BOOK REVIEWS

CASES ON TORTS, *by W L Morison and others. 5th edn by W L Morison, C. S. Phegan and C. Sappideen,* (Law Book Co, 1981) pp xxxiv, 1011.

TORTS: CASES AND COMMENTARY, *by H Luntz, D Hambly and P Hayes,* (Butterworth, 1980) pp xxxiv, 1158.

Case books on law are basically of two kinds. There is the sort which expressly disclaims comprehensiveness and which is designed to build up the student's text-book or lecture-note knowledge of his subject and to make him think more deeply about it. Weir's *Casebook on Tort* is a triumphantly successful example of this type. The second kind of book is the one which aims to present a more or less comprehensive collection of material relevant to the subject. The idea is to provide a compendious and convenient means of obtaining information, designed to keep to a minimum the often inconvenient business of visiting a law library. There is nothing wrong with this aim, though of course the student should realise that the casebook can never be a complete substitute for the library. Certainly in Australia, where the system of precedent is much less stringent than in England so that the number of binding precedents is far fewer but the number of relevant precedents far greater, the "comprehensive" casebook serves a real need. Both books under review are examples of the second type of casebook, and both seem to me to fulfil the utilitarian purpose of provision of information well. Both are the product of a formidable amount of industry, both serve the Australian market by the inclusion of a generous number of Australian cases, and both are very much up to date on recent English and Australian authority. Morison is, of course, an established work now in its fifth edition, whereas Luntz is new.

Compilers of casebooks, however, will always wish to go beyond the mere provision of information. They will normally seek to provide by exposition, judicious comment, thought provoking questions, or by their classification and arrangement of material, a learning tool. On this matter also it is therefore necessary to examine the two books. I will deal with Morison first. I liked this book in a number of ways. It adopts a sensible order of treatment, beginning with trespass and the intentional torts to person or property, carrying on with negligence, and concluding with nuisance and the torts of strict liability. Although no order of treatment of torts is perfect, this seems to me more satisfactory than any other as an aid to comprehension. The book omits all the torts which have as their essential function the protection of interests other than those in person and property. Again this seems defensible – no torts course covers every tort and the inclusion of these torts would have meant that the length of the book was enormous. The virtual omission of the economic torts from the book (they are mentioned briefly in Chapter 1) means that the student is never faced with the interesting dilemma why negligence causing economic loss may be actionable under *Hedley Byrne*, *Caltex Oil* v *The Dredge "Willemstadt"* or the new tort of negligent maladministration, whereas an intentional infliction of such loss is not generally actionable. Chapter 1 fails to draw a distinction between an intentional act inflicting economic loss which serves the legitimate interests of the defendant, and a malicious infliction of such loss. Is there now any sound reason for not recognising a tort in the latter case?

Morison is easy to use, adopting page references in the index and bold type for the leading extracted cases. It is a veritable mine of information, since it supplements the case-extracts with detailed summaries in small print of other relevant material. I found certain chapters disappointing. The authors quite often seem preoccupied with the historical development of torts perhaps at the expense of providing an adequate synthesis of the modern position. An extreme example of this is the chapter on the development of the modern law from trespass and case. Although the historical development is very fully covered, the strands are not sufficiently drawn together and the issues that continue to trouble us not sufficiently analysed. For instance, whether trespass can ever now operate as a tort of strict liability is not clearly distinguished from whether and, if so, in what cases the defendant has the burden of proof. Granted that the defendant has the burden in certain cases of trespass, will the court ever *presume* an intentional trespass? Apart from the burden of proof, is there any other possible advantage to plaintiffs in the continued survival of negligent trespass? On the latter point, *Letang* v *Cooper* would surely have been a more useful case to extract than *National Coal Board* v *Evans* which merely applies the orthodox English rule to trespass to chattels. It also seems odd to omit *Williams* v *Milotin* and *McHale* v *Watson,* particularly when the whole of Bray C J's judgment in *Venning* v *Chin* is extracted (including irrelevant parts). At one point the authors even imply that the forms of action continue to exist in Australia, certainly a ground for believing that differences of substance between English and Australian law exist!

The chapter on duty of care also bears a slightly faded historical air. We are led through the pre-*Donoghue* v *Stevenson* cases to that leading authority. The controlling function of duty of care and its "policy" aspects are not, however, dealt with until *Anns* v *London Borough of Merton* many pages later. The book indeed seems to regard as unwelcome the intrusion of policy into the duty question even though it now seems clear that policy reasons underlie most of the recognised "exceptions" to the neighbour principle. The convenient distinction between notional duty and duty on the facts is not mentioned at all. Students may find it very difficult to understand *Anns* from the treatment it receives in the book, classified curiously as it is as a case concerning duty to control the conduct of others and included without any previous mention of the omissions rule or of the *East Suffolk Rivers Catchment Board* case. The chapter contains most of the relevant information but needs reorganization. The section on remoteness of damage is also unsatisfactory. The only two cases extracted here are *The Wagon Mound (No 1)* and *Parsons* v *Uttley, Ingham & Co.* The considerable problems that this area of law causes are consigned to Notes which here are not very helpful. Whether foreseeability has different meanings according to whether breach of duty or remoteness of damage is under review is, I think, what the authors are discussing on page 468, but I doubt whether any student of torts would get the point. The authors accept that there is an "egg-shell skull" rule, but what is the basis of it and what is its extent? The matter is not explored. Remoteness questions arising out of deliberate or negligent conduct of a human being are not examined at all and one case which concerns this point, *McKiernan* v *Manhire*, is wrongly treated as a case on the "egg-shell skull" rule. My conclusion from all this is that where difficult theoretical problems are concerned, particularly those which go to the

foundations of the tort of negligence, it is not enough to rely on providing "information" through Notes – an analysis should be attempted, and the authors should not remain neutral but should indicate their own position.

Luntz, which has the same content as Morison together with defamation, is more of a true casebook. The authors' comments are much shorter and the number of extracted cases far greater, the book relying far less on potted summaries of cases. There is some provision of questions for the reader, but they tend not to be very penetrating, being often of the "Do you agree?" variety. The system of identifying cases by paragraph rather than page reference is an irritant. In terms of speed of discovery, Morison won hands down every time. Luntz treats the tort of negligence first, and bearing in mind its importance this is defensible. However trespass is dispatched to various parts of the book and there are weaknesses here. The trespass/case dichotomy and its modern sequels are dealt with in the chapter relating to intentional torts to person and property. A student will be puzzled to find that *Williams* v *Milotin*, *McHale* v *Watson*, *Letang* v *Cooper* and *Venning* v *Chin*, though all essentially claims for negligence, are extracted in this chapter. The reader does not discover until page 793 that false imprisonment is a form of trespass to the person. Whether or not negligence is examined before the intentional torts, there is much to be said for expounding the general principles of trespass early in the book as Morison does. Luntz is much better and more complete than Morison on remoteness of damage, but the chapters on duty of care, although a more ambitious attempt than Morison's, fail more resoundingly. Although the reader is introduced to the problems of foreseeability and policy at an early stage, he is not told that foreseeability may have a different meaning according to whether notional duty or duty on the facts is concerned, nor that the "unforeseeable plaintiff" problem and the *Palsgraf* case which embodies it concern duty on the facts. The effect of intermediate examination of a product is, for some unfathomable reason, included in the chapter on the general duty of care rather than in the later section on products liability. The reader's difficulties are not eased by the fact that some problems which are essentially questions of notional duty (for example, Omissions, Nervous Shock) are relegated to a later chapter entitled "Particular Negligence Situations", and separated from the main chapter on duty of care by chapters on Breach of Duty, Remoteness of Damage, Measure of Damages, and Defences to Negligence. The chapter also contains disparate material. In what sense is *Haley* v *London Electricity Board* a "particular negligence situation"? There was no rule before the case that duties of care were not owed to blind men (abnormal plaintiffs). Equally after the case there is no rule that they are. The case is concerned with duty on the facts, ie whether there was a sufficient degree of risk to justify the imposition of a duty. Again the classification found in this chapter of "existing relationships" is confusing and the cases considered concern essentially the question of extent of duty (ie breach) rather than duty itself. *Anns* appears as an example of a "particular negligence situation" covering liability for defective structures whereas it is quite clear from Lord Wilberforce's judgment that it was mere coincidence that the principles he laid down were being applied in relation to a case concerning a defective building. To complete the confusion, *Hedley Byrne* and *Caltex Oil* appear in a later chapter on "Infliction of Economic Loss" separated from "Particular Negligence Situations" by

chapters on Occupiers' Liability, Breach of Statutory Duty, Intentional Injury to Person and Property and Liability for Animals and Wrongful Death. Neither *Hedley Byrne* nor *Caltex Oil* is treated as a case concerning duty at all, and the former is misleadingly classified under "Misrepresentation". Nuisance is, like negligence, a tort which causes problems to the student, but I feel that Luntz's description of private nuisance (p 895) may cause further perplexity, since it appears to admit as nuisance some cases which are clearly not.

Both books, therefore, serve a useful purpose and it is significant that their weaknesses occur mainly in those areas of the law of torts which are the most testing. To some extent such weaknesses can, and one hopes will, be remedied. At the same time no casebook on torts can ever be a complete "hydrographer's chart" enabling the student/navigator to sail safely past the various dangerous reefs in which the subject abounds.

David Baker

NEGLIGENCE AND ECONOMIC TORTS: SELECTED ASPECTS, *ed T Simos,* (Law Book Co, for the New South Wales Bar Association, 1980) pp vii, 159.

This volume of essays contains six papers presented at seminars conducted by the Council for Continuing Legal Studies of the New South Wales Bar Association; four date from 1971 and two from 1977. The decision to publish them together at this stage is justified in the foreword on the basis of the quality of the papers and the distinction of their authors. Some updating has been provided (Mr Gerber indeed has provided two postscripts for his 1971 paper, the second discussing the decision in *Public Transport Commission of New South Wales* v *Perry* (1977) 137 CLR 107). But the obvious question for a reviewer is whether at this late stage the papers do provide sufficiently new or provocative material as to amount to a useful addition to the *corpus* of published matter on the topics they cover.

As one might expect, the answers tend to vary for each essay. Those which contribute least are perhaps those of Mr Gerber and Professor Heydon. For this Mr Gerber, at least, is scarcely to be blamed; as he pointed out at the beginning of his 1971 paper on Occupier's Liability: "it is not a subject which has much room left for originality". His main theme is that, while the process of classification of entrants is an archaeological curiosity, there is little point in reforming the law unless a common duty of care extends to trespassers as well as lawful entrants; or, as he puts it: "one should let sleeping fossils lie unless there are pressing reasons for converting them to fuel". The main lines of the justification for this are in standard form: that the ordinary law of negligence is perfectly well capable of dealing with the special problems of trespassers and the courts have effectively demolished the distinctions between licensees and invitees despite careful preservation of the forms. Ten years later we may wonder at why it is that so rational a view as the former reason embodies has been unable to attract universal support (Law Reform Committees all over the globe have gone out of their way to avoid it); even in 1971 the latter depended on leaving the other categories of entrant – the entrant by contractual, or public right – beyond the scope of the paper. The postscripts are typically lively and acerbic casenotes on *British Railways Board* v *Harrington* [1972] AC 877,

Cooper v *Southern Portland Cement Co Ltd* [1974] AC 623 and *Perry's case* (supra); they add nothing to the argument but admirably convey a mounting frustration at the conservatism of courts and the inactivity of legislatures. The reason for the limited extent of the contribution of Professor Heydon's paper on *Interference with Contractual Relations: Recent Developments* is very different: the bulk of the material presented here also appears in the second edition of his book on *Economic Torts* (1978). It is helpful that some points are expanded from the very compressed scope allowed them in that work, and pleasant to see more extensive analysis of the Australian cases. But the essence is available elsewhere, and it is slightly disappointing that even with the extra space Professor Heydon rarely offers his own views on difficult issues.

Mr Phegan contributes two careful and helpful essays on liability for defective structures. The 1971 essay is chiefly notable for the detailed and constructive analysis of the cases on the liability in negligence of architects and building contractors; relatively little has been written on this area and this is a helpful introduction. The section on the immunity of vendors and landlords from liability in negligence analyses the slender authority on which the doctrines were raised and provides a survey of the means by which the courts have restricted their scope; but South Australian readers will have to superimpose the effects of the Defective Houses Act 1976 and the Residential Tenancies Act 1978-81 to begin to reach any comprehensive view of the range of liabilities that may now arise. The 1977 essay builds on some of Mr Phegan's earlier analytical work to provide a helpful analysis of *Anns* v *London Borough of Merton* [1978] AC 728 though one which concentrates on the division between planning .and operational decisions to the exclusion of any consideration of the question of whether the injury is brought about by *intra vires* or *ultra vires* activities — a question discussed by Lord Wilberforce in terms which have caused concern to other commentators.

But the two papers which justify the publication of the book are those of Professor Atiyah on *Property Damage and Personal Injury — Different Duties of Care?* and the late Mr Justice K S Jacobs on *Law and Fact in the Duty of Care.* The principal point of the latter is to establish that in any case the existence or non-existence of a duty of care is to be dealt with as a pure question of law, and that the neighbour principle merely expresses a setting or background against which the courts determine that as a question of law a duty of care exists, but does not involve the proof of any questions of fact. Unless this is appreciated and respected the duty of care becomes simply tautological with the concept of negligence. The conclusion adopts the analysis of Lord Diplock in *Dorset Yacht Club* v *Home Office* [1970] AC 1004. This is, of course, not a new thesis and might even be regarded as classical Sydney doctrine, since it essentially echoes the analysis and conclusions of Morison's celebrated article in (1948) 11 MLR 9. The interest lies mainly in two areas: the subsidiary thesis that the alternative view that the neighbour principle takes one direct to the negligence issue had a special appeal not only to reforming judges, but to deeply conservative judges concerned at the implications of overtly creative, policy making decisions on their conceptions of the judicial process, which is carefully worked out by reference principally to the judgments of Kitto J, and secondly, in the way in which the analysis is applied to explain decisions. The latter is generally brought off with insight and

success, but the cases of *Bourhill* v *Young* [1943] AC 92 and *Chapman* v *Hearse* (1963) 106 CLR 112 remain obdurate. *Bourhill* v *Young* is treated as rightly decided on the ground of absence of duty as a matter of law, since there was no conceivable damage that the plaintiff could have suffered; while *Chapman* v *Hearse* is analysed as "a high-water mark in what might be described as the *Donoghue* v *Stevenson* generalisation". The analysis does not solve the long-standing puzzles caused by *Bourhill* v *Young*, in particular, at all. Those are brought about by the implausibility of the factual conclusions (even in 1943 a rescuing policeman coming from the position of the plaintiff would have recovered) and the point, now openly acknowledged by the Court of Appeal in *McLaughlin* v *O'Brien* [1981] 2 WLR 1014, that nervous shock cases can be categorised more sensibly and clearly than *Bourhill* v *Young* could anticipate. It is probably right to analyse *Bourhill* v *Young* as a decision on a point of law, but the reason offered in practice takes one to an examination of the facts (from which most members of the House of Lords did not shrink) of the kind that in his analysis of *Chapman* v *Hearse* later in the paper Jacobs J considered inappropriate. Indeed the stresses to which his analysis are subject are neatly pointed by the consideration that *Winfield and Jolowicz* has long treated *Bourhill* v *Young* as the paradigm example of the need for a duty *in fact* to exist, as well as what they term a notional duty (see eg 10th edn pp 46-60, esp at pp 59ff). It is equally true that in ignoring a possible range of arguments based on policy the High Court in *Chapman* v *Hearse* must be assumed to have made a preliminary determination in favour of the possibility of a duty of care being owed to rescuers. The analysis of such cases is very difficult, and perhaps can only be profitably approached in terms of the doctrinal difficulties facing courts having to make policy decisions in cases where for one reason or another they find themselves unable to produce general statements that can be applied to categories of cases.

These problems will not go away after *Anns* v *London Borough of Merton* (supra), though Mr Phegan has provided a postscript that indicates that the means of developing the law via the duty concept preferred in the paper (what Morison called 'the open list of duty situations') has been replaced by one which, at any rate in personal injuries cases, takes it that the means of development is to accept the neighbour principle as offering a prima facie solution, subject to exceptions and qualifications based on historical or policy grounds. Indeed, the temptations to manipulate the facts so as to avoid as yet insoluble or imperfectly understood policy difficulties may even increase. It is simply too hard to confine the processes of reaching acceptable answers to new and difficult problems within any rigid conceptual apparatus.

Professor Atiyah, as is well known, would have little truck with such problems. The main importance of his paper is that it represents the most detailed and comprehensive of the accessible accounts of his views on property damage. It has always been clear from *Accidents, Compensation and the Law* that he sees the desirable future trend of the law as encouraging first-party insurance against property and economic losses rather than encourage the spread of third-party insurance by extending principles of liability in negligence. But his reasons have tended to be scattered, and it is good to have his views on the differences between personal injury and damage to property that the law recognises,

the arguments against extending liability in cases of property damage, and the ways in which this might be achieved, collected in the one place. And to have his critique of the *Dorset Yacht Club* case next to Mr Justice Jacobs's approval of it provides an excellent example of the divergences between current academic analysis of the social consequences of accidents and the traditional form of liberal technical analysis.

In retrospect, it is perhaps surprising that the essays retain the usefulness they have. There is nothing on no-fault or social insurance schemes for personal injury, and little on the difficult issues of the present law on liability in negligence for economic losses. The large issues of social policy that confront the law of torts are raised only by Professor Atiyah. The origins of the papers no doubt encourage their limited perspective. But it is a perspective of continuing importance, and they help to illuminate it.

John Keeler

THE LAW MAKING PROCESS, *by M Zander* (Weidenfeld & Nicolson, 1980) pp xxxvi, 309.

This book is intended as a companion volume to Professor Zander's *Cases & Materials on the English Legal System* (1973). This earlier book is concerned largely with procedure, legal process and the legal profession, dealing with the role of courts and tribunals, pre-trial procedures, the trial process, the jury and associated matters. *The Law-Making Process* is a companion volume in the sense that there is nothing at all in the earlier *Cases and Materials* book which considers or even indicates the sources or the purposes of the matters and processes which it describes. *The Law-Making Process* is concerned to remedy this deficiency, and tackles directly and specifically the various ways in which law is "made".

Professor Zander states in his Preface that "the chief purpose of this book is to improve the understanding of the law-making process". He also defines the persons to whom the book is directed: both law and non-law students who are studying a "legal system" course. Clearly then the book is directed to persons who have little or no knowledge of the law, and is intended to introduce them to legal terms and the process of the creation and development of the law. Along with Zander's *Cases and Materials* this book is designed "to provide the basic reading required for a university or equivalent course on the legal system". He also expresses the hope that this book "will also be of value to anyone concerned to understand how the law-making process actually works". The value of a book directed to such readers must rest largely on its capacity clearly and simply — but not simplistically — to enunciate basic principles of law.

The book is set out as a cases and materials book, although there are few cases included: the extracts are mostly commentaries, derived from articles, books, speeches and official reports. A better label may be a "resource" book, although it is more than that. The extracts used are pulled together by introductions and some discussion by Zander: of course, to be any use at all, materials in such a book have to be placed in a context, so that their salient points can be related by the reader to the discussion in issue. Such a book must indeed rely for its value very

heavily on the depth of its accompanying commentary; consequently, the contextual discussion and questions raised must be penetrating and stimulating, otherwise there will be nothing new in either substance or analysis in the work. To some extent this book does not always fulfil these criteria, as often extracts – though of considerable value in themselves and of intrinsic interest – appear with little or no discussion or commentary by the author.

Another problem, though a relatively minor one, which can arise with books of this nature, is the irritating lack of flow in stylistic terms, with the constant need imposed on the reader to adjust to different styles and attitudes. Such lack of integration can be very confusing to readers with little understanding of the subject matter, as would be the case with many readers of this book. It is only introduction and commentary which can even begin to overcome this problem, leaving aside the problem of style, which is unavoidable in a book directly drawn from diverse sources.

The first chapter is concerned with legislation, as the dominant form of law making. The procedures described are those relating to the British Parliament, though of course there is a broad similarity to the legislative and Parliamentary procedures in Australia. It is in this first chapter that the problems mentioned above begin to manifest themselves: extracts from other works are used to make and illustrate particular points, but, lacking any linking commentary, the reader is left with a feeling of hanging in the air in respect of both the original point under discussion, and Zander's own view of it – which must amount to the point which he is making. Perhaps a more desirable and effective way of utilizing other illustrative or informative work on an issue under discussion is by summary and analysis, which is how an article on drafting is dealt with on page 8. This chapter also deals with criticism of parliamentary drafting, procedure, and very briefly, delegated legislation.

The chapter on statutory interpretation begins with an excellent discussion on the need for and purposes of rules of interpretation. The three basic rules are then considered, with a statement and analysis of each rule, illustrative cases, and criticisms. The status of the rules is also discussed, and the role of the court in interpreting statutes, with the central problem of deciding the "intention of parliament". This leads Zander to raise the question of the creativity of courts, a question which he considers in more detail in a different context in chapters 5 and 6. The point he makes relates to the way in which courts have changed their interpretation of specific words as social expectations and attitudes have changed (presuming parliamentary attitudes to have changed too). The example given is that of "any person", a phrase consistently interpreted in the nineteenth century to exclude women. This interpretation was, of course, altered in 1930 to include women; a literal reading. (This point was discussed in both its US and English contexts by A Sachs and J H Wilson in *Sexism and the Law* (1978)). Zander acknowledges that the role of the courts in statutory interpretation is clearly a creative one. This chapter is admirable in its clarity and in the sense of its criticisms, so far as it goes: but it makes no attempt at all to consider the general area of statutory interpretation: it becomes, in its brevity, a mere introductory chapter to Maxwell's *Interpretation of Statutes*, to which readers are referred.

Stare decisis and the general role of precedent is examined in the next chapter, with a detailed discussion on the English court hierarchy. There is also some comparison with French, US, Scottish and other Commonwealth courts, emphasizing the continuing significance of House of Lords decisions. This chapter clearly is of little use to an Australian law student. The following discussion on law reporting is a curious chapter dealing with the shortcomings of the present system; duplication, inaccuracy, unreported decisions, decisions of administrative tribunals, and the difficulties of dealing with the immense mass of materials produced. Some suggestions are made for overcoming these problems and indeed, the same comment could obviously be made in relation to our situation in Australia; but it remains curious, as Zander does not discuss the law-making function of law reporting, whereby cases are chosen for report by barristers, and unreported decisions are unable to become effective precedents and so contribute to the development of the law.

The two central and most interesting chapters are 5 and 6, *How precedent works* and *The nature of the judicial role in law-making.* These are, however, also the most frustrating, since they begin to examine interesting and difficult questions but do so incompletely and inconclusively. The precedent chapter begins with a pellucidly clear statement of the operation of the doctrine of precedent, in simple but not over simplified terms, including a discussion of how the arguments from each side may be weighed up. Then Professor Zander moves on to a discussion of the old question, are precedents the law or only evidence of the law? This resolves itself, of course, into a discussion of whether judges merely declare law or whether they legislate. Zander seems to take the view that judges *find* the law, and so precedents are evidence of the law rather than the law itself, but he seems to hedge his bets on this question. This is an unsatisfactory attitude in a book such as this; or really, any other where this point is raised. Zander acknowledges that judges do have a legislative function and indeed, approvingly quotes Lord Radcliffe (at p 177) where he says: "...there was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it?" It is difficult, to say the least, to reconcile this statement with Zander's paramount attitude that the judge's role is declaratory.

The following chapter, *Subsidiary sources of law*, compounds this problem even by its very title. It too is interesting and stimulating, though more in the material extracted in it than in Zander's commentary. Ultimately it too is unsatisfactory. He begins this chapter with an assumption that judges do make law, at least on a collective basis, and so examines the factors which may influence the judge in this function. If this chapter stood alone it could represent, generally, an excellent discussion of these factors, but following from the attitude taken in the previous chapter it makes difficult reading. In considering the question of the personal element in judicial law-making, Zander looks at the problems raised particularly by the issues of sexism, landlord and tenant problems, and industrial problems, where the issues of class bias (in its broadest sense) are most apparent. The figures which he gives, relating to union matters, do not appear to bear out the conclusion which he attaches to them; there is little discussion of these figures, beyond a reference to the article from which they were extracted. This kind of omission seriously undermines such an analysis.

Both the problems and virtues of a system of precedent are canvassed, along with a discussion of the balancing act which judges must perform between flexibility and stability. The creation and elaboration of new principles of law are illustrated by a discussion of the cases on the action for negligent misstatement (but not including *Evatt* v *MLC* in the Privy Council).

These represent the two most interesting and stimulating but least satisfactory chapters in the book: the extracts included are often fascinating, but the dissatisfaction emerges from Zander's lack of an explicit statement of his own attitude, which nevertheless sometimes emerges by implication or emphasis. There is little attempt to weigh the conflicting views against each other.

The final two chapters are on subsidiary sources of law — textbooks, custom, and EEC law — and an examination of the function and work of the UK Law Commission. Zander illustrates the Commission's work, and suggests ways in which a greater community involvement in law reform could be established, by reference to the Australian Law Reform Commission's work, using points made by Mr Justice Kirby. Such a chapter is a useful and, for these days, essential consideration in any analysis of the law-making process.

The book contains often excellent and clear discussions and definitions of basic areas of law — essential when the readership to whom such a book is directed is considered: it is often very difficult for a trained lawyer to put into simple but accurate terms the basic principles of the law. However, it is in considering the potential readership of the book that it falls down for it is often so vague and inconclusive that it would serve only to confuse such readers. For other experienced lawyers, the omissions in the work are frustrating and limit its value considerably. The problem would seem to be with the nature of the book: such a cases and materials work, growing as it must, from the author's own teaching, perhaps becomes so idiosyncratically related to that style and method of teaching as to be not easily transferable to another context. Certainly its specifically English orientation limits its value to Australian readers, and this is not compensated for in its general discussion, which, as indicated above, is unsatisfactorily incomplete.

K P McEvoy

LAW AND SOCIAL CONTROL *ed E Kamenka and A E-S Tay*, (Edward Arnold, 1980) pp ix, 198.

This is a mermaid-book. Parts of it are enticing and stimulating, while important sections are patently unsatisfying. The book is divided into two parts, "Law in Society" and "Law 'for' Society", each part opening with an introductory chapter by the editors and then containing four essays by academic lawyers and social scientists.

Kamenka and Tay work away at a theme on which they have been writing for at least a decade: the phases of western social and legal development and in particular the evolution of the common law. *Gemeinschaft* (community); *Gesellschaft* (association); and bureaucratic-administrative are the historical types referred to. The common law is seen as developing a predominantly *Gemeinschaft* milieu in which custom, status and relationship hold sway until forced to give way to

Gesellschaft concepts in which rights and duties are determined impersonally, on general principles unrelated to status. What follows, and is exemplified in the late twentieth century, is the bureaucratic-administrative society in which public policy is paramount, the rights and duties of individuals being regulated by and subordinate to the felt necessities of the public good.

The import of anthropologist Krygier's and sociologist Ziegert's essays may be summed up in the notion of possible ordering and control of societies without a legal system, but the impossibility of ordering a society through "the law" without a State, elevated and aloof from its individual citizens.

Political scientists Professors Partridge and Avineri provide papers first delivered in 1977 to the World Congress of the International Association for Philosophy of Law and Social Philosophy at Sydney. Under the titles "Law and internal peace" and "Violence and political obligation" we are presented with a view of Government and the State in the modern period: implicitly Kamenka and Tay's bureaucratic-administrative phase. Partridge's thesis may be reduced to the query that modern Governments are biting off more than they can chew: the political pressures on the existing and accepted legal structures may be too great. Both Partridge and Avineri are grappling with the need to alter legal perspectives to cope with the change from predominantly *Gesellschaft* attitudes to those which once again depend on status and relationships, but in the light of public policy. The weakness of both papers is to be based in sweeping assumptions. Rather than backward-looking nostalgia for apparent past tranquility we might be better off thinking in the terms posited by Professor Nils Christie in "Quarrelling Society" (*Law and Social Change* (1973) ed Ziegel, 114) that society and law develop through phases of national pacification, then local pacification, and finally a stage of the rebirth of conflict. Christie thought the second phase "self defeating. The case for quarrelling, and therefore also for the institution of law in a more old-fashioned form, is far from dead".

Part two, "Law 'for' Society", provides ample illustration and implicit explanation of the tensions between common lawyers and the modern legal system. As pointed out by Kamenka and Tay in " 'Transforming' the Law, 'steering' society", the bureaucratic-administrative state infuses policy into dispute resolution (p 114): anathema to the common lawyers.

Historian Professor MacDonagh in a study of legislative overturnings of *Gesellschaft* concepts in Victorian Britain provides a most readable chapter using the examples of trans-Atlantic passenger Acts, trade union legislation and Irish fair rent Acts to remind the reader that supervening bureaucratic control and the enforcement of public policy through the existing judiciary are not only features of late twentieth century life.

The remaining three chapters have been written by academic lawyers on trade practices, industrial relations and landlord and tenant law. The latter two, by London School of Economics lecturers Simpson and Partington are excellent empirical studies of modern social control. Professor Heydon's study "Restrictive trade practices and unfair competition" is as learned as one would expect, but disappointing for exposing the hold of *ex post facto* thinking on even the most erudite common lawyers. His is the only paper in the book which does not make at least an implicit bow to Kamenka and Tay's theoretical

framework. The discussion of "twentieth century overmighty subjects, trade unions and government" (pp 144-146) is unsatisfactory for this failure.

In discussing the late Tudor and early Stuart law on restraint of trade Heydon accepts (at pp 135-137) the declamations of Coke and Chief Justice Anderson as though they were pronouncing immutable truths rather than their own value laden assessments of what ought to be public policy. Heydon concluded on this matter that the medieval view held it a crime against God not to work and a crime against the commonwealth not to be a useful member of it. The Elizabethan Poor Laws do not appear to bear out this criminality: certainly the paintings of Bosch and Pieter Brueghel do not. Ivan Illich in his essay "Shadow Work" ((1981) 2 Social Alternatives 37) makes plain the lack of discrimination between medieval wage labourers and beggars. The common lawyer understandably views the past in terms of his own period and concepts, but here was a missed opportunity to examine the design of the Ordinance and Statute of Labourers of 1349 and 1351 and the Statute of Artificers of 1563 [Lawyers since Coke all seem to ignore the fact that the Statute of Artificers effectively repealed the earlier labour statutes: (1978) 10 U Queensland LJ 198]. Superficially appearing as instruments of a *Gemeinschaft* society, imposing status by legislation, was in fact the legislative mode (the signal of a break with customary notions), the seed of destruction of the common law? Such legislation may be seen as the prototype of bureaucratic-administrative law, based in a public policy that the land owners' real property must be kept productive. The rub of course was that the land owners were both the law makers and policy determiners.

Disappointment with this chapter and some aspects of the whole book reflects the failure to take the reader inside the machine to see what is really happening at the points of change, particularly for common law judges. Taking some industrial examples, why does the *Gesellschaft* judge find public policy in such a secretive and so often biased fashion? Reflecting *Gemeinschaft* subverted by *Gesellschaft*, Coleridge J in 1848 found against a waggoner's right to a supply of good strong beer *(Lilley* v *Elwin* 11 QB 742; 116 ER 652, 658) when such a custom had been recognized only fifty years earlier (although branded ridiculous) (Thompson, *The Making of the English Working Class* (1968) 237). In a more modern vein, reflecting *Gesellschaft* unable to accommodate bureaucratic-administrative realities, why does the High Court of Australia (the common law world's pre-eminent *Gesellschaft* court) take such a restricted view of the concept "industrial dispute" for the purpose of determining Commonwealth arbitration capacity? (*In re Holmes; ex p Public Service Association of NSW* (1978) 52 ALJR 243.)

In conclusion, the work of Kamenka and Tay is of great descriptive use: the puzzle of judicial behaviour is solved if not explained with the three phases they provide. Lord Denning, and Professor J A G Griffith's attack on his jurisprudence ((1979) 42 Mod LR 348), become explicable: Denning is a *Gemeinschaft* judge out of his time. Atkin was a judge of such elegance and subtlety as to defy easy classification. The recent English developments in public law: *Ridge* [1964] AC 40, *Durayappah* [1967]2 AC 337 *Padfield* [1968] AC 997 and *Anisminic* [1969]2 AC 147, to some extent paralleled in Canada and the United States, are a result of courts concerning themselves with the limits of the arbitrary

application of bureaucratic-administrative techniques. The flaw may be an inadequate examination of bureaucratic-administrative developments outside post-war western "liberal" democracies. Albie Sachs' *Justice in South Africa* should be a lesson in the fate of *Gesellschaft* common law courts confronted by united legislators and policy makers pursuing minority purposes. *Law and Social Control* is a valuable, if limited addition to the analysis of law in society.

Steven Churches

THE OXFORD COMPANION TO LAW, *by D M Walker* (Clarendon Press, 1980) pp ix, 1366.

There have never been sufficient sourcebooks for the provision of legal reference information. The appearance of this encyclopaedic dictionary of law is therefore very welcome. The compiler, David Walker, Regius Professor of Law in the University of Glasgow, states in the preface that his concern is largely to provide 'information about some of the principal legal institutions, courts, judges and jurists, systems of law, branches of law, legal ideas and concepts, important doctrines and principles of law, and other legal matters' which any person coming into contact with the law in any way may need to know. Unfortunately, there is little indication how the author went about this enormous task, and one's curiosity concerning the culling procedure, given the mass of potential entries, remains unsatisfied.

The result, however, is an easily consulted dictionary style work arranged alphabetically by topic. A general description of each entry is provided in keeping with the compiler's aim of providing information 'as concisely as possible'. Without this limitation the encyclopaedic coverage of the work would obviously have been greatly reduced, but with respect to some entries, breadth of scope has inevitably been achieved at the expense of usefulness. For example, sources of information for individual topics are rarely included, although where reliance has been placed on one or two main works, references are added at the end of the entry. This usually occurs where the topic is afforded a brief essay rather than a mere description, such as the entries for the main branches of the law and the legal systems of various countries, eg "International law"; "Australian law."

Similarly, cases such as *Foss* v *Harbottle*, which warrant specific entries, are accompanied by the relevant citation, but where a legal concept is described, such as "Clapham Omnibus, man on the", the original source has not been included. In a compendious work such as this, clearly the compiler is compelled to restrict the number of references for each entry, but sometimes the lack of source information proves disappointing. In particular, it is a pity that the entry for "Reasonable man" does not cite the original case in which the idea was introduced: information that is commonly unknown though occasionally sought. On the other hand, a quick check of existing reference works revealed that "Reasonable man" has not previously been explained at all. To this extent Professor Walker has honoured his intention 'to complement rather than duplicate existing legal works of reference'.

The emphasis of the book is on the law and legal institutions of Great Britain, particularly Scotland. However, with its substantial coverage of

both civil and common law topics, the work will appeal to a wide range of readers and should be an automatic selection for university law libraries in both English speaking and continental countries. It will be used by the scholar, librarian, student and practitioner for information on and basic explanation of most aspects of law and legal concepts and systems. In addition, the compiler has provided an invaluable Appendix listing 'the holders of various offices since 1660', which includes lists of the kings and queens of England, the justices of the courts of England, Scotland, Ireland, and United States and the International Court of Justice, and the chairmen of the Law Commissions of England and Scotland. A second Appendix is a 'Bibliographical Note' on the various sources of law in ten different areas, which is useful but basic, listing for example only one book under the section headed Commonwealth law. Fuller bibliographies are provided in the text as mentioned above.

In any wide ranging compilation there are bound to be a few discrepancies such as the blind reference from "Isle of Man" to "Manx law" where, instead of appearing under that heading, the proposed entry seems to have been incorporated under "Man, Isle of". An explanation of allusions to "mere puff" and "smokeball" could possibly have been included, or at least the case of *Carlill* v *Carbolic Smokeball Company*. International law students will regret the omission of an explanation of the term "opposability", and seekers of information on the rights of de facto wives will be disappointed. "De facto" is described only in terms of recognition in international law. "Matrimonial property" is not mentioned under "Property", and it would perhaps have been useful to include some reference to decisions in favour of de facto wives with the entry for "Constructive trusts".

From a purely Australian point of view the book is not so useful. Any Australian entries are fairly token in character, and some of the information is simply wrong, largely because it is years out of date. Under "Australian law", for example, in the sub-section Private law, it is stated that 'Family law is a matter for each State though there is a Commonwealth Matrimonial Causes Act'. The passing of the Family Law Act in 1975 and the subsequent developments in family law jurisdiction have rendered this statement misleading to say the least. Clearly, the work had a lengthy gestation period, but to ignore a whole new system of family law with its courts structure and associated jurisdictional problems is a serious error. In the same entry, under sub-section Executive, the information on the administration of the Australian Capital Territory and the Northern Territory is also inaccurate. The Minister for the former is now the Minister for the ACT rather than the Ministery for the Interior, and the self-governing status of the Northern Territory, instituted in August 1978, has not been acknowledged, as the Administrator is described as 'advised by a Council'.

Again under "Australian law" it is stated that 'Subsequent to the dates of reception no English decisions have any binding authority'. This statement is made despite the fact that the High Court regarded decisions of the House of Lords as binding up until *Parker's* case in 1964 ([1964] ALR 524). In short, the Australian content of the work is riddled with inaccuracies. The result is a largely unreliable and out of date guide to Australian law which substantially detracts from the reference value of the book in this area.

Finally, the book contains numerous biographical entries covering a wide variety of British and foreign judges and legal scholars. These include Australians Isaacs, Griffith, Dixon and Barwick, but surprisingly not Evatt, one of our most eminent jurists, whose work on *The King and His Dominion Governors* (Oxford, 1936) should alone have qualified him for inclusion.

To sum up, considering that the three comparable legal source-books, *Jowitt*, *Stroud*, and *Words and Phrases Legally Defined*, are all multi-volume dictionaries, Professor Walker has provided a unique reference work. It is particularly useful in combining compactness with the extra encyclopaedic dimension that has till now been unavailable. Despite reservations concerning the Australian content, the book is a remarkable and scholarly contribution to legal reference.

Jacqueline Elliott

LIST OF BOOKS RECEIVED

(Inclusion in this list does not preclude review in a later issue.)

BAXT, R, BIALKOWER, L & MORGAN, R J *Guidebook to Partnership Law* (CCH Australia, 1980) vii, 307p, limp $29.00 (ISBN 0 86903 250 x).

BENNETT, J M and CASTLES A C, eds *A Source Book of Australian Legal History* (Law Book Co, 1979) x, 299p, cloth $27.00 (ISBN 0 455 19953), limp $16.50 (ISBN 0 455 19954).

CHESTERMAN, M *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson, 1979) xxxii, 490p (Law in context) cloth $43.80 (ISBN 0 297 77590 1), paper $37.95 (ISBN 0 297 77619 3).

CLUTTERBUCK, R *Kidnap and Ransom: the Response* (Faber, 1978) 192p, cloth $13.20 (ISBN 0 571 11306 0), paper $9.25 (ISBN 0 571 11327 3).

COHEN, S and TAYLOR, L *Psychological Survival: The Experience of Long-Term Imprisonment* 2nd edn (Pelican Books, 1981) 239p, paper $6.95 (ISBN 0 14 021657 x).

COLLINGE, J *Tutorials in Contract* 3rd edn (Law Book Co, 1981) xxi, 343p, cloth $25.00 (ISBN 0455 20256 7), paper $17.50 (ISBN 0 455 20257 5).

COMMONWEALTH LEGAL AID COMMISSION *Directory of Legal Aid Services in Australia* (AGPS, 1980) 114p, paper $3.25 (ISBN 0 642 04724 3).

COMMONWEALTH LEGAL AID COMMISSION *Legal Aid in Australia: an Annotated Bibliography. Supplement Number One* (including an overseas section on Resources on Legal Aid). (Commonwealth Legal Aid Commission, 1980) viii, 205p (looseleaf), paper, gratis (ISSN 0 159 – 169x).

Community Legal Education: Preventive Legal Aid: Proceedings of the Commonwealth Legal Aid Commission Seminar of June 1979; ed by B Boer (Commonwealth Legal Aid Commission, 1980) 309p, paper, price unknown (ISBN 0 642 89734 4).

CROSSLEY, R and McDONALD, A *Annie's Coming Out* (Penguin Books, 1980) xiii, 251p, paper $4.50 (ISBN 0 14 00 5688 2).

DEVLIN, P A *The Judge* (Oxford University Press, 1979) xi, 207p $27.00 (ISBN 0 19 215949 6).

DU CANN, R *The Art of the Advocate.* Repr with revisions. (Penguin Books, 1980) 185p, paper $4.95 (ISBN 0 14 02 0665 5).

EDWARDS, E J *Cases on Evidence in Australia* 3rd edn (Law Book Co, 1981) xxix, 795p, cloth $45.00 (ISBN 0 455 20244 3), paper $30.00 (ISBN 0 455 20243 5).

GAMBLE, H *The Law Relating to Parents and Children* (Law Book Co, 1981) vii, 341p paper $15.00 (ISBN 0 455 20254 0).

GIFFORD, D J & K H *Our Legal System* (Law Book Co, 1981) xvii, 297p, paper $9.95 (ISBN 0 455 20258 3).

GILLIES, P *The Law of Criminal Complicity* (Law Book Co, 1980) xxi, 319p, cloth $27.50 (ISBN 0 455 20073 4).

GILLIES, P *The Law of Criminal Conspiracy* (Law Book Co, 1981) xviii, 215p, cloth $25.00 (ISBN 0 455 20079 3).