

## REVIEW ARTICLE\*

*Outline of Torts*: DAVID GARDINER (Butterworths, 1992) pp i-iv, 1-384 softcover recommended retail price \$49.00 (ISBN 0 409 30308 9).

The 1980s have been an era of rapid change in tort law in Australia, in particular in the area of negligence. The common law changes have been accompanied by a correspondingly rapid increase in the level of legislative activity in the law of torts as in every other sphere of life. In New South Wales we have seen the rise and fall of Transcover, and although it has gone we retain the state regulation of damages in the *Motor Accidents Act* 1988 and the Personal Injury Damages Bill which is still likely to be enacted. Workers Compensation has been regulated throughout the twentieth century. In product liability there has also been recent legislative activity with the recent introduction of the *Trade Practices Amendment Act* 1992 (Cth). The regulatory activity of the state has expanded rapidly in the late twentieth century and one of the challenges of any torts course is to teach what has traditionally been a common law course within the context of ever-increasing legislative activity.

David Gardiner's book is an outline of torts intended for beginning torts students. It traverses the difficult tension between conciseness and superficiality with ease covering both legislative and common law activity; he manages to cover many topics concisely, and in reasonable depth while retaining clarity. This is a remarkable achievement.

The structure of the book reflects the importance of the particular torts according to their frequency of use in the courts. The classification chosen is a system which allows negligence a class of its own. This is important because negligence is a major focus of this work, and rightly so in view of the present scope of this tort. Despite this, the classification of torts that Gardiner uses is not an intuitively recognisable classification system - he divides the torts into

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seven groups - trespasses, occupation or possession of land (this combines private nuisance, cattle trespass and the rule in *Rylands v Fletcher*), negligence, public and statutory duties, misrepresentation (defamation, deceit, innocent misrepresentation, passing-off etc), intentional causation of economic interests, and domestic relations. In my view the only real benefit of this classification scheme is that it gives negligence a niche of its own.

The opening chapter covers the history and nature of torts. Here Gardiner manages to briefly cover some of the history of torts and discuss various aspects of underlying policies (in torts in which he includes distinctions between various doctrine areas of contract/tort). He also discusses various vital concepts such as the acts/omissions distinction, pure economic loss, the voluntary/intentional distinction and its various shades of meaning, and the notion of fault, among others. These are essential concepts for the beginning tort lawyer and it is a good idea to deal with them first.

A further part of this very good introductory chapter is the discussion of some of the various theories of the function of tort law. This is well-handled, although largely confined to instrumentalist theories (ie those concerned with end-products of rules rather than interpreting the process of arriving at the rules). Economic-type theories are dealt with more than others. Notable omissions are feminist and Critical Legal Scholars' views of tort theory (although there is a discussion of the movement towards the Married Women's Property Acts).

The book goes on to cover the major tortious areas - the trespass classification is covered in Chapters 2 to 8, covering the distinction between trespass and case, and clearly outlining the different approaches of the United Kingdom and Australian courts to fault in non-highway trespass to the person cases. Trespasses to person, land and goods are covered as well as the particular remedies for trespass.

Chapter 8, "Wilful Injuries - Actions on the Case" makes a historical and logical bridge from trespass to negligence. Negligence is covered in Chapters 9 to 14. It seems illogical to cover "select duty categories" after Duty, Breach and Causation and Remoteness. Why not cover this at the end of the Duty chapter, for the sake of the flow of the concepts? Limitation of Actions and Judicial Remedies come next, then Death which allows a treatment of statutory regulation and common law together.

The rest of the book is divided between Employers' Duties and Workers' Compensation, breach of statutory duty, service and domestic relations. Then come vicarious liability, concurrent tortfeasors and misrepresentation, defamation, interference to business and nuisance.

The coverage of this book is very broad. The language is precise, concise and clear. A further attempt at clarity has been made with the use of diagrams throughout the book to illustrate the dynamics of various tortious situations. A glossary of terms gives clear explanations of terms relevant to torts such as "ferae naturae" and "actionable per se". This is very useful for students in

particular. A useful bibliography is included and where more information would be of interest references have been included in the text. The layout of the book is particularly clear.

The usefulness of Professor Gardiner's book lies in its attempt (mostly successful) to give an outline of tort law which is thoughtful, giving some space to theory, and which is clear without being superficial. The interweaving of statutory regulation and the coverage of all Australian jurisdictions, with comparisons to the United Kingdom and the United States where they are relevant, makes the analysis particularly comprehensive. This book's value as an introduction to tort law is clear; but readers will find that further attention to it will pay further dividends because Gardiner has not shied away from knotty problems like the status of 'proximity' in negligence, or the basis of the intentional torts. It will be particularly useful to readers returning to tort law after an absence. This book is definitely much more than an outline.