Torts in the Nineties edited by Nicholas Mullany (Sydney: LBC Information Services, 1997) pages v–vii, ix–xxxix, xli–xlv, index 333–342. Price $125 (hardback). ISBN 0 455 21437 9.

In *Torts in the Nineties*[1], Nicholas Mullany has edited a collection of essays written by internationally renowned torts scholars and judges, which are intended to analyse recent developments in the law of torts and, in doing so, 'guide lawyers to understand the state and purpose of the law, its underlying values and principles and the terms in which the law is articulated'.[2] The collection also is intended to provide guidance as to where tort law is heading, including a discussion of the forces guiding its evolution.

I WHAT'S MISSING?

While the collection of authors who wrote pieces for the book is commendable — in terms of their breadth of knowledge and experience (academically and practically) — a few shortcomings are worth noting at the outset. First, it is rather unfortunate that not one essay among the eleven collected is written by a female torts scholar. Surely there is room to hear women's voices, bearing in mind the fact that the book professes to consider tort's 'underlying values'.[3] For example, commentary from Jane Stapleton on product liability (or any number of torts-related matters), Regina Graycar on gendered damages assessment, or Lucinda Finley on gendered harm, should have been included to widen the perspectives represented in the volume.

Second, it is odd that in a collection of so many essays, in a decade following the institution of several major statutory compensation schemes, there are no papers critically discussing — as major themes — the merits (or otherwise) of these schemes (no-fault compensation schemes were, however, noted in passing in Harold Luntz's and Bruce Feldthusen's essays). While it might be argued that this type of discussion is somewhat 'old hat' or 'dated', its continued relevance cannot be underestimated. An essay by Patrick Atiyah, Peter Cane, Terence Ison or Jane Stapleton, alongside those which consider new contexts in which personal injury litigation could be instituted, would have been valuable. So too would a paper which critically considered compensation schemes against the present political climate of economic rationalism, government cut backs and reduction of benefits. For example, recent fundamental changes to Victoria's crimes compensation scheme will, no doubt, have a substantial detrimental effect on all claimants, in particular women and survivors of abuse.

[1] Nicholas Mullany (ed), *Torts in the Nineties* (1997).

[2] LBC Information Services, '*Torts in the Nineties* — An Exposition of Modern Tort Law by Leading Jurists', Media Release (April 1997).

[3] Ibid.

II WHAT'S INCLUDED?

That said — and it is perhaps a little unfair to dwell on what I believe should have been included in a work of this nature — the collection covers a wide range of significant issues of concern to contemporary torts lawyers and scholars, and is especially welcome in countering suggestions that tort, if not dead, is dying.

The fact that the commentators included in the volume come from several common law countries is one of the work's most positive features, as is the fact that all commentators take great care, wherever possible, to compare developments in Australia, the United Kingdom, Canada, New Zealand and occasionally the United States. Practitioners, academics and students have been provided with an opportunity to easily understand and come to terms with recent doctrinal changes across a range of jurisdictions.

Most importantly, several papers — including, for example, Bruce Feldthusen's analysis, 'The Canadian Experiment with the Civil Action for Sexual Battery'[4] and Harold Luntz's description of his experiences as a member of the 'Foreign Fracture Panel', in 'Heart Valves, Class Actions and Remedies'[5] — are at the 'cutting edge' of tort, from which lessons for Australia can be learnt. They are, as the media release notes, part of what makes this a 'groundbreaking work'. However, not all of the contributions could be considered of equal significance which is not unexpected in a collection of essays.

A *Feldthusen*

Feldthusen's essay, 'The Canadian Experiment with the Civil Action for Sexual Battery'[6] is particularly noteworthy. An overtly political study, it incorporates inter-disciplinary material in its approach to an increasingly important and alarming social issue, the sexual abuse of children. He describes the recent phenomenon in Canada, where '[s]urvivors of sexual abuse have turned increasingly to the civil courts for relief instead of or in addition to prosecuting a criminal complaint'.[7] He thoughtfully canvasses possible rationales as to why such actions are instituted, such as the therapeutic benefits to survivors who may be said to be empowered by running the proceedings, and the way in which 'some aspect of the litigation — the complaint, the process, or the outcome — is expected to, or does, assist the victim along the path to recovery'.[8] Punishment, public vindication and encouragement of other victims are also noted as possible reasons for instituting these proceedings.

Feldthusen attempts to identify peculiarities within the Canadian social, legal and political scene to explain the recent proliferation of these claims in comparison to

4 Bruce Feldthusen, 'The Canadian Experiment with the Civil Action for Sexual Battery' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 274

5 Harold Luntz, 'Heart Valves, Class Actions and Remedies: Lessons for Australia?' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 72.

6 Feldthusen, 'Civil Action for Sexual Battery', above n 4.

7 Ibid 274.

8 Ibid 302.

other common law jurisdictions. Discussing the initial attempts to bring actions for battery in this context, he notes:

> Many, perhaps most, of the earlier Canadian sexual battery plaintiffs brought their civil action with no expectation of ever recovering from the defendant. Perhaps this phenomenon ... is the truly unique aspect of the Canadian sexual battery litigation landscape.[9]

His discussion is linked to statutorily implemented crimes compensation schemes and recently litigated negligence actions, including those misguided actions against the 'non-perpetrator parent (effectively, the mother) for failing to have adequately protected the child'.[10] With these types of backlash cases in mind, Feldthusen states that lawyers who defend these actions

> should appreciate that often these women themselves were victims, powerless to protect themselves or their children from the abuser ... Meanwhile, when the mother ends up incurring greater liability than the attacker ... [this] is surely one of the more bizarre examples of woman-blaming in our legal system.[11]

The section, 'Evidentiary Issues: Experts, Syndromes, and Other Unpleasant Realities of Civil Litigation', skilfully addresses a series of contentious evidentiary issues. For example, Feldthusen notes:

> The idea that women and children lie about having been sexually abused has always been warmly received by the common law. It is in that context that we should both loathe and fear the 1990s equivalent of Freud's failure to accept the reality of women's and children's lives. I refer, of course, to the so-called ... 'false syndrome lobby'. The falsehood is the syndrome, not the memory. There is no such recognised medical syndrome. The term originated not in science or medicine, but in an American lobby group founded by parents who had been accused of sexually abusing their children. It consists mostly of self-serving propaganda, dangerously appealing to the defence bar and some traditional psychologists. Worse, it may also appeal to a society that prefers a false syndrome to the shocking truth about inter-familial sexual abuse.[12]

He forcefully develops this argument, noting that the false syndrome operates as a 'cultural conditioner ... The myth that women and children lie about their history of sexual abuse is an important one in the social and legal oppression of women and children.'[13] Finally, he considers the likelihood (or otherwise) of whether these types of claims will continue to be brought in the future.

[9] Ibid 279.
[10] Ibid 289.
[11] Ibid 289.
[12] Ibid 292.
[13] Ibid 294.

B *Luntz*

Harold Luntz's contribution, 'Heart Valves, Class Actions and Remedies: Lessons for Australia?',[14] like Feldthusen's, is one of the more overtly political essays in the collection, with a discussion of product liability reforms, access to justice issues and recognition of group interests. While the bulk of the essay is devoted to a detailed description of the way in which the heart valve litigation was run in the United States, embracing claimants from disparate jurisdictions, the essay never loses sight of the social background against which tort-based remedies operate. Keeping in mind the comparative nature of his essay, Luntz notes, '[w]hether or not our tort law in the future will follow American patterns, it may be of interest to Australian readers to know just how product liability class actions operate in the United States today.'[15]

Luntz's description of the terms of settlement, nature of the patient benefit fund and way in which the 'Foreign Fracture Panel' operated is certainly instructive to the Australian reader. Of special interest are the difficulties arising from devising formulae considered appropriate to particular groups of countries, 'consistent with awards and settlements in each group'.[16] Finally, Luntz notes the difficulties associated with the length of time from the commencement of proceedings until the court approval for distribution of funds, stating that 'as an exercise in compensatory justice, it is hardly a model Australia would want to emulate'.[17] However, he states that the formulae (despite their flaws) should now allow for speedy compensation in appropriate instances. Of special relevance to Australian practitioners, he suggests:

> Perhaps better formulae, confined to the Australian context, could be devised, if they have not already been, for the settlement of tort actions arising out of such disasters as the mass exposure to asbestos at Wittenoom, Western Australia.[18]

In his conclusion, Luntz notes that protracted litigation, with its associated delays, demonstrates some of the inadequacies of tort as a substitute for a proper welfare state. It is a welcome comment on how the heart valve proceedings must be considered in the context of more comprehensive social welfare mechanisms.

C *Fleming*

John Fleming's essay, 'Preventive Damages',[19] considers ways in which a damages award can serve a preventative rather than merely reactive function. The difficult issues of damage being the 'gist of the action' and of associated limitations concerns are discussed, as are ways in which tort could — through an emphasis on

[14] Luntz, above n 5.

[15] Ibid 74.

[16] Ibid 94.

[17] Ibid 98.

[18] Ibid.

[19] John Fleming, 'Preventative Damages' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 56.

prevention — fulfil its classic admonitory role. The first type of case discussed — anticipatory repair of dangerous defects — links well with the consideration in earlier chapters of economic loss and the development of duty of care principles. His balanced analysis of 'latent injuries', in which he considers 'exposure' cases, and 'fear phobia' is suitably linked to Nicholas Mullany's essay, 'Fear for the Future: Liability for Infliction of Psychiatric Disorder',[20] also of relevance to where tort may be heading in the latter part of the 1990s.

D *Mullany*

Mullany has written an extraordinarily detailed, exhaustively documented account of damage to the psyche and ability to recover for such loss. In fact, the sheer number and nature of the hundreds of footnoted references to primary and secondary sources cited to support his argument is, in some ways, one of the paper's shortcomings, in that they have a tendency to distract the reader from his contentions.

Despite his lengthy discussion of recovery for psychiatric harm, one of the most novel and arguably significant kinds of modern case — where fear alone, divorced from mental illness, has been suffered — has been deliberately excluded from consideration even though, in many ways, pure 'fear of disease' cases are among the most interesting which might now come (and are coming) before the courts. A case like *Graham v Australian Red Cross Society*[21] could quite conceivably have been treated by Mullany as a 'fear of disease' case and not one in which mental illness was suffered. Assessed on the former basis, it could be seen as an instance in which the requirement of damage (the gist of the action) must be reassessed and revised. In any event, his focus on the difficulties associated with mental illness cases generated by fear (rather than 'shock') is illuminating.

Mullany's assessment of psychiatric illness and mental injury cases is passionately written and is certainly the most polemical essay in the collection. Unfortunately, the manner in which he argues his position would have benefited substantially from rigorous editing, in order to improve its tone and to make the nature of the argument more convincing and compelling. For example:

> Extirpation of deserving claims through meek surrender to the difficulties to which this area of the common law gives rise would be an anathema to the administration of justice and a pathetic confession of incompetence, inflexibility and lack of appreciation of modern science and the functions of contemporary society. That this has even been mooted in the light of current psychiatric and psychological knowledge and the burgeoning body of compelling, often tragic, cases is astonishing. It is this retrograde strategy which would be an 'embarrassment' to and the saddest indictment on the common law and its fundamental role as protector of individual well-being and freedom from wrongdoing.[22]

[20] Nicholas Mullany, 'Fear for the Future: Liability for Infliction of Psychiatric Disorder' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 101.

[21] Supreme Court of Tasmania, The Master, 31 January 1994; Supreme Court of Tasmania, Cox J, 3 June 1994.

[22] Mullany, above n 20, 106.

He also notes, '[c]learly, not every civil wrong merits a legal remedy. But there must be sound reason for the common law to decline to assist tort victims.'[23] I would like Mullany to have engaged, at least momentarily, with the suggestion that the common law has not in fact been exemplary in its attempt to fulfil this purported 'fundamental role'.

In his repeated criticisms of Stapleton,[24] it would have been fruitful to have widened the debate to a consideration of no-fault compensation and the problems with tort law recovery *per se* — matters largely ignored by the author in his desire to convince the reader of the need to compensate for wrongful damage to the psyche. The wider societal problems and issues associated with providing any type of compensation to a selected class of 'fortunate victims' are essentially ignored.

While many readers might agree that it is unjust to discriminate between mental and physical injury, and that tort victims deserve remedies, no attempt is made to grapple with the argument 'no-faultists' have raised for years: a legal regime which treats the equally injured and needy in vastly different ways, because of their differing ability to come within and access tort in the first place, as well as their ability (or inability) to prove fault, is itself unjust.

E *Judicial Contributions: Mahoney, French, Mason*

The judicial contributions are among the book's most refreshing essays. As is often the case, papers written by judges can be illuminating, as they give the reader the opportunity to gain insight into the minds of those who have contributed to the development of legal doctrine.

Dennis Mahoney, in 'Defamation Law — a Time to Rethink',[25] writes a startlingly frank indictment of the present state of defamation law, which requires 'fundamental reconsideration and redrafting':[26] '[t]he law of public defamation is seen publicly to be a failure: it does not do what it should do and what it does it does not do in an efficient, effective and timeous way.'[27] He comments that 'the law has not dealt directly with the two problems which, in this century, require urgent consideration: the extent to which effect is to be given to the (so-called) right to free speech; and the development of the mass media and the use of words as a means of exercising power.'[28] These problems must be faced squarely, by analysing and examining competing claims and the ways in which they can accommodate one another.[29]

He places his discussion in a political context, discussing free speech in the light of international instruments, such as the Universal Declaration on Human Rights

[23] Ibid 172.

[24] See, eg, ibid 106.

[25] Dennis Mahoney, 'Defamation Law: a Time to Rethink' in Nicholas Mullany (ed), *Torts in the Nineties* 261.

[26] Ibid 261.

[27] Ibid.

[28] Ibid 265.

[29] Ibid 266.

and International Covenant on Civil and Political Rights, and the power of the media, its extent and growth during the present century. According to Mahoney, these complicated issues need to be directly addressed, and this has not yet occurred. His disturbing and provocative conclusion serves as a wake-up call: '[i]t is necessary that the law of defamation be re-examined and that the fundamentals of it be recast.'[30]

'Statutory Modelling of Torts', by Robert French,[31] canvasses the relationship between the common law and statutory law in the context of tort, and whether 'common law rules should be restated in and or replaced by a statutory code of broadly expressed principles which can support the development of case law underpinned by coherent legislatively sanctioned policies'.[32] In the course of discussing weaknesses and limitations in judicial law-making, he notes the contributions of feminist scholarship. His concluding suggestions are rather novel: while he calls for a 'general review of the field of the law of torts',[33] he backs away from recommending its complete codification. Rather, he calls for the development of 'broad statutory principles to subsume the myriad of existing rules and to provide for a coherent understandable and principled development of the law sanctioned by the democratic process'[34] — no small plea.

Anthony Mason's essay[35] is an enlightening account of the problems associated with recovery for economic loss. Having discussed three leading cases, he notes:

> Since then, despite a plethora of decisions, the relevant principles are by no means clear. The endeavours of the courts in the past two decades or so to fashion viable principles regulating the entitlement to the recovery of damages in tort for economic loss have not been crowned with conspicuous success.[36]

His detailed summary of the approaches taken in several common law jurisdictions explains why. The section, 'The Way Forward', with its analysis of an incremental approach to finding a duty of care by comparison to one based on proximity (for example), is especially illuminating in that Mason rather forthrightly states, '[t]he debate about proximity as a concept or test is a theoretical bone of contention which in practice does not amount to much.'[37] He concludes that 'England apart, [there is] general agreement on the elements which are taken into account in determining whether there is a duty of care in a particular situation'.[38]

30 Ibid 273.

31 Robert French, 'Statutory Modelling of Torts' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 211.

32 Ibid 212.

33 Ibid 228.

34 Ibid.

35 Anthony Mason, 'The Recovery and Calculation of Economic Loss' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 1.

36 Ibid 2.

37 Ibid 24.

38 Ibid 33.

F *Stanton, Trindade, Todd, Fridman*

Mason's paper is followed by Keith Stanton's essay, 'Incremental Approaches to the Duty of Care',[39] in which Stanton assesses the ways in which courts reason duty questions. One of the more refreshing passages in Stanton's paper is his reference to the circumstances in which incrementalism arose in the United Kingdom (although he refutes the suggestion): '[t]he notion that the English courts were adopting a legal species of Thatcherism is very difficult to sustain. Incrementalism in its gradualist form represents a positivist doctrine which respects law for its own sake.'[40] However, most of the essay is devoted to a sophisticated, detailed analysis of doctrine and judicial attitudes and approaches to decision making. While of interest, there was room for some pruning of the text, in that certain matters seemed a little repetitive (especially following Mason's essay).

Francis Trindade's 'The Modern Tort of False Imprisonment'[41] and Stephen Todd's 'Protection of Privacy'[42] consider, respectively, (i) the current and future status of an already existing tort and (ii) whether the common law is capable of developing a new cause of action. The modernity of false imprisonment requirements are illustrated by Trindade's linkage of traditional tort arguments to those which may be derived from implied rights under the *Australian Constitution* and treaty obligations under article nine of the International Covenant on Civil and Political Rights. Todd discusses how the common law is capable of recognising new duties and liabilities, and how it can — rarely — recognise a wholly new tort. The focus of the chapter is on 'whether or how far existing principles or new developments in the law of torts can give a remedy'[43] in respect of behaviour which involves a violation of so-called 'privacy rights' (the nature of which are extensively discussed in Todd's essay). Of particular interest is his inclusion of relevant developments in New Zealand.

The final contribution, Gerald Fridman's 'Judicial Independence of a Different Kind',[44] canvasses developments within common law countries, such as Canada, Australia and New Zealand, in which tort principles different from those of the United Kingdom have evolved over the years, particularly in recent times. While this is an interesting assessment of how these developments came about and of the ways in which independent doctrinal positions have been reached with respect to a wide range of torts-related interests and conduct, errors and oversights detract from the impact of the argument. For example, *Gala v Preston*[45] is referred to as if it was a case of 'unilateral' rather than 'joint' illegality, when in fact the differences

[39] Keith Stanton, 'Incremental Approaches to the Duty of Care' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 34.

[40] Ibid 42.

[41] Francis Trinidade, 'The Modern Tort of False Imprisonment' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 229.

[42] Stephen Todd, 'Protection of Privacy' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 174.

[43] Ibid 178.

[44] Gerald Fridman, 'Judicial Independence of a Different Kind' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 305.

[45] (1991) 172 CLR 243.

between joint illegal enterprises and illegal acts of the plaintiff alone are doctrinally significant (at least to the courts).

III CONCLUSION

As is often the case with collections of essays, not every contribution will be of interest to the book's general readership, which presumably will be rather broad (including practitioners, academics and students). However, it is likely that at least several of the essays will appeal in some way to all readers, because of the wide-ranging subject matter covered and the nature of the pieces, from the theoretical to the practical.

Many of the papers provide insightful analyses of where tort has come in the last decade and where it may — or should — be heading. In doing so, they describe and demonstrate the important role tort has played in attempting to strike a balance between individual rights and community interests in the 1990s, and how it will continue to do so well into the future if, in some circumstances, appropriate reforms are adopted.

In recommending Mullany's *Torts in the Nineties*, the following should be kept in mind: several of the essays are so challenging and thought-provoking, they will likely appeal to readers who have, in the past, had only a passing (if any) interest in tort, thereby surpassing the editor's and the publisher's objectives.

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