BOOK REVIEWS

The Law of Torts by HARRY STREET, LL.M., PH.D., 3rd ed. (Butterworth & Co. Ltd, London, 1963), pp. i-lxxxv, 1-494, Index 495-537. Australian price: £4 16s.

The publication of the first edition of Professor Street's book on the law of torts in 1955 was an exciting event. It was the first English textbook to break with the *Salmond-Pollock-Winfield* tradition of expounding the law of torts around a central theme of an analysis of the character of the defendant's conduct. Professor Street wrote his book from the point of view of the interest of the plaintiff which had been infringed. Moreover, the book launched immediately into an examination of specific torts. *The Salmond-Pollock-Winfield* tradition was to spend the first two hundred or so pages discussing the foundation of tortious liability, remedies, parties, the effect of death, remoteness of damage and so on. All this before the reader was even introduced to the substantive law of one solitary tort! And finally the book was somewhat unusual in the clarity of its organization—each tort was treated in such a way that the ingredients of the plaintiff's case and all the possible defences that might be raised by a defendant were clearly set out.

The popularity of the book with practitioners, teachers and students is clearly evidenced by the appearance of a third edition, only nine years after its original publication. This new edition has been extensively rewritten to take account of the many developments in the law of torts since the second edition was published in 1959. A completely new chapter (Chapter 8) has been added to accommodate the effect of the Privy Council decision in the *The Wagon Mound*.[1] There is also some new material dealing with liability for nuclear incidents (pages 282-284). Other parts of the book, such as those dealing with the liability of highway authorities (pages 473-474) and the law relating to inter-spousal tort immunity (pages 480-482), have been drastically pruned in view of the recent statutory amendment of the common law rules on these subjects in England.[2] Elsewhere the author has reconsidered views expressed in earlier editions and has incorporated some of the products of the research that went into his recently published book on the law of damages.[3]

Professor Street's treatment of *The Wagon Mound* is very interesting. He is a critic both of the Court of Appeal's decision in *Re Polemis and Furness, Withy & Co.*[4] and the Judicial Committee's advice in *The Wagon Mound*. The Judicial Committee's advice is subjected to three major criticisms. First it employs 'clumsy techniques' (page 150) to dispose of *Re Polemis*.[5] Second, on the facts of the case there was no need to disapprove *Re Polemis* as, even accepting that decision, the

[1] *Overseas Tankship (U.K.) Ltd v. Morts Dock & Engineering Co. Ltd* [1961] A.C. 388.

[2] See Highways (Miscellaneous Provisions) Act 1961, abolishing, *inter alia*, the common law immunity of highway authorities for nonfeasance; and the Law Reform (Husband and Wife) Act 1962, abolishing inter-spousal tort immunity.

[3] *Principles of the Law of Damages* (1962).

[4] [1921] 3 K.B. 560.

[5] These techniques included treating *Re Polemis* as displacing the need for a duty of care which was 'the usual obvious device of *reductio ad absurdum*', and falsely implying that *Thurgood v. Van den Berghs and Jergens Ltd* [1951] 2 K.B. 537 was decided prior to *Victoria Laundry (Windsor) v. Newman Industries* [1949] 2 K.B. 528. Professor Street characterizes this last technique as 'particularly crude'.

damage occasioned to the plaintiff's wharf was not a direct result of the oil discharge. It was some fifty to sixty hours after the original discharge of oil that it caught alight and severely damaged the plaintiff's wharf.[6] Third, and most important of all, the Judicial Committee only confuse the issue by presenting it as a choice between reasonable foreseeability and direct consequences as tests to determine remoteness in negligence. Professor Street takes the view that the courts have been working out sensible rules to determine the problem of remoteness quite independently of this dispute and that much of the law was well settled even before *The Wagon Mound*. These developments he suggests have taken place since 1921 (when *Re Polemis* was decided) and in themselves cast doubt upon that decision without any reference to the validity of the direct consequences test.

The developments to which Professor Street refers concern the concept of hazard or risk in the tort of negligence. They may be summed up in the following proposition:[7]

(1) A plaintiff will fail in negligence if the risk which materializes is not one against which the duty was intended to guard.[8]

(2) If the damage suffered by the plaintiff is within the risk, against which the duty was intended to guard then the defendant may be liable even though he cannot foretell the precise way in which the harm materializes.[9]

(3) If the damage suffered by the plaintiff is within the risk against which the duty is intended to guard then the defendant must take the following facts concerning the situation of the plaintiff as he finds them:
   (a) his physical condition.[10]
   (b) the condition of his property.[11]
   (c) his surrounding external circumstances.[12]
   (d) his economic situation.[13]

On the basis of these developments Professor Street suggests that *Re Polemis* would now be decided otherwise 'because it paid insufficient heed to the question of whether a risk of impact and mechanical effects should have extended to a risk of chemical reactions and fire' (page 149). In other words it would not satisfy proposition (1) above, which was only settled in 1943 by the House of Lords in *Glasgow Corporation v. Muir*.[14] Professor Street also points out that the way in which the Judicial Committee

[6] As Professor Street rightly points out (page 141, n. 3) the whole of the facts do not appear in the report of the Privy Council but must be ascertained from reports of the case below. See [1958] 1 Lloyd's Rep. 575; [1959] 2 Lloyd's Rep. 697.

[7] These propositions are condensed from the material on pp. 141-148.

[8] *E.g.* A gives a loaded gun to a ten-year-old child who drops it on his foot. A is not liable for the injured foot because the risk to be guarded against was the child shooting himself, or others.

[9] *E.g.* A owes a duty to guard B against the risk of damage by fire. A may be liable to B if he is damaged by fire even though it happened in an unforeseeable way.

[10] *E.g.* A cannot complain if his victim is a haemophiliac.

[11] *E.g.* A hits B's car, and extensive damage is suffered because of the rusty condition of the bodywork of B's car. A is liable for the full amount.

[12] *E.g.* A carelessly causes B's ship to run aground and it suffers extensive damage because it settles on an object the presence of which was unforeseeable. A is not liable for the entire damage.

[13] *E.g.* A carelessly runs down B, a £10 per week labourer, who is about to fulfil a once-only lucrative television contract. A is liable for his loss of fees.

[14] [1943] A.C. 448.

formulated the test of reasonable foreseeability in *The Wagon Mound* is not really helpful because in propositions (2) and (3) above recovery is allowed in situations where the damage is, in a real sense, unforeseeable. His plea is that, instead of becoming hypnotized by the dispute between reasonable foreseeability and direct consequences as the appropriate test to determine the problems of remoteness of damage, we direct our attention to the concepts of risk and hazard which are at the root of the modern development of the tort of negligence. Such an approach would, in his opinion, expose the critical, yet little discussed problem of the judicial discretion involved in the particularization of the hazard or risk against which the duty of care is designed to protect.

In the present writer's opinion this is a sound approach to the problems of remoteness of damage and Professor Street's new chapter will be essential reading for all who are interested in this area of the law. There is more good sense in its twelve pages than in the thousands of pages of law review comment on *Re Polemis* and *The Wagon Mound*. However, perhaps one caveat should be entered. Professor Street places his chapter dealing with remoteness in Part III of the book, which is concerned with the tort of negligence. The problems of remoteness of damage are, however, not limited to that tort but are common to all torts. Yet while remoteness is a common problem it seems clear that any solution of it in relation to the tort of negligence is not automatically transferable to other torts, which not only protect different interests, but are governed by other policy considerations. The second chapter of the *The Wagon Mound* dispute has, for example, just been written by Walsh J. in *Miller Steamship Co. Pty Ltd v. Overseas Tankship (U.K.) Ltd, The 'Wagon Mound' (No. 2)*.[15] There Walsh J. held that the test of reasonable foreseeability was inapplicable to an action in public nuisance and, instead, applied the *Re Polemis* test. Professor Street's treatment of remoteness should therefore be treated with great care when being used in connection with torts other than negligence.

It is pleasing to note the frequent citation of Australian cases in this new edition. The Table of Cases shows that some 45 cases from the Commonwealth Law Reports and the various State Reports are used. This, of course, will increase the practical value of the book in this country. However it should be remembered that Professor Street has written a book on the English law of torts and is only interested in Australian cases insofar as they provide authority in areas where English law is silent,[16] or where they disagree with the English authorities,[17] or point to a new approach,[18] or contain a good discussion of the English cases.[19] His interest in our law is therefore very limited and his book can-

[15] [1963] N.S.W.R. 737.

[16] *E.g. Burton v. Davies* [1953] St.R.Qd. 26 (driving a car at such a speed to prevent a passenger alighting may be false imprisonment); *Hutchins v. Maugham* [1947] V.L.R. 131 (not trespass to leave poisoned bait which is *later* picked up by a dog). In the next edition Professor Street might like to add a reference to *Chapman v. Hearse* (1961) 106 C.L.R. 112 which supports the proposition he states at the top of p. 148.

[17] *E.g. Cowell v. Rosehill Racecourse Co. Ltd* (1937) 56 C.L.R. 605 (revocability of licenses); *Mummery v. Irvings Pty Ltd* (1956) 96 C.L.R. 99 (effect of plea of *res ipsa loquitur*).

[18] *E.g. The Commissioner for Railways (N.S.W.) v. Cardy* (1960) 104 C.L.R. 274.

[19] *E.g. Walsh v. Ervin* [1952] V.L.R. 361 (special damage in public nuisance); *Victoria Park Racing & Recreational Grounds Co. Ltd v. Taylor* (1938) 58 C.L.R. 479 (nuisance, right of privacy *etc.*).

not be regarded as a competitor with *Fleming*. It was Professor Heuston's eleventh edition of *Salmond* that was the first English text on the law of torts to make extensive use of Australian authority and it is satisfying to see others following his lead.

Mention of *Fleming* and *Salmond* gives rise to the reflection that there is a veritable glut of tort textbooks on the market at the moment. There is the new seventh edition of *Winfield*,[20] the thirteenth edition of *Salmond*,[21] the twelfth edition of *Clerk and Lindsell*,[22] the fifteenth edition of *Pollock*,[23] the second edition of *Fleming*[24] and now the third edition of *Street*. This is not the place for any comparative analysis of their respective merits though it must be said that for Australian purposes *Fleming* is the only indispensable one amongst them.

The one serious criticism that can be made of Professor Street's book is the terse staccato style in which it is written. Too often he assumes that the reader is well acquainted with the general outline and background of the rules he is explaining. The consequence is that his writing is stripped of all preliminary and exploratory material and launches straight into the substance of the law. This enables him to compress the whole of the law of torts into 494 pages (as against 813 for *Winfield*, 812 for *Salmond*, 704 for *Fleming*), but it reduces the value of the book for students at whom, as I understand it, it is primarily aimed. It is a very difficult book for anyone to use who does not bring to it a knowledge of the general outlines of the law of torts. After a student has that knowledge he will find this a stimulating book, but it is not one on which to ask him to cut his tort teeth.

Finally, and this follows on from what has just been said, *Street* is a book to work with, not to read. Its style is stark and unattractive. This is further exaggerated by the method in which the book is organized. It is divided into numbered parts, then subdivided into numbered chapters which are further subdivided into numbered sections, and these sections are finally subdivided again into lettered divisions. Now this makes for great clarity of treatment but it makes the book unreadable. In *Street* one will not find the charm and urbane wit which Professor Heuston has brought to *Salmond*, nor the cultivated elegance that was in *Winfield* (but which the latest editor has drastically excised), and nor will one find the magisterial atmosphere of *Fleming*. However what one does find in *Street* is clear if stark, exposition, a host of stimulating ideas, and one of the most accurate statements of the modern English law of torts which is available. It was a good book when it was first published, and it is pleasing to report that this new edition is even better.

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The Constitutions of the Australian States, by R. D. LUMB, LL.M. (Melb.), D.PHIL. (Oxon.), Senior Lecturer in Law, University of Queensland. (University of Queensland Press, 1963), pp. i-viii, 1-96, and Index. Price: £1 9s.

Dr Lumb states in his brief preface to this little book that it was written to fill a gap in the existing literature on Australian constitutional law. I could not say whether in fact this is the only work extant which deals

[20] Ed. Jolowicz and Ellis Lewis (1963). [21] Ed. Heuston (1961).
[22] Ed. Armitage (1961). [23] Ed. Landon (1951). [24] 1961.

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