



BOOK REVIEWS

PROFESSIONAL NEGLIGENCE by *David F. Partlett* (Law Book Co, 1985) pp xvii, 425.

Most texts on professional negligence are not much concerned with general theory. General principles of contract and tort are assumed to apply, and the task is perceived as examining particular instances of breach of the duty of care to a client and of cases on causation and the measure of damages. Individual decisions may be criticised, but it is not common for a text to re-examine the basic principles of tort or of contract, still less for them to embark on a criticism of the categories of tort and contract themselves. David Partlett acknowledges the utility of such works, subject to the *caveat* that questions of fact should not be allowed to masquerade as rules of law, and regrets their absence from Australian legal literature. His concerns, however, are more ambitious: to state and justify a limited number of policies that the law should seek to implement with respect to liability for professional advice; and to formulate a set of principles that will adequately embody them in cases where the plaintiff is complaining of economic disadvantage rather than personal injury or damage to property. The examination of principle takes priority over the sifting of cases illustrating the extent of the obligation of care, and to the extent that conventional categories of legal analysis obstruct the achievement of those policies, that is a cause for criticism of the categories and their limits rather than an objection to the rational development of the law. The chapters that directly address these issues constitute the core of the work, though it ranges well beyond them into, for example, the justifications for and scope of the fiduciary obligations that the law attaches to professional relationships, the immunities of advocates and arbitrators, and an analysis of alternatives to a regime of liability based on negligence.

Very early in the text the main propositions are introduced: that the liability of professionals should be conceived as a part of a wider liability of persons for mis-statements and misrepresentations. Two paradigms are distinguished: the one, where A relies on a statement of B and suffers loss as a consequence and liability is based on the reasonable expectations of A as to the accuracy or carefulness of B's statement; and the other where A contracts with B to confer benefits on C and through B's fault C does not receive those benefits, where C's action should depend (though formally it does not) on C's being able to enforce the contract as a surrogate for A. The rules to be applied to each paradigm are stated more fully in the fourth chapter. With respect to the former

there is a reasonable expectation on A's part of honest communications that is adequately protected by the rule in *Derry v Peek*. Beyond that the expectation of reasonable care in the normal case where professional advice is in issue is complied with if liability attaches to the supply of information or advice by an individual where the utterer may expect to receive from its supply to the recipient some material benefit or advantage either direct or consequential — a formulation that covers not only cases where the parties are in a contractual relationship but also the supply of information or advice in a serious business context to identified persons, or to a known class of persons, whom the utterer knows will put the information to use in a certain transaction or in a generally known or predictable way. This analysis does not apply to public bodies tendering information while acting within their public functions and powers. Here the authority should not owe a duty of care where the supply of information is in pursuance of a policy or planning function or power (unless the circumstances are so unreasonable as to take it out of that function or power) but should owe a duty of care that it should not be permitted to disclaim where the supply is in pursuance of an operational function. And beyond the expectation of reasonable care may be an expectation of accurate communication — B may be liable without fault for supplying inaccurate information where, in addition to the factors that give rise to the obligation of care, the recipient has acted to his or her detriment reasonably in faith upon the accuracy of the information, the utterer had a special or peculiar advantage in respect of the compilation, retrieval and communication of the information, and either the information is intrinsically factual and not judgmental or the utterer gives the recipient reasonably to understand that the information may be relied upon absolutely or does not disabuse the recipient of that understanding although knowing that it is held by the recipient. This obligation may be characterised indifferently as contractual or tortious when owed by a professional to a client, so long as the characterisation is not allowed to carry in its train inappropriate rules as to the availability of contribution and the defence of contributory negligence to delinquent professionals, nor any preconceptions as to the operation of principles of limitation, for these are matters which require determination on a functional basis having regard to the purposes of obtaining professional advice and the application of cost-benefit principles. Subject to the same qualifications, the obligation is tortious where owed to a third party who relies on the advice or information.

With respect to the second paradigm, a person who contracts with another to provide reliable information or advice for the benefit of a third identified person should be liable to that third person for failure to be reliable to the extent contracted for in providing that information. Since the beneficiary is enforcing the contract as a surrogate for the person paying for the advice, the liability should be regarded as essentially contractual and the rule against the enforcement of contracts by third parties as being abrogated to that extent.

These rules are underpinned by an examination of the policies that they seek to effectuate. Those policies are based almost exclusively on economic and cost-benefit considerations. The overall objective is the optimisation of welfare; advice should be available and made use of within the community to the extent that its overall benefits outweigh its overall costs. Three considerations are involved in this: people must be

prepared to offer advice, so the legal rules should not unduly discourage its provision; people must be prepared to accept advice without being unduly discouraged by the fear of suffering losses after relying upon an adviser; and where losses result from reliance upon the advice liability should be placed on the person who, at least cost, could have avoided them so that the costs of taking precautions may the better be weighed against the potential benefits of taking them. These considerations are developed as three "models": one of information production — advisers will make more accurate decisions as to the amount of beneficial advice to produce if they can capture the benefits of providing it and are not liable for detrimental consequences to freeloaders where they have no opportunity to be rewarded for its benefits; one of agency costs — people will more readily seek advice if their security can be guarded in a cost-effective manner by restrictive rules of entry to a profession and by the apparatus of the fiduciary relationship; and one of optimal bargaining — that any rule should, in order to avoid the costs of bargaining, impose liability on the least cost avoider. So liability is to be restricted, in general, to cases where the professional or other advice giver should derive a benefit from the supply of information to the recipient who relies upon it. But where A contracts with B to assure a benefit to C, B will often be in a position to take the benefits of the contract without risk of liability even if careless advice results in C's failing to obtain the intended advantage. In these circumstances B would have insufficient incentives to take the cost-efficient level of care, and giving to C the right to enforce the obligation of due care remedies that deficiency without exposing B to losses of uncertain scope. Again, the relationship of confidence between professional and client may be eroded if the professional can shift liabilities either back to the client *via* a defence of contributory negligence or on to a third person *via* contribution or the construction of a cause of action for the adviser against a third person, so in cases between them, these mechanisms should either not be available or should be severely limited (regardless of whether the action is classified as contractual or tortious). Given that the scope of liability is restricted to those whose reliance on the advice is accompanied by an advantage to the adviser, the same considerations should restrict their availability where the plaintiff is not a client but a third party.

The proposed rules and their economic justifications are applied to a wide range of cases where the plaintiff is claiming compensation for economic disadvantage. Amongst these are included cases brought against architects and engineers where premises are found to have been badly constructed; the cases that classify this as property damage are rightly rejected and the alternative analysis that the cause of action depends on a prophylactic function against future personal injury or damage to property is found to be inadequate. The cost-benefit analysis is used to justify the retention of some part of the immunity of the advocate, at least in jurisdictions where the bond of professional co-operation between an independent bar and the bench is essential to the administration of justice in an adversary system and so ensures "the health and robustness of the common law as a legal system", given that the costs of the immunity (in removing incentives to the optimal degree of care in the presentation of a case) are reduced and the confidence of the client enhanced by the reliance of barristers on their reputations amongst an informed group of solicitors. On the other hand the benefits of the

arbitrator's immunity do not clearly outweigh its costs: we would be better served by a competitive market amongst arbitrators to see whether all would insist on immunity or whether a choice should be available between those who do and those who do not.

Would it be worthwhile to abandon the existing methods of stating the law of professional negligence in order to adopt Partlett's proposed rules? As he himself concedes, not many cases within the sphere of professional liability would be decided differently. The test adopted in *Haig v Bamford* (1976) 72 DLR 3rd of the range of people who rely on a statement and to whom a duty of care might be owed is wholeheartedly endorsed, and since all but one or two cases where liability has been held to exist fall comfortably within it, it is clear that no major change would take place. The only case that might be decided differently is *Scott Group v McFarlane* [1978] 1 NZLR 553 and even then there is a suggestion that the finding of a duty of care might have been justified by reasoning other than that adopted by Cooke J or Woodhouse J. Similarly, with respect to cases where A contracts with B to ensure a benefit to C, the only case decided in recent years that would be decided differently is *Seale v Perry* [1982] VR 193, a decision that has attracted more controversy than approval. The effect of the proposed rule is little different from that articulated by Wootten J in *B.T. (Australia) v Raine and Horne P/L* (1983) 3 NSWLR 221 — a duty of care will be owed if the defendant was aware that the inquirer would act on the information in the execution of a duty owed to the plaintiff in a way which would cause the plaintiff financial loss.

If these limitations can be fitted within the ordinary structure of the law of negligence with particular reference to the category of cases involving statements that bring about financial losses, is there any point in demolishing the accepted structures of reasoning in favour of another that disturbs them? Again, the discussion of whether or not contributory negligence should be a defence to a professional in an action brought by a client who has suffered loss justifies a result that has long been accepted simply by classifying the action as one in contract. Does it matter that the result is justifiably by another route? Ought the courts to be enthusiastic about engrafting a limited exception on to the rule against third parties enforcing contracts, about devising exceptions to the statutory provisions providing for the defence of contributory negligence and for contribution between tortfeasors, or about adopting a rule which provides for strict liability with respect to the provision of information in at least some cases?

Obviously Partlett would answer all these questions affirmatively, though for rather different reasons. The difficulty with confining the scope of a duty of care to third parties who rely on statements made to others or who are affected by those others relying upon advice so that losses are inflicted or benefits denied is the pervasive — “imperialistic” — influence of the test of reasonable foreseeability of harm to the plaintiff as a sufficient basis for imposing a duty of care. Especially since the two-tier stage proposed by Lord Wilberforce in *Anns v London Borough of Merton* [1978] AC 728 that influence has permeated cases on liability in negligence for causing economic losses. The most dramatic example may have been the decision of the House of Lords in *Junior Books v Veitchi Co Ltd* (1983) 1 AC 420, but the reasoning adopted in *Scott Group v McFarlane* and in *Ross v Caunters* (1980) Ch 297 is capable of

imposing an obligation of care in circumstances well beyond those where the adviser can capture the benefit of providing it. These dangers may be reduced in Australia following the rejection of the process outlined by Lord Wilberforce by members of the High Court (especially Deane J) in *Jaensch v Coffey* (1984) 54 ALR 417 and *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 and the refusal of the Privy Council in *Candlewood Navigation Corp. Ltd v Mitsui Osk Lines* (1985) 2 All ER 935, the House of Lords in *Peabody v Parkinson* (1985) AC 210 and the Court of Appeal in *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* (1985) 2 All ER 44 to allow the reasonable foreseeability principle to determine the scope of a duty of care in cases of economic loss. Partlett analyses these cases to seek assistance for his view, and it may be that the backlash from *Anns* and *Junior Books* will propel the law into the channels that he desires. The adoption of a principle of the third party enforcement of a contract designed to assure them a benefit would simultaneously deny the possibility of broadening of liability that the negligence analysis in *Ross v Caunters* allows, avoid all problems as to the relationship between the terms of the contract and the separate duty owed to the third party, and stifle any difficulties that might possibly arise from a conflict of the professional's duties to the client and to the third party. The recent developments in restricting the ambit of negligence can only partially achieve these objectives. A functional analysis of the desirability of allowing contributory negligence as a defence to a claim against a professional, of allowing losses to be shifted to other people, of the operation of statutes of limitation and of the appropriate measure of damages in cases where liability is based on the justified reliance of the plaintiff on the advice of the professional, demonstrates that insistence on the formal dichotomy of tort and contract with its corollary of the immediate adoption of a set of rules associated with each classification impedes, rather than assists, the rational development of the law.

If then a new approach is justified, is Partlett's case for the rules and policies he advocates persuasive? It has to be admitted that there are times when the weight of the claims made for them leads to doubt and concern. For example, the inadequacy of tort and contract as basic categories of civil liability is asserted so strongly and so frequently that one awaits a fundamental reanalysis of the whole bases of common law obligation; to find that most of what is sought might be achieved by a reappraisal of the scope of the doctrine of consideration and the rule against enforcement of contracts by third parties produces something of an anticlimax, especially when there is no detailed analysis as to what such a reappraisal might produce. The economic models are asserted rather than analysed or tested (nobody to my knowledge has attempted a real cost-benefit analysis of any of the rules governing professional negligence, so that we do not know whether a system which tends to produce what is virtually a strict liability for mechanical errors but only rarely any liability for errors in complex analysis does produce "optimal precaution", nor yet whether the rules that are advocated would be the most efficient in producing optimal quantities of advice or information), and often appear ponderous in the way in which they are used to support arguments or conclusions. The pithy comment of Jacobs JA in denying an auditor a claim for contribution against a company accountant who had prepared the defective accounts that "a contrary conclusion would defeat the primary purpose of having company

auditors" — *Dominion Freeholders v Aird* (1966) 2 NSWLR 293 — carries the point much more tellingly than the painstaking analysis of economic models, and the economic analysis that is used to support the immunity of the advocate is simply the traditional claim for the integrity of the administration of justice garbed in gimcrack apparel.

Another source of frustration is the habit of criticising the present law for uncertainty while adopting a basic set of rules which bristles with unresolved ambiguities and which does not critically address contemporary issues. Three examples may indicate the kind of problems which are not addressed (many more could easily be identified). First, the division of the law into the two paradigms (A gives advice to B who acts upon it; A gives advice to B who wants to confer a benefit on C, and B in consequence acts in a way which does not achieve that goal) is not as easy as it looks at first sight. Why, for example, does the case where A is an architect or engineer who gives advice to B, an owner builder who subsequently sells to C, come within the first paradigm rather than the second? Would it not be easier to locate C as the successor to B's rights under the contract, and would this not deal with the problem of the operation of the terms of the head contract and any exemption clauses in it more effectively than the well-known but rarely applied *dictum* of Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 that "the contract with the building owner is not an irrelevant circumstance. It determines what was the task (he) entered upon"? And why is this different from the case where A pays B to provide information that will be acted upon by C — the classical *Candler v Crane Christmas* or *Haig v Bamford* situation? Partlett acknowledges that the question as to which third parties may be allowed the role of surrogate enforcer of the contract is open-ended but a closer examination would have been more persuasive. Secondly, what precisely is meant by providing for liability "where the utterer may expect to receive from its supply...some material benefit or commercial advantage either direct or consequential"? We are told that advice given by banks as to the creditworthiness of customers — the *Hedley Byrne* situation — falls within the formula and that mere "puffing" does not. But this sort of formula gives rise to a host of well-recognised problems: is the advice given by a professional gratuitously to a charity or club to be treated as a form of advertising or professional duty, or does it give rise to no liability? When does "puffing" cease to become trivial? — or what can a salesman or real estate agent whose commission depends on making a sale say to an intending purchaser with impunity (cf *Presser v Calwell Estates* (1971) 2 NSWLR 49) in the absence of downright dishonesty? Perhaps less fairly, what should be made of the tendency in *Howard Marine v Ogden* [1978] QB 574 or *Shaddock v Paramatta City Council* (1981) 150 CLR 225 to insist on written advice? Or, less fairly yet, does the encouragement derived from the *San Sebastian* case (1983) 2 NSWLR 268 imply any approval of the gobbledegook of denying liability to a person invited to invest on the basis of a professionally prepared plan because it is wrong to allow any action on the basis of an implication that care has been taken that the plan so presented is capable of implementation? The point is that the test of "direct or consequential financial advantage" is no more sufficient as a rule of liability than the idea that a person with a financial stake in a transaction floated by the Privy Council in *Evatt's* case may owe a duty of care in relation to advice offered in relation to it. Thirdly, the current *causes celebres* of

professional liability are barely mentioned. For example, the discussion of conflict of interest and duty mentions, but does not dilate upon, the possibilities of a Chinese Wall being erected between members of one firm acting for different parties to a transaction. And it is something of an achievement that the *Cambridge Credit* case and the issue of statutory limitation of liability for auditors is not, as far as I discerned, mentioned at all.

It is always easier to criticise other peoples constructs than one's own, of course, and though Partlett does not subject his own scheme to the same sceptical lens that he applies to the present law he has distilled from the present authorities a convincing account of the concerns that the courts have identified as truly afflicting them and his proposals unquestionably constitute a constructive step towards their resolution. The work is intended as an examination of principle, not as one of reference for the solutions to specific fact situations that have arisen or might arise. It is therefore appropriate that it should be challenging in its approach to a wide range of authorities and courageous in its criticism of the accepted categories of legal thinking, but stimulating rather than definitive in its proposals for the rational development of the law. The dearth of monographs which are prepared to bring a broad and critical analysis of fundamental principle and of social needs to the examination of a specific field has often been lamented. This work does not shirk those tasks and presents a penetrating account of the issues the law must address and a thought-provoking proposal for their resolution. It is a thoroughly worthwhile addition to our legal literature.

John Keeler

FAMILY LAW By *Anthony Dickey (Law Book 1985) pp lxxxvi, 685.*

This is the second book covering the field of family law published by the Law Book Company in the past twelve months. Butterworths has since trumped Bates & Turner, *Family Law Casebook* with the far superior Finlay et al, *Family Law, Cases & Commentary*, but Dickey's textbook evens the score. It is old-fashioned and traditional in approach, ie it consists exclusively of exposition and analysis; there are no bleeding chunks hacked from cases, statutes and articles. By way of compensation, there is an excellent bibliography which contains copious references to the periodical literature. There is also a comprehensive Table of Cases, Dickey's book standing alone in this respect. The provision of references to several alternative reports of the same decision will be appreciated by students, who will also welcome being spared the irritation inflicted on them by those authors who do not trouble to provide citations at all in their Table of Cases, merely references to paragraphs in the text. This time-wasting procedure has increased, is increasing, and ought to be diminished.

Parts I and II of Dickey's book are particularly commendable. He provides a concise but very helpful survey of the historical background, explaining how the basic topics of marriage and nullity developed from canon law, rather than common law principles. He then deals quite brilliantly with the constitutional aspects of family law, especially the demarcation disputes which have consistently plagued this subject. Since

the enactment of the Family Law Act 1975, the Commonwealth has been avid for jurisdiction in matters of maintenance, property and custody, and its repeated attempts to extend its suzerainty have led to a plethora of successful challenges in the High Court. This is a topic which students frequently find extremely difficult to grasp, and Dickey's lucid account is an invaluable guide to its complexities. In particular, those who teach the subject, and who have wrestled with the attempt to understand and explain the principles pertaining to the accrued jurisdiction of the Family Court, can only be envious of the elegant way he conveys the essence of the matter in a mere three pages.

Students and teachers alike will benefit from the invariably pertinent references to comparative material, recent English decisions in particular. In the Preface, Dickey says he makes this particular comparison "in order to help dispel any impression that Australian family law still generally follows English law. Although Australian family law owes much to English law, it has not infrequently been in advance of the law in England". Of course, the phrase "in advance of" is ambiguous. For example, the courts, both here and in England, have recently debated the question whether parental pressure on a child to go through with an arranged marriage is enough to have it annulled. Until the decision of Watson J in *In the Marriage of S* (1980) 42 FLR 94, there is little doubt that very few lawyers, if any, would have said that it was. It was generally thought that Sir Jocelyn Simon's ruling in *Szechter* [1971] P 286 correctly represented the law: nothing less than an immediate threat to life, limb or liberty sufficient to destroy the reality of consent could substantiate a plea of duress. However, Watson J held that the absence of threats, violence, imprisonment or physical constraint was immaterial where the applicant's will had been overborne by "oppression". It was enough that she had been "caught in a psychological web of family loyalty, parental concern, sibling responsibility, religious commitment and culture that demanded filial obedience" (ibid 103). In *Singh v Kaur* (1981) 11 Fam Law 152, *In the Marriage of S* was cited to the Court of Appeal which expressly refused to follow it, Ormrod LJ stating that, in his opinion, the Australian court had not adopted the right approach. Both he and Shaw LJ thought that it would be undesirable for the Court of Appeal to relax the stringent standards applied to the plea of duress "even if it were free to do so". And Ormrod LJ was emphatic that it was not free to do so. He referred to *Singh v Singh* [1971] P 226 (which had approved Sir Jocelyn Simon's statement of the law in *Szechter*) and said: "That decision is, of course, binding on us and we have no option but to follow it."

According to Dickey (p 130): "*Singh v Kaur* has... since been overruled for all practical purposes by the Court of Appeal in *Hirani*" (1982) 4 Fam LR 232. But the status of *Hirani* as a precedent is extremely tenuous. For a start, the Court of Appeal in that case simply disregarded *Singh v Kaur*, decided a mere 15 months previously. It also completely ignored its own earlier decision on the precise point at issue in *Singh v Singh* and relied instead on the merely persuasive authority of dicta in *DPP v Lynch* [1975] AC 653, particularly the analysis of marital coercion by Lord Simon at 693,694. *Hirani* has found its way into no law report other than the one cited here, which may give some idea of its comparative insignificance.

In a book of nearly 700 pages, excellent as it is, it would be very

strange if there were not propositions with which one might reasonably disagree. That aside, there are two matters of balance (or emphasis) which this reviewer hopes to see changed in future editions. First, the book does not deal adequately with the conflictual aspects of the subject. This is precisely where students and practitioners in the field of family law need all the help they can get. (Indeed, misunderstanding of elementary principles in this area extends beyond students and practitioners. Their Honours the judges of the Family Court of Australia are, on occasion, somewhat confused. See, eg *Suria* [1977] FLC 90-305, *Emson* [1980] FLC 90-803, or *Re B* [1983] FLC 91-332.) As everyone knows, s 42(2) of the Family Law Act 1975 gives a general directive to the Family Court to apply the common law rules of private international law (unless, of course, they are excluded by statute). Section 22 of the Marriage Act 1961 does likewise for the specific question of the validity of a marriage, whether celebrated in Australia or abroad. At the time of writing, the sections of the Marriage Amendment Act 1985 which affect this have not been proclaimed. When they are, s 22 of the Marriage Act and s 42 (2) of the Family Law Act will cease to apply to marriages celebrated in Australia from that date onwards. But the new Division 2 inserted into Part III of the Marriage Act 1961 will not operate retrospectively. Moreover, the new Part VA, which does operate retrospectively preserves the Common Law rules of private international law in certain circumstances. In moving the second reading of the Marriage Amendment Bill 1985, the Attorney-General (Mr Bowen) remarked: "In 1983, 35% of all marriages taking place in Australia involved one party who had been born overseas" (*Debates* (20 March 1985) H of R 616). This means that in at least 35% of Australian marriages there is the possibility that one of the parties is domiciled abroad. The common law rules of private international law are usually said to refer the question of capacity to marry to the law of the domicile of each party. But the matter is not simple. When the Marriage Amendment Bill was debated in the Senate, a former Attorney-General (Senator Durack) described the relevant rules as "enormously complicated" (*Debates* (28 February 1985) S 303); while in the House of Representatives the shadow Attorney-General (Mr Brown MHR) conjured up the vision of what he described as "Generations of law students and lawyers...kept awake at night grappling with these difficult principles". (*Debates* (20 March 1985) H of R 618) The fact that comparatively few students of family law include conflicts of law in their curriculum may account for some of that lost sleep. It certainly imposes an obligation on those who teach family law — whether by lectures or by textbook — to provide something more than a merely token account of the principles involved.

Secondly, the book seems to gloss over the contradictions and vagaries of contemporary family law. Dickey offers no explanation of the profound dissatisfaction with many aspects of the Family Law Act and its interpretation, which has surfaced in recent years. As Sir Harry Gibbs has told us, this jurisdiction is far from being the embodiment of all that is excellent. However, Dickey offers a bland, almost idealized representation of what the judges are actually doing which may give students the misleading impression that all's as right as right can be. The character and style of his approach is foreshadowed in the Preface, where the object of the book is said to be "to present and examine the rules of contemporary family law in Australia in the context of the basic

principles which they display". This, it is alleged, will enable readers to gain an appreciation of "the basic structure...and philosophy of current family law" so as to see that its many and varied rules fit in with a reasonably coherent whole.

The fact is that in several branches of family law there are neither clear principles, nor consistent philosophy, nor coherent structure. The number of conflicting decisions may or may not diminish as a result of s 21A of the Family Law Amendment Act 1983, which established an Appeal Division of the Family Court. However, at present the law relating to maintenance and property, for example, seems to be little more than "a wilderness of single instances", and the strictures of *Watson J* are not exaggerated. In a vigorous dissenting judgment (in a case involving the question of lump sum child maintenance) his Honour remarked: "In the course of preparing this judgment, I glanced through all judgments relating to property and maintenance since early 1976...I...have great difficulty distilling principle from a triune subjectivity which surfaces in many cases. In some cases, statements are made which have an *ex cathedra* quality unsupported by research or precedent, and sometimes not even by logic" (*In the Marriage of V and G* [1982] FLC 91-207, 77,095-6). By way of illustration, s 75(1) of the Family Law Act requires the Family Court, in the exercise of its maintenance jurisdiction under s 74, to take into account 14 matters specified in s 75(2). Section 75(2)(d) refers to "the financial needs and obligations of each of the parties" and s 75(2)(e) refers to "the responsibilities of either party to support any other person". Clearly these paragraphs are very closely linked. Indeed, one judge described them as "in many respects tautological". (Lindenmayer J, *Lutzke* (1979) FLC 90-174, 78,836.) And yet, for the purposes of para (d), the Family Court seems to favour the principle that there is no *prima facie* obligation on the respondent in a maintenance application to support either his *de facto* spouse or the child of his *de facto* spouse by someone else. On the other hand, the Family Court adopts an inconsistent, if more liberal, principle when exactly the same point arises under para (e). The confusion which this has caused is compounded by conflicting answers to the related question: who takes priority in maintenance matters, the first family or the second, or do both rank equally? Until the Family Law Act, the principle to be applied was clear. "The fact that the respondent has taken on the responsibility of a second wife...is a matter to be taken into consideration...but if the means of the respondent are so circumscribed that either the ex-wife or the second wife must accept a reduced standard of living, then it is the second wife who must suffer" (*Nelson* [1965] NSW 793, 795 per Selby J). In other words, the first wife was accorded precedence "at all events short of actual hardship to the second family" (*McOmish* (1968) 12 FLR 370, 376 per Gowans J). Since then, as one might expect, it has all become opaque. The Full Court in *Soblusky* (1976) 12 ALR 669, 728 tells us that it "depends on the circumstances of each individual case". The judgments in *Lutzke*, *Ostrowski* [1979] FLC 90-730, and *Baber* [1980] FLC 90-901 adopt one policy, those in *Murkin* [1980] FLC 90-806, and *Axtell* [1982] FLC 91-208 another.

In the same way, judicial interpretation of s 75(2)(f) reveals that the judges are unsure of what they ought to be doing. s 75(2)(f) requires the court to take into account the eligibility of either party to a maintenance application for a pension, allowance or benefit. Prior to the Family Law

Act the policy applied by the judges was clear. Maintenance was assessed as if social welfare did not exist, except where the respondent had very little money, so that an order against the respondent would cause genuine hardship. This had the theoretical disadvantage that a spouse receiving social security might end up better off than the maintaining spouse. It had the practical advantage that the community was not obliged to shoulder burdens not primarily its responsibility. Since 5 January 1976, judicial interpretation of para (f) has been inconsistent. On the issue of whether or not to protect the public purse, *Wong* (1976) 2 Fam LR 11,159, and *Kajewski* [1978] FLC 90-472 go one way, *Mehrtens* [1977] FLC 90-288 and *Brady* [1978] FLC 90-513 the other, and *Kauiers* [1986] FLC 91-708 goes both ways at once.

Those maintenance orders which the Family Court does make are often treated with derision or disdain. (The National Inquiry into Maintenance reported that at least 40% of maintenance orders are never paid, and that 75% of orders are regularly in arrears.) This has now reached scandalous proportions and legislative intervention has been called for by the Family Law Council. According to the Minister for Social Security (as reported in *The Australian* 1 January 1986) spending on maintenance payments has rocketed from \$76 million in 1975 to \$1066 million in 1984/5, and projections released last November estimate that this will reach \$1426 million by 1986. In the same report, the Chairman of the Family Law Court, Mr Justice Fogarty, was said to have blamed "ambiguities" in the Family Law Act for the Family Court's tendency to consider the financial commitments of the non-custodial parent before making an order for maintenance. This has led, according to him, to maintenance orders being made only if money were left over after those commitments had been met. In consequence "repayments on videos and boats" were at times given priority over obligations to spouse or child. Moreover according to Fogarty J: "Pensions should be reserved for those who have no other means of support...Too many sweetheart deals are being done. Some divorced couples are making financial arrangements designed to maximise the custodial parent's pension entitlement." The Council has therefore recommended that the policy which prevailed under the repealed Matrimonial Causes Act should be restored and entitlement to a pension disregarded when a maintenance order is contemplated. The point has been taken, and in December 1985 a private member's Bill was introduced into the Senate to deal with these vexations. It proposes to amend the Family Law Act so as to direct the Family Court in dealing with maintenance applications (a) not to take into account eligibility for a pension, allowance or benefit; and (b) to give priority to the needs of a party to a marriage, or a child of a marriage, over responsibilities assumed since the marriage. It is proposed also that s 107 of the Family Law Act be repealed. This provides that no person shall be imprisoned for failure to comply with a maintenance order. Not before time.

When it comes to the Family Court's property jurisdiction, Dickey concedes (in a caveat on p 516) that some cases on s 79 of the Family Law Act "appear to be — and not to put too fine a point on it, are in fact — inconsistent with one another". But this is only part of the problem. There is a great deal of dissatisfaction in the community with the rationale of s 79 itself. This assumes that the Family Court should enjoy an extraordinarily wide discretion to re-allocate property as it thinks fit. Such a policy was condemned by the Scottish Law Commission because "it encourages a process of haggling in which one

side makes an inflated claim and the other tries to beat it down...[This] does nothing to help the partners to arrange their affairs in an amicable way. It is calculated to increase animosity and bitterness". (Scottish Law Commission, *Family Law: Report on Financial Provisions* (1981) para 3.37.) The judges are, of course, required by s 79 to take various factors into account in exercising their discretion. But the "weight" to be given them can only be subjective, and in practice 95% of cases are decided by a registrar. Moreover, even when clear principles have been professed, they have not been applied. In numerous cases before the unanimous High Court decision in *Mallett* (1984) 58 ALJR 248, the Full Court of the Family Court stated that where one spouse earns and the other fulfills responsibilities in the home, there is no reason to attach greater value to the contribution of one than to that of the other. (See eg *Wardman and Hudson* [1978 FLC 90-466, *Rolfe* [1979] FLC 90-629.) At least as a starting point, equality was equity. However, as Scutt and Graham convincingly demonstrate, "whatever the stated principle, the reported decisions confirm that property division is not equal, and no-one has any idea in advance what the division will be" (*For Richer, For Poorer* 25, emphasis added). Unless s 79 is repealed there is no longer any hope of improvement. *Mallett* makes it quite clear that the Court's discretion must remain absolutely unfettered, and, of course, no two cases are ever the same. It may or may not be better that the law be certain than that it be right, but there is a growing number of people who are beginning to suspect that in this matter it is neither.

It is the same story when Dickey comes to deal with the issue of guardianship and custody. He says the "the courts now seek to be impartial as to the relative merits of the practices, beliefs and ways of living of differing cultural, ethnic, social and religious groups within society" (334). And, "there are no rules or presumptions that certain facts or circumstances are not in the best interests of a child" (343). Of course, the judges pay lip service to both propositions. One example is *In the Marriage of Horman* [1976] FLC 90-024 where Fogarty J observed: "Our community enjoys the benefits of widely differing social styles and attitudes and it would be unacceptable if a parent's custodial position was endangered simply because that person's...style of living or attitude to life differed even radically from what might be regarded as the community norm" (75,114). But one ought to ask whether these pious principles are honoured in the observance. In one respect, at least, it is clear that they are not. It is simply untrue to say (as Dickey does at p 344) that "In respect of religion...the courts have for long refused to prefer one religion to another or even, in more recent times, to prefer a religious household to a non-religious household". The fact is that some religions are more equal than others. In *Kennard* [1979] FLC 90-680, the wife adhered to the doctrines of the Exclusive Brethren while the husband did not. The evidence indicated that she could not be faulted for the manner in which she had looked after the children, and in particular that she had done everything within her power to ensure that they maintained a good relationship with their father. Despite this Toose J not merely refused her application for sole custody, and gave control over the children's education and religion to the father; he also granted an injunction forbidding the wife from taking the children to meetings of the Exclusive Brethren or from permitting them to be influenced by others of that sect. As Dickey points out, there is no doubt that its members "lead a particularly closed life"(ibid). But where is the

convincing evidence that there is anything wrong in that? Decisions about the best interests of a child are always based on some inarticulate major premise about the values and purposes of life itself. Neither experience nor logic establishes or can establish that strict religious discipline ought to defer to some form of economic utilitarianism. Yet the instructive case of *Plows* (No 2) (1979) 40 FLR 339, suggests (*pace* Dickey) that the Family Court is coming close to adopting an *a priori* assumption that parents holding certain religious beliefs are, by that very fact, unfit to have custody of their children. After the usual, and merely ritual incantations about the impropriety of judges preferring one religion to another, or considering the merits of purely religious beliefs, Wood J said (at 352): "In my view if the effect upon the appellant is that as a result of holding and living by these beliefs she would so bring up these children...that their minds would be formed in a like rigid mould and their lives similarly ordered and circumscribed upon the premises that they must withdraw from the world and live within a confined group within society, then she cannot properly be seen as a person to whom sole custody of the children should be committed". But everyone to some degree or other lives in a "confined group" of those sharing the same beliefs and values. Those who belong to a religious minority may be more isolated from non-believers, but they are by that very fact more fully members of their own community of believers. Might it not be better to have strong links with a few people rather than weak links with a multitude? "For who knoweth what is good for man in this life, all the days of his vain life which he spendeth as a shadow?" (Ecclesiastes vi, 12).

Brian Davis

**THE AUSTRALIAN COMMONWEALTH:
A FUNDAMENTAL ANALYSIS OF ITS CONSTITUTION** by
M.J. Detmold (Law Book 1985) ppxiv, 266.

Michael Detmold's outstanding study of Australian constitutional law will present most readers with a series of challenges — not merely because it is, as the publishers claim, "a radical revision of a wide range of constitutional notions", but in large part because it is argued, in considerable density, from a commitment to political values which are in turn grounded in the concept of "commonwealth" as developed by Thomas Hobbes: a community of people, governed by laws endorsed (through their representatives) by the majority of the people — "to the end, to live peacefully amongst themselves, and to be protected against other men." (*Leviathan*, 18).

From that foundation are drawn such values as legitimacy, equality and independence — values which fall within Owen Dixon's "deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice." ("Concerning Judicial Method" in *Jesting Pilate* 165). Such a commitment to "compelling" political values¹ must, Detmold argues, inform constitutional decision-making. He hits that vulnerable Aunt Sally, legal positivism (and, in particular, the judicial claim that "the constitutional formula is sufficient in itself". Barwick CJ, *Strickland*

1 The term is, of course, that of Dixon J in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82.

v *Concrete Pipes Ltd* (1971) 124 CLR 488,491) arguing that judges who adopt this view misunderstood their function:

"[T]he truth of the matter is that law is not text, it is the use which is made of text. If there is a constitutional truth to be found it is not in the text of the constitution, but rather in the function of applying the text to the governance of a community. The text, of course, has status — a judge will always be applying this constitution rather than that — but constitutional principle (law) is grounded in the function, not the text"(p 5).

The point being made here might best be illustrated by Detmold's discussion of s 92 — the guarantee of the absolute freedom of trade, commerce and intercourse (chapter 3). This is, he says, the fundamental constitutional provision of the Australian commonwealth. It was a simple (perhaps primitive?) reading of the language of the section which produced the individual right conception of the guarantee, which reads the section as demanding that those individuals engaged in interstate trade, commerce and intercourse shall be free of government controls and impediments. But, Detmold says, this reading is implausible and shallow. It ignores the historical and enduring objective of federation — opening up the colonial (now State) communities to each other, ensuring in Hobbes' phrase "the nutrition of the commonwealth" through "the plenty, and distribution of materials conducive to life" (Hobbes 24). The activities of trade, commerce and intercourse are protected, Detmold continues, because they are intended to make a federal community — a commonwealth. The function of this protection is to facilitate the expansion and integration of formerly separate communities, to create a national economy or, in the pure sense of the words, a commonwealth. Section 92 invalidates only those laws which are incompatible with this expanded commonwealth —

"parochial and protective laws; of which border tariffs constitute an obvious example, and the laws protecting the New South Wales milk industry in the *North Eastern Dairies* case, a not quite so obvious one" (p 34).

This analysis of s 92 comes down squarely in favour of regulatory laws which qualify the interests of traders in favour of those of the wider community —

"because that wider community is the whole point of the operation of s 92. Thus legislation protecting consumers from traders is allowed not because the well-being of traders is dependent ultimately on the well-being of consumers..., but because the well-being of consumers is part of the federal Commonwealth which it is the function of s 92 to construct, and because the consumer's end of the interstate movement (the means of that construction) is not less important to community or commonwealth than the trader's end" (p 38).

Up to this point, the thrust of Detmold's argument — that s 92 is directed to preventing governmental actions which would frustrate the development of a national economy, is similar to arguments put forward most recently by Leslie Zines in *The High Court and the Constitution* 124-130 and Michael Coper in *Freedom of Interstate Trade* 297-307. But Detmold's argument is firmly grounded in a political philosophy, a philosophy which permeates his approach to all the constitutional issues which he discusses; whereas the views of Zines and Coper, for example,

are grounded in history and liberal economic analysis (or the type of analysis which passes for economic amongst lawyers).

Finally, and most provocatively, Detmold raises the question of Commonwealth-established monopolies in significant areas of the economy — air transport and banking (invalidated in *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 and *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 and wheat marketing (left in considerable doubt after *Uebergang v Australian Wheat Board* (1980) 145 CLR 266). Detmold returns to his basic proposition — that a federal commonwealth is the purpose of s 92 — and asserts that to exclude a “nationalized commonwealth” from that purpose “would assert a most acutely contestable value judgement about the nature of politics” (p 45).

Detmold applies his analysis, which I have characterized as based on political philosophy, to a range of issues: to intergovernmental immunities (“It is in the nature of commonwealth that no part is supreme; all parts submit to the whole” (p 17)); to Aboriginal rights (“The Australian Commonwealth will not be a just commonwealth until the nature of Aboriginal entry and its legal consequences are recognised...[T]he conquest doctrine...brings the other side of the frontier into the new legal order with honour (respect) and justice (in the strict legal sense)” (p 65)²); Australia’s independence from the United Kingdom (the first stage of independence — when the Australian people became the reference point for questions of political legitimacy — came with federation; the second state — the end of any ultimate imperial power — is more problematic because, in the Australian context, it has been evolutionary rather than revolutionary); and the “republican question” (since the Queen of Australia declined to intervene in 1975, we can assume that she will never exercise significant constitutional power for Australia; and “in the constitutional (as opposed to the sentimental) sense Australia is already a republic, and one with inadequately instituted and dangerously vague reserve powers vested in one man accountable to none” (p 227).

There is a great deal more to this book: substantial chapters on constitutional reasoning, on the foundations for judicial decision making, on the nature of constitutional litigation, as well as analyses of interstate conflicts of laws, inconsistent Commonwealth and State laws, voting rights and other more or less technical issues.

It is, indeed, impossible to do justice to the wealth of ideas and consistency of argumentation to be found throughout the book. It does not always make for easy reading (although it is elegantly written), for it explores fundamental and sometimes elusive concepts (power, authority, equality, legitimacy, justice, to name a few). But, for anyone interested in the legal and political dimensions of the Australian Constitution (dimensions which, as Owen Dixon observed, overlap)³ here is a stimulating resource from which you can draw solid inspiration. You

2 The allusion is to Henry Reynolds’ study of Aboriginal resistance to the European invasion, *The Other Side of the Frontier*.

3 In *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82, Dixon J suggested that the distinction between legal and political considerations was speciously plausible but, in the context of the Constitution, meaningless.

may not always agree with Detmold's answers to the 'currently contentious constitutional questions'⁴ which he analyses; but the consistent and firmly constructed framework which he imposes on the subject should provide you with a basis against which you can develop and test your own answers — and any book which succeeds in doing that, can properly claim to be a work of scholarship.

*Peter Hanks**

INTRODUCTION TO TORTS by *D. Baker* (Law Book 1985) pp xxxiv, 307; **THE LAW OF TORTS IN AUSTRALIA** by *F. Trindade and P. Cane* (Oxford University Press 1985) pp Ixv, 763.

The content of a book intended to introduce students to a subject as vast as the law of torts is bound to be contentious. On one view, an introductory work should avoid the discussion of detailed technical rules, and the analysis of competing cases. Rather, its purpose should be to describe the historical evolution of torts, to examine the purposes and social effects of the law and, possibly, to make some predictions about future trends. Such a book would contrast the performance of torts as a system for compensating injury to person or property with alternatives such as statutory compensation schemes and social security. Ideally, it would examine the social justification for concepts central to the torts system (for example the concept of fault in the negligence action). It would also alert students to the role which the system plays in allocating losses and to the function of insurance as a means of loss spreading. Though a book of this kind might discuss the rules relevant to various torts this would largely be for the purpose of illustrating the way in which the law in this area has responded (and sometimes failed to respond) to the changing demands of society.

There is little doubt that an introductory book of the kind described above would be useful. Substantial changes to the law of torts can be expected and suggestions have been made that at least in some areas it is on its death bed. The future of the common law negligence action for personal injury is uncertain. Limitations have been placed on the common law negligence action in work-related cases in Victoria and similar reforms may soon be introduced in South Australia. The new South Wales Law Reform Commission has proposed a comprehensive motor accident compensation scheme in place of the negligence action, and a no fault scheme abrogating the common law already operates in the Northern Territory. Arguably, a broad discussion of the principles and values underlying the torts system rather than an examination of specific rules would be the most effective way of introducing students to torts and equipping them with the tools to deal with future developments.

4 This remarkable piece of alliteration can be found on the back cover of the paperback version: unfortunately, the culprit is not clearly identified; but readers can jump to their own conclusions.

* Faculty of Law, Monash University

The approach adopted by Baker is a different one. Though his book gives a brief account of the historical evolution of negligence, and refers to competing policy principles in contentious areas (for example nervous shock claims), its primary purpose is to expound the rules applied by the courts to various torts. Broadly, the book deals with the intentional torts, negligence, torts of strict liability, injuries to relational interests, remedies and legal capacity. It provides a useful summary of case law and legislation relevant to the major torts. Leading English and Australian decisions are covered throughout the work and some reference is made to United States and Canadian decisions. There is considerable case analysis in contentious areas: for example, the sections dealing with nervous shock and negligent misstatement.

As befits an introduction, the book is relatively short (300 pages excluding index). The concise account of rules provided in the book makes it a useful text for both students preparing for examinations and busy practitioners who need a brief but accurate statement of the law. Certainly, it fulfils its promise of "[e]xpounding the basic principles of the law of torts, primarily for the benefit of the first-time student of the subject". My only concern is that the emphasis which the book places on the exposition of "rules" may discourage their critical examination and, for the less perceptive student, may obscure the role which flexible concepts such as duty of care, standard of care, and remoteness play in moulding the law of torts to meet new situations.

The limited purpose of Baker's book makes it unfair to draw direct comparisons with the more ambitious *Law of Torts in Australia* by Trindade and Cane. The latter book not only provides a comprehensive exposition of the principles governing the major torts (excluding defamation) but examines them critically and makes suggestions for reform. Chapter 18 introduces students to the literature on law and economics and discusses the concepts of loss spreading, internalization of costs and economic reference in the context of negligence.

The book is divided into seven parts. Parts II to V are primarily descriptive of the present law though criticism and suggestions for improvement are made throughout. Part II covers the intentional torts, Part III negligence, including occupiers liability, and Part IV deals with torts of strict liability. Part V covers a number of miscellaneous matters including limitation of actions, and contribution between tortfeasors. The text is well ordered, and lucidly expressed. Both students and practitioners are likely to find the case analysis and explanation of complex principles in developing areas (for example compensation for economic loss) helpful and thought provoking. Where the law is not yet settled, the authors discuss the competing policy principles, rather than rely on a technical analysis of precedent.

Chapters 9 to 11, dealing with the component elements of the tort of negligence, are excellent. Not only is the case law clearly and comprehensively covered, but the discussion communicates to students the flexibility of the concepts of duty, breach and remoteness, and the extent to which they can be manipulated by courts as devices to limit or expand liability. Unfortunately the book was submitted for publication too early to include a discussion of the recent High Court decisions in *Jaensch v Coffey* (1984) 54 ALR 417 and *Sutherland Shire Council v Heyman* (1985) 60 ALR 1.

The opening and closing parts of the book are designed to place the law of torts in a wider social context. Part I deals with the aims of the law of torts, and its relationship with criminal law and contract. Part VI of the book is concerned with alternatives to the tort system and highlights the relative lack of importance of the common law negligence action as a means of compensating accident victims. Law students in some universities could be forgiven for believing that most injured people receive damages in negligence actions. This section of the book puts the action in some perspective although it would have been useful for the author to discuss the criticisms of the common law negligence as a means of compensating accident victims, which have been made by Atiyah, Luntz and others.

The part contains a useful discussion of the no fault motor accident schemes operating in Victoria, Tasmania and Northern Territory. The Working Paper of the New South Wales Law Reform Commission on a Transport Accident Scheme for New South Wales is discussed. The treatment in this part of the chapter is largely descriptive. In the next edition of the book the author should perhaps consider a lengthier discussion of some of the policy issues raised in designing a no fault scheme. Finally, Part VII of the book discusses "the future of the law of torts and predicts areas of both expansion and decline".

The Law of Torts in Australia is an excellent book which will be read widely by both practitioners and students. Best of all, the book may encourage readers to examine the law of torts critically and to perceive that it is not a set of immutable rules but a developing and dynamic body of principles capable of responding to changing social circumstances.

M. Neave