The Law of Torts in Australia (2nd edition, 1993, Melbourne, Oxford University Press)

By Francis Trindade and Peter Cane

Reviewed by Barbara Ann Hocking*

Reflecting a trend in tort law scholarship generally, this book is detailed but not overwhelming, scholarly but comprehensible, well written and comprehensive, legal yet evaluative. Now in its second edition, it covers the gamut of modern tort law, dealing in a concise yet detailed fashion with, inter alia, the intentional torts, negligent trespass, negligence, employers' liability, products and premises, nuisance, *Rylands* v *Fletcher* and liability of public authorities. The approach to the ordering of the material is a structured one and hence one which gives a semblance of order in a field which can seem overwhelmed by case law, legal principles and statutory provisions.

Trindade and Cane also approach their subject matter in a way which is both easy to read and yet scholarly: furthermore, the extensive details of the law are interspersed with interpretive and theoretical comments. It is clear from the material that the evolution of the law of torts remains a dynamic and fascinating process.

In this book, each area of law is dealt with on a reliable and scholarly basis. The subject matter is also, and most refreshingly, seen through a predominantly Australian lens. Indeed, the authors expressly assert in their Preface to this second edition that their original commitment in the first edition to presenting the law of torts, 'from a truly Australian perspective' had clearly been vindicated by recent judicial developments, particularly Brennan J's pronouncement in *Mabo* v *State of Queensland*[1]

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1 *Mabo* v *State of Queensland (No. 2)* (1992) 175 CLR 1.

that 'the law which governs Australia is Australian law.'[2] In keeping with this Australian perspective, there is a focus throughout, then, upon specifically Australian developments such as the High Court reformulation of the conceptual structure to deal with actions in negligence and the significant impact of actions under sections 52, 53 and 55 of the *Trade Practices Act* 1974 (Cth). The authors fully recognise this and other growth areas of the law. They provide an expanded discussion of the economic torts in Chapter Five 'The Intentional Infliction of Purely Economic Loss'. This second edition also contains a new section in Chapter Two 'Intentional Torts to the Person' on abuse of process, which the authors consider 'a recent growth area within the law of torts.'[3]

As is the case with so many tort law books, there is a considerable focus in this work upon the major tort of negligence notwithstanding the comprehensive treatment accorded the other areas of the law. However, the balance is well struck and negligence does not dominate the picture overall and is not focussed upon until Chapter Nine.

The 'Sketch of the Tort of Negligence' which launches Chapter Nine, entitled, 'Negligence - The Duty of Care', makes the critical point that the term negligence is used in two senses in modern law. It refers in one sense to the tort of negligence which had its birth in Lord Atkin's famous pronouncement of the neighbour principle in *Donoghue* v *Stevenson*.[4] In another sense it refers to the second of the three elements of the tort of negligence: a breach of the requisite duty by the defendant. In this second sense the term negligence is 'roughly synonymous with "carelessness".'[5] More technically, negligence consists of failure to take reasonable care and precautions to guard against reasonably foreseeable and not insignificant risks of injury to the plaintiff.[6] The next section of this chapter provides a useful outline of the judicial debate about the means of justifying the imposition of new duties of care: a debate generated by

2 Trindade and Cane, xvi.

3 *Ibid* at xvii.

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

5 *Supra n 2* at 326.

6 *Ibid.*

Lord Atkin's enunciation of the neighbour principle in *Donoghue* v *Stevenson*.[7]

Much of the case law contains rigorous judicial attempts at formulating unifying principles to deal with duty of care in relation to difficult categories of harm such as economic loss and nervous shock. It is inevitable that the courts should deliberate in this way: as Trindade and Cane note, the duty question is essentially a control device which serves to 'restrict or limit the circumstances in which a defendant can be held liable for careless conduct.'[8] For Trindade and Cane, the notion of duty is one device which is 'used to specify the type of situations and activities to which the tort applies, and the sort of interests which the tort of negligence protects.'[9]

Therefore, the authors continue, a convenient label can be placed upon duty even if it is one recognising the generality of the concept. Duty provides for the extent of the conduct which will be proscribed.

The general concepts of the neighbour principle from *Donoghue* v *Stevenson* cannot provide an universal determinant of liability. As Trindade and Cane observe:

> Lord Atkin's enunciation of the neighbour principle started a debate (which has not yet ended) as to which of two methods of justifying the imposition of new duties of care is to be preferred. Should new duties of care be derived from some general principle in the way Lord Atkin suggested, or should they be developed by incremental extension of established duty relationships?[10]

After *Anns* v *Merton London Borough Council*,[11] it is widely recognised that generalisation has given way to pragmatism and that the courts have retreated from the references to wide generalisations back to the more traditional categorisation of cases approach. While recognising that a more restrictive approach to the duty question characterises the

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7 *Supra n 4.*

8 *Supra n 2* at 326.

9 *Ibid* at 326-7.

10 *Ibid* at 328.

11 [1978] AC 728.

modern law across jurisdictions, nevertheless Trindade and Cane observe that the approach to this weakening and restricting of the duty concept has been slightly different in Australia. The House of Lords has taken the most stringently restrictive approach. While it is indisputable that the High Court has 'also sought to weaken the expansionary tendencies inherent in the neighbour principle'[12] it has done so in 'a quite different way.'[13]

The essential division in this on-going debate is between the idea that new duties should be derived from some general principle (the Atkin formula) and the adoption of an incremental approach. The authors provide a useful account of the High Court's unique approach to the weakening of the expansionary tendencies inherent in the neighbour principle and in particular to the meaning of the notion of proximity which has gained such ascendancy as a conceptual tool in the High Court jurisprudence in this area. The account of the meaning of 'reasonable foreseeability' and 'proximity' and of the interaction between the two terms will be appreciated by students of law and practitioners alike.

Trindade and Cane suggest that both these terms as tests of duty are 'extremely vague'[14] and essentially provide the courts with means through which to express value judgments 'as to when it is appropriate to impose liability for negligent conduct.'[15] Furthermore, both terms are concerned with the relationship between the parties. However, at that point, the similarity ends, for the two notions focus on different aspects of the relationship between the parties. The authors advance this distinction between the two terms:

> Foreseeability is concerned with the parties as persons (with interpersonal morality, if you like). Judgments of foreseeability are moral judgments about the degree of care for and awareness of others, and about the degree of sensitivity to their presence and vulnerability to injury, which it is reasonable and proper to expect people to display.

12 *Ibid.*

13 *Ibid.*

14 *Ibid* at 229.

15 *Ibid* at 330.

> Proximity is more concerned with factors such as nature of the injury inflicted (victims of purely economic loss are less likely to be held to be in a relationship of proximity with the defendant than victims of personal injury, for example), the nature of the plaintiff's interest (for example, property interests are much better protected by the tort of negligence than are contractual interests) and the circumstances in which the injury was inflicted.[16]

And, as the authors amply illustrate in their subsequent consideration of negligence case law, proximity '... is also concerned with matters of social policy which are not specific to any particular case.'[17] The central factor unifying the two terms (reasonable foreseeability and proximity) is however that they are both 'merely organizing concepts which courts use to express value judgments.'[18] As general tests of duty, they will not provide a definitive answer in any particular case where a duty has not hitherto been recognized. Thus it is made clear to the reader that no one test in any aspect of negligence can possibly suffice to subsume the range of potential duties.

Yet, of course, the extent to which proximity masks policy bases to decisions and the extent to which proximity actually provides a limiting factor varies between fact situations: the High Court decision in *Gala* v *Preston*[19] and the House of Lords decision in *Alcock*[20] might usefully be contrasted in this regard. Therefore, Trindade and Cane alert the reader to the vital requirement in understanding any aspect of negligence law: '[t]he only way properly to understand how the courts deal with questions of duty is to study the cases.'[21]

In their consideration of physical damage caused by accidents on the roads or at work, the authors emphasise the extent to which the notion of duty may be superfluous. The requirement of proximity may usually be

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16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 (1991) 172 CLR 243.

20 *Alcock and Others* v *Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907.

21 *Supra n 2* at 331.

satisfied by foreseeability because the courts have placed few limitations in terms of duty on recovery in cases of personal injury or property damage caused on the roads or at work. In this case the concept of duty adds nothing to the concept of negligence (that is, the second element of the tort) because it too contains the requirement of foreseeability.[22] The questions of duty and breach of duty then only require separate treatment if 'the defendant argues absence of proximity or that some precedent or policy is against the imposition of a duty.'[23]

Trindade and Cane offer interesting case law to amply illustrate this point. In *James* v *Harrison*,[24] the plaintiff, a customer, left a shop just behind an employee of the owner. The employee, who was hurrying along the pavement, suddenly turned to go back and knocked the plaintiff to the ground, injuring her. It was held by McGregor J that on these facts, the employee both owed the plaintiff a duty of care and had breached it. And in *O'Connor* v *South Australia*,[25] a stenographer was standing behind a door when it was suddenly opened, injuring her. The case was decided on the basis that the injury was foreseeable. Cases such as these are usefully advanced to illustrate that even in cases of personal injury, foreseeability is only part of the test for negligent conduct but that in cases of physical injury caused by road or work place accidents, the policy issues have long been determined in favour of imposing liability for negligently caused foreseeable accidents.

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22 *Ibid* at 336. Jaffey has similarly argued that in such cases the inclusion of foreseeability as an ingredient of the test for the existence of a duty of care is 'inveterate' and also 'unnecessary.' By this view, although the notion of duty is predicated upon foreseeability, this often adds little to the issue. For Jaffey, reasonable foreseeability is 'quite superfluous' as a requirement for the existence of a duty of care `although it is traditionally stated as a requirement.' Jaffey suggests that a more feasible approach to duty and foreseeability would be to recognise that foreseeability of damage is a necessary fact for the proof of breach of duty and that its 'extent can only be measured in that context.' See Jaffey, AE *The Duty of Care*, Dartmouth, 1992 at 7.

23 *Supra n 2* at 336.

24 (1977) 18 ACTR 36.

25 (1976) 14 SASR 187.

In dealing with the standard of care, the authors commence with an outline of the significance of the dominance of the foreseeability and neighbour principle phase exemplified in the decision in *Wyong Shire Council* v *Shirt*.[26] In that case, the plaintiff was injured when he fell waterskiing and struck his head on the bottom of a lake. A sign said 'Deep Water' which, he claimed, had misled him as an inexperienced waterskier into thinking it was safe to ski. The sign had been erected by the Shire engineer to warn swimmers near the jetty of the fact of deep water in the channel. The High Court suggested that the standard of care in law requires only foreseeability of a risk that is not fanciful or far fetched. This is as opposed to risks that are 'real' or more stringently 'not unlikely to occur.' The High Court decided that because the risk was neither far fetched nor fanciful it was reasonably foreseeable. Mason J stated that a 'risk which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk.'[27]

In this decision, therefore, the Australian High Court laid down an extremely broad test, one which essentially said that in cases of physical harm, very few limitations ought to impede the plaintiff's recovery from the defendant. As Trindade and Cane comment, the test is one which 'requires of the defendant a very high degree of perspicacity.'[28] However, the authors note that consideration of the principles formulated in *Wyong* in relation to the role of foreseeability in questions of the standard of care requires two important qualifications. First, there are the implications of Mason J's judgment that foreseeability of risk is a necessary but not necessarily sufficient condition. At this point, the calculus of negligence enters the picture, bringing with it the consideration of the actual magnitude or significance of the risk. Secondly, the development by the High Court of the notion of 'proximity' is also of significance as a qualification on the concept of foreseeability as a measure of standard of care.

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26 *Wyong Shire Council* v *Shirt* (1980) 146 CLR 40.

27 *Ibid* at 48.

28 *Supra n 2* at 412. The authors note that '... it may not be unfair to say, as Wilson J did in *Shirt*, that the law "tends to credit (the reasonable) man with an extraordinary capacity for foresight, extending to "possibilities" which are highly speculative and largely theoretical." (1980) 146 CLR 40 at 53'.

The authors refer back to their expose of the notion of proximity as a test of duty of care, again asserting its centrality as a 'conceptual basket into which can be placed policy considerations which count against the imposition of a duty of care in cases where the court thinks no duty ought to be imposed.'[29] The notion of proximity as a measure of the standard of care is considered to operate in a 'related but rather different way.'[30] As in the discussion of duty, once again, the authors suggest that proximity essentially lacks specific content and that the only way to understand the law is to examine the cases.

The discussion of the fascinating Australian developments in the areas of abuse of process, malicious prosecution and the intentional infliction of economic loss is much to be welcomed. The section in Chapter Two 'Intentional Torts to the Person' dealing with abuse of process and malicious prosecution canvasses the effect of the decision of the High Court in *Williams* v *Spautz*[31] and notes the significant difference which appears to again be developing in this area between British and Australian law. The authors have expanded their attention upon the economic torts in Chapter Five 'The Intentional Infliction of Purely Economic Loss', contending that the tendency for the economic and industrial torts to be dealt with in more detail in industrial law courses rather than in torts courses warrants some redress.

The chapter draws the threads of the various actions together in a scholarly way, and imposes a structure through the adoption of the general rubric of actions brought mainly for the protection of business interests. This chapter deals first with the tort of deceit, then with the economic and industrial torts of injurious falsehood, passing off, interference with contractual relations, intimidation, conspiracy and causing loss by unlawful means. It then turns to the action on the case for damages and the actions for malicious prosecution and abuse of process before turning to the requirements of the tort of misfeasance in a public office. Noting that misfeasance in a public office is not an economic or

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29 *Supra n 2* at 413.

30 *Ibid.*

31 (1992) 107 ALR 635.

an industrial tort, the authors draw attention to the relevance of all these actions in a chapter broadly concerned with the intentional infliction of economic loss.

The final central concern in this important chapter is with the statutory provisions in Australia which intrude into the area occupied by some of these torts. Of these provisions, Trindade and Cane suggest that sections 52, 53 and 55 of the *Trade Practices Act* 1974 (Cth) which deal with misleading and deceptive conduct are particularly important: the authors contend that 'over the next decade or two' these provisions 'may well be relied upon as possible alternatives to the common law torts of deceit, injurious falsehood and passing off.'[32] However, the mooted reining in of section 52 of the *Trade Practices Act* in commercial litigation that was hinted at by the High Court in *Concrete Constructions (NSW) Pty Ltd* v *Nelson*[33] is noted by way of footnote. One of the strengths of this book is precisely that it both indicates the way in which the authors predict the law may develop, while also alerting the reader to current case law that is likely to impact upon the predictions.

The discussion of the three recognized individual economic torts which require an intention to inflict economic harm - interference with contractual relations, intimidation and conspiracy - is detailed, informative and scholarly. The authors provide the reader with considerable knowledge of the case law in this developing and significant area, referring in some detail to the implications of vital cases such as the British decisions in *Lonrho p.l.c.* v *Fayed*[34] and the decision of Brooking J in *Ansett Transport Industries (Operations) Pty Ltd* v *Australian Federation of Air Pilots.*[35]

The continuing reminders throughout this book of the specifically Australian developments in this area are timely both because the British law has, until recently, apparently diverged so markedly from that in Australia and Canada, and because of recent developments subsuming traditional areas within the general principles of negligence. The authors

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32 *Supra n 2* at 171.

33 (1990) 64 ALJR 293.

34 Court of Appeal [1989] 3 WLR 631 and House of Lords [1991] 3 WLR 188.

35 [1991] 1 VR 637.

refer to the effect of the decision in *Australian Safeway Stores* v *Zaluzna*,[36] which decided that occupiers' liability should cease to be governed by the category of visitor features which had characterised the law and could now be governed by the general principles of negligence. In this respect, the authors also presage the recent High Court decision in *Burnie Port*,[37] which drew the principles traditionally preserved as *Rylands* v *Fletcher*[38] under the general ambit of the law of negligence. Trindade and Cane observe the extent to which the introduction of various elements of fault into the law in this area has altered the function of the law. They suggest that:

> This change of focus has more or less destroyed *Rylands* v *Fletcher* as a source of strict liability, and further witnesses the dominance of negligence as a principle of liability in the modern law of tort.[39]

It must be stressed that this is a useful sourcebook and that it represents a cornucopia of well written, easily absorbed information. Inevitably, however, despite the extremely meritorious treatment accorded the subject by the authors, the book has its shortcomings. Perhaps the most pressing limitation is that of theory. In a more detailed work, for example, the considerable differences in approach between the House of Lords and the Canadian and Australian courts would have been drawn out in more detail. Trindade and Cane can only hint at the differences that have emerged and briefly sketch their implications for comparative jurisprudence. The fascinating differences in approach between the Canadian Supreme Court in *Canadian National Railway Co.* v *Norsk Pacific Steamship Co Ltd*[40] and the House of Lords in the Hillsborough case, *Alcock* v *Chief Constable of South Yorkshire*,[41] cannot figure prominently in what is essentially an overview of the law. Nonetheless, there is a not insignificant amount of theorizing, particularly in the

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36 (1987) 162 CLR 479.

37 *Burnie Port Authority* v *General Jones Pty Ltd* (1994) 68 ALJR 331.

38 (1866) LR 1 Ex 265; affd (1868) LR 3 HL 330.

39 *Supra n 2* at 644.

40 (1990) 65 DLR (4th) 321.

41 [1992] 1 AC 310.

introduction which emphasises, inter alia, the problem tort experiences as a fault and 'cause based' system of compensation. There is a range of perspectives on tort law, however, particularly feminist theories, which might usefully have been canvassed in the introduction.

This is particularly the case since the authors commendably state their own view about the proper function of the law of torts in that introduction, contending that:

> it is a proper function of the law of torts to offer protection to hitherto unprotected interests either by including them in an existing category of protected interests or by creating a new category.[42]

However, perhaps inevitably, given the scope of the work, it is not possible for this perspective to be drawn out in any detail, even though it undoubtedly underpins the approach throughout. At times, therefore, the theorising can seem overly restricted by the scope of the work to one line questions or footnote references.[43] However, both authors have provided the reader with ample opportunity to peruse their scholarly views about this subject elsewhere and they certainly bring the scholarly nature of that other work to this book. Given their aim at providing through this particular work another edition of a comprehensive presentation of the law of torts from an Australian perspective, a call for the slightly greater influence of theory is a minor reservation indeed.

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42 *Supra n 2* at 4.

43 For example, in the section on nervous shock, the authors ask in relation to *Alcock* 'Where is the line to be drawn?' and refer by way of footnote to the 'accident preference' in tort law and Jane Stapleton's *Disease and the Compensation Debate* Oxford, 1986.