THE LAW OF TORTS. 4th Ed. By John G. Fleming. [Australia: The Law Book Company Ltd. 1971. lii + 669 pp.].

THE LAW OF TORTS. 5th Ed. By Cecil A. Wright & Allen M. Linden. [Canada: Butterworths, Toronto. 1970. xviii + 1034 pp.].

When Prosser reviewed *Fleming* when it first appeared in 1957 he commented: "This is a most excellent book." (Prosser (1959) 47 Calif. L.R. 418.) No doubt Prosser saw the book as the Australian counterpart to his own treatise on the subject. And of course Prosser was right. In style, in approach, and in his method of analysis Fleming followed rather closely the somewhat unusual tracks imprinted by Prosser. The likeness between *Prosser* and *Fleming* does not lie simply in the author's unorthodox choice in confining mention of virtually all the cases to the footnotes and none in the text. Fleming's reason for doing this is that the text will flow more

smoothly and therefore will be more readable once references to cases are confined to the footnotes. This reviewer is not convinced that this method does in fact make for smooth reading. The law of torts is a case law subject and many leading cases have to be engraved in one's heart; thus somehow it is not right that one should not come across these cases in the text.

But the differences between the traditional textbooks on torts and *Prosser* and *Fleming* are more fundamental. The conceptual approach to the law of torts as exemplified by *Salmond* and *Winfield* is discarded by Prosser and Fleming in favour of a functional analysis of the subject. For Prosser and Fleming this does not mean simply the reclassification of the torts in terms of the kinds of interests protected by the law. That is the method adopted by *Street.* Unlike *Street* and the others, both Prosser and Fleming conduct a frontal attack on the formalism of judge-made rules in the law of torts, and in the end systematically exposing the value and policy assumptions and designs of the courts. Above all — and this is surely one of the greatest merits of *Prosser* and *Fleming* — the authors are able to see from the vastly complicated case law the nature of its historical development and the shifting social and economic functions of the law of torts with remarkable clarity. The following from *Fleming* (p. 103) is typical:

> "But neither society nor law are static. The forces that moulded nineteenth century thought have long been spent, and the assumptions underlying the negligence concept are increasingly subjected to challenge. The individualistic fault dogma has been replaced by the mid-twentieth century quest for social security, and the function of the law of torts is today seen less in its admonitory value than in ensuring the compensation of accident victims and distributing the cost among those who can best bear it. As a result, the legal mechanism of negligence is being exposed to stresses which, in some areas at any rate, have already initiated a return to stricter liability. The gradual transformation of negligence, in response to this modern trend, will be observed throughout the ensuing discussion."

Fleming covers a very wide range of torts as indeed do the other textbooks. Reviewing in 1972 a 1971 edition of *Fleming* it does not seem inapposite to ask whether the author should have radically reconsidered the traditional approach in this connection. After cases like the *Wagon Mound (No. 2)* [1967] A.C. 617 and *Goldman* v. *Hargrave* [1967] A.C. 645, is there any point in continuing to treat nuisance as a separate topic for the purpose of a tort course? Is it not time to relegate the law of nuisance to a modernised land law course? Now that compensation for victims of crimes is no longer alien to the criminal law is it not at least arguable that the intentional torts of false imprisonment, assault and battery might be better studied in the context of criminal law? And trespass to land should surely be taught in a new land law course. It is not suggested however that negligent trespass to the person should be taken out of the tort course at this stage: *Letang* v. *Cooper* [1965] 1 Q.B. 232 (C.A.) cannot be regarded as the last word on this topic. Trespass to chattels might well be better omitted in a new tort course however. One would go further and question whether there is any sense in holding on to defamation in a tort course; defamation is a topic which appears to be eminently suitable for study in the context of constitutional law. Further, what is to be gained by including "Interference with Economic Relations" in a tort course? Should that not be better left to the labour lawyers?

If one goes through the list of torts that are traditionally included in a torts textbook one could hardly fail to see that the tort of negligence — the bulk of the case law on which is concerned with compensation for personal injuries in accidents — appears to be the only tort which cannot be fully and appropriately engrafted into any other course in the LL.B. curricula of most law schools. This coupled with the fact that the other torts mentioned above could be better taught in other more accommodating contexts would justify the rejection of a traditional torts syllabus which attempts — inevitably without success — to unify or to accommodate rather disparate creatures. Would it not be infinitely more satisfying and sensible to concentrate and expand on the materials on compensation for accidents (i.e., the law of negligence and of damages) instead? It is of some interest to observe that Equity, a hotch-potch subject, not unlike the traditional tort course in this sense, has been losing ground rapidly to new and competing subjects (e.g., law of succession, remedies) in recent years. One would not go so far, however, as to ask with Allen Linden "whether tort law is still relevant in our time." *(Wright & Linden*, p. ix.) That is a question which Anglo-American lawyers might well have to face in the 1980s though.

The strength of *Fleming* lies in its chapters on the tort of negligence. One is pleasantly surprised however by a few lapses. For example, the trenchant criticism on pages 125-26 of *Monk v. Warbey* [1935] 1 K.B. 75 does appear to be inconsistent with the author's views on the loss distribution theory. Professor Fleming's readiness to laud "the wisdom of judicial self-restraint" in *East Suffolk Catchment Board v. Kent* [1941] A.C. 74 seems, too, quite out of place. In recent cases the Court of Appeal led by Lord Denning M.R. in England has made it implicitly clear that there should be no undue deference to the judgment of administrative authorities: see e.g., D*utton* v. *Bognor Regis United Building Co. Ltd.* [1972] 1 All E.R. 462. Professor Fleming's explanation of *Doughty* v. *Turner Mfg. Co.* [1964] 1 Q.B. 518 is unexceptional and unhelpful (see p. 188). This is inevitable so long as one continues to look at it as a remoteness of damage case. But one wonders whether there was a breach of duty at all in that case. The discussion on contributory negligence does not mention what *Wright & Linden* has called the "Seat Belt Defence." There have been a number of leading cases on this from Canada since 1967. Omission of a case like *Yuan* v. *Farstad* (1967) 66 D.L.R. (2d) 295 is particularly surprising since Professor Fleming does in fact cite Canadian cases rather freely.

In previous editions of *Fleming* the chapter on "Interference with Economic Relations" represented a significant contribution to the study of this branch of the law. In this new edition Professor Fleming seems to have neglected it and this, unfortunately, at a time when judicial activity in these economic torts is more dramatic than at any other period in English legal history. In the section on "Interference with Contractual Relations" (pp. 603-11) one feels that the author is dealing with the law as stated in 1952 in *Thomson v. Deakin* [1952] Ch. 646. The discussion on the requirement of "knowledge" in this tort fails to take into account the effects of *Stratford* v. *Lindley* [1965] A.C. 265. The effects of the *Torquay Hotel* case [1969] 2 Ch. 106 too appear to have escaped the author's attention. Professor Fleming appears not to have been aware that Lord Denning's suggestion in that case that the principle of *Lumley* v. *Gye* extends to a case of interference with contractual relations without that involving a breach of contract has now been fully accepted in a Canadian case — *Einhorn* v. *Westmount Investments Ltd.* (1969) 6 D.L.R. (3d) 71 — which has provoked the comment from Professor Wedderburn that "The spectacle of a Canadian court thrusting the rugged but amorphous new tort into law of the English style affords a useful warning." (Wedderburn (1970) 33 M.L.R. 309, at 313.) Equally disappointing is the section on "Intimidation" (pp. 613-14) which not only fails to deal with *Rookes* v. *Barnard* [1964] A.C. 1129 adequately, but also fails to mention *D. & C. Builders Ltd.* v. *Rees* [1966] 2 Q.B. 617 ("two-party" intimidation) and *Morgan* v. *Fry* [1968] 1 Q.B. 521. The author appears not to have appreciated Lord Devlin's notion of "implied threat" for the purpose of this tort in *Rookes* v. *Barnard*, *supra.* The section on "Conspiracy" (pp. 615-21) makes no mention of *P.T.Y. Homes Ltd.* v. *Shand* [1968] N.Z.L.R. 105, a case of some significance which appears rather uncharacteristically to have escaped Professor Wedderburn's attention as well in his book *The Worker and the Law* (1971 ed.). On the defence of justification to these economic torts Professor Fleming also appears to have overlooked another important New Zealand case, *Pete's Towing Services Ltd.* v. *Northern Industrial Union* [1970] N.Z.L.R. 82. Throughout the discussion on these economic torts, which inevitably has a very strong labour law flavour, Professor Fleming makes no reference to the Donovan Report on Trade Unions and Employers' Association, Cmnd. 3623 (1968), which had examined these torts quite exhaustively. This compares most unfavourably with the chapters on negligence which refer to several official reports on accident compensation in a number of countries. The above criticisms and the increasing complexity of the economic torts reinforce our view that "Interference with Economic Relations" is a subject which is better left to the labour lawyers.

The above comments refer to matters of detail. There is no doubt whatever that *Fleming* is one of the most important textbooks on the law of torts, and one would expect it to compete very favourably with the other works on the subject. For the student as well as the teacher, a good casebook to go along with *Fleming* is almost indispensable. The table of cases in *Fleming* mentions specifically the cases which are to be found in Morison's *Cases on Torts*, another Australian work produced by the same publishers. In this reviewer's opinion, *Wright & Linden* would do just as well. It is true that the new editor of this work has now chosen to "focus on the uniquely Canadian aspects of the law of torts" (p. ix): but, as the materials collected in this casebook show, the backbone of Canadian tort law is still significantly English. This new edition of Wright's casebook not only has a new name ("Wright & Linden"), it has also changed rather fundamentally in content. In particular, the last six chapters (on Vicarious Liability, Nuisance, Misrepresenta-

tion. Interference with Reputation — Defamation, Abuse of Legal Process — Malicious Prosecution, and Interference with Advantageous Relations) containing approximately 350 pages in the previous edition of the book have been completely omitted. On the other hand, three new chapters have been introduced; these are "Products Liability", "Automobile Accident Compensation" and "The Future of Tort Law". Whether or not these important changes are desirable may well be a matter of taste, but for the reasons given at the beginning of this review this reviewer fully supports the changes. There are several other changes throughout the book, and all for the better. It is interesting to note the addition of quite a number of extracts from textbooks, treatises and learned articles. This makes it possible to treat *Wright & Linden* as a "textbook" in its own right in a sense, and students may well use the leading textbooks like *Salmond*, *Fleming*, etc., as reference works. Included in this new edition are various specimen problems at the end of some chapters. The new editor also adds in numerous questions in the notes sections. One wonders, however, whether most of the questions are not much too general to be of real help to the student. For example, after the extracts from *Hughes* v. *Lord Advocate* [1963] A.C. 837 and *Doughty* v. *Turner Mfg. Co.* [1964] 1 Q.B. 518, the question is asked (notes section, p. 421), "Is this an acceptable distinction in your opinion? Is the result just?" (Cf. this reviewer's curiosity about *Doughty*, *supra.)*

While the choice of cases in a casebook, particularly on a subject like torts, admits of much difference of personal opinion, the omission of some English cases in *Wright & Linden is* very much to be regretted. The one omission that this reviewer feels most strongly about is *Ashdown* v. *Samuel Williams & Sons Ltd.* [1957] 1 Q.B. 409. It is also disappointing to see the omission of *Goldman* v. *Hargrave*, *supra*, and *Buckpitt* v. *Oates* [1968] 1 All E.R. 1145 might have been mentioned along with the notes on page 607.

On the whole *Wright & Linden* is likely to be a leading casebook on torts for many years yet. Two other features should perhaps be mentioned here. First, the notes now appear in slightly smaller print so that they are visibly distinguishable from the extracts: this must be regarded as a significant improvement on previous editions. Secondly, the book now has an "Editorial Advisory Board" which consists of a very impressive list of names from English as well as Canadian law schools.

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