting one to choose in honouring this most exceptional of legal scholars.