The law of torts
John C Fleming

Dr Danuta Mendelson*

The eighth edition of John C Fleming's *The Law of Torts*[1] has been a timely and important update of this seminal treatise on the law of torts. The book provides the most comprehensive, penetrating and intellectually challenging exposition of the law pertaining to liability for tortious conduct in Australia.

The book is divided into two distinctive parts. The first part adopts the classic outline of general works on torts. Following a penetrating theoretical discussion of the nature of the law torts, Professor Fleming presents a sequential analysis of the three major conduct-oriented bases of liability: *intentional wrongs, negligence and torts of strict liability.* The second part of the book, under the heading *miscellaneous torts*, examines areas of liability according to the interest which has been invaded.

Chapters covered under the part dealing with *Intentional Wrongs*, that is wrongs involving intentional interference with plaintiff's interests, include an analysis of the tort of trespass and intentional interference with person (battery and assault, false imprisonment, emotional distress, and a section devoted to victims of crime); intentional invasion of land (trespass and ejectment); and intentional interference with chattels (trespass and conversion).

The section of the book designated *Negligence* inverts the orthodox paradigm of the cause of action for negligence (duty of care, standard of care, causation, remoteness of damage, defences and special duty situations) by discussing standard of care before dealing with duty of care. This approach reflects more closely the importance of the concept of standard of care in the context of the law of negligence.

Jurisprudentially, placing standard of care at the top of elements of the cause of action for negligence emphasises the regulatory aspect of tortious negligence. For, traditionally the rationale of this cause of action has been to identify the acceptable standard of conduct in a given

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* Lecturer in School of Law, Deakin University.

1 Fleming, J.C., 1992, *The Law of Torts*, 8th edn, The Law Book Co. Sydney.

situation by reference to the touchstone of reasonableness. It is the failure to conform to the required standard of care which passes under the name of 'negligence'.[2] In practical terms, the great bulk of contested litigation in negligence concerns the issue of standard of care. The main function of duty of care is to delimit the scope of legal protection against inadvertent, negligent harm. This function of duty of care, as Professor Fleming points out, is similar to that of the remoteness of damage. The concept of duty of care whereby the law protects certain interests against unreasonable risks by requiring the defendant to act with reasonable care as measured by the standard of care of a notional reasonable person, is important. However, its importance is theoretical rather than real in so far as placing the responsibility for the injury on the wrongdoer tends to be more a matter of public policy than of jurisprudential considerations.

The segment dealing with *Torts of Strict Liability* includes a discussion of the principle of *Rylands v. Fletcher,* liability for damage by fire, torts involving animals, vicarious liability, and private and social insurance. The great appeal of Professor Fleming's work is the extraordinary depth and the breadth of his knowledge of the law. An example, taken at random, involves tortious aspects of private and social insurance which are discussed within the context of *Torts of Strict Liability.* Differences between first party and third party compulsory and non-compulsory insurance are explained with reference to their impact on tort liability. As usual, in examining the Australian law, Professor Fleming refers to not only to English cases but also to American, Canadian, New Zealand and European cases and statutes. The reader is thus presented with a broad perspective on the legal, philosophical and economic issues of social insurance (including no-fault systems of compensation). It is the wide intellectual panorama which makes this book unique in its field.

A penetrating analysis of legal, moral and social effects of the changing nature of tort liability informs the discussion of each cause of action. In fact, one of the hallmarks of the text is the interplay between abstract legal doctrines and what the French call *la condition humaine.* For instance, in negligence litigation the plaintiff carries the burden of proof on balance of probability with respect to all facts in issue.

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2 Id at 103.

Professor Fleming notes that a judgment based on balance of probability:

> requires more than a mere mechanical comparison of probabilities independently of any belief in its reality; the tribunal must feel an actual persuasion based on a preponderance of probability. Thus a merely mathematical or statistical probability of barely 51 per cent is not sufficient because it carries no conviction that the case falls within the 51 rather than 49.[3]

The second part of the book comprises ten chapters including sections on nuisance; dangerous premises; products liability; employers' duties and liability; defamation; abuse of legal procedure (malicious prosecution, abuse of process and maintenance of champerty); misrepresentation; domestic relations (wilful interference, negligent interference, fatal accidents and torts within family); and economic relations (loss of services, interference with contractual relations, unlawful interference with trade or business, conspiracy, injurious falsehood and passing-off). A separate chapter is devoted to the evolving legal right to privacy.

The division of liability based upon categories of interests which have been tortiously invaded involves placing liability for negligent advice under the broad rubric of misrepresentation, and of the occupiers' liability as well as liability for negligent omissions under a general category of dangerous premises. This method of classification accords with the fundamental precept of Professor Fleming's thesis that, strictly speaking, negligence is not a specific nominate tort but a basis of legal liability which protects certain interests against unintentional harmful interference.[4] Professor Fleming considers that legal analysis of liability in negligence involves a scrutiny of negligent interference - that is interference which falls within the scope of unreasonable risk of harm created by the defendant - which must be examined within the context of the particular category of interest which has been thereby invaded. This concept of negligence, which is analogous to classification of interests relating to the law of delict, provides the organising jurisprudential principle for the whole book.

Professor Fleming's approach towards negligence as merely a standard of tortious liability differs from the orthodox notions of tortious

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3 Id at 314-315.

4 Fleming, J.C. id., at 102-103.

negligence. At least since the publication of the first edition of Thomas Beven's *Principles of the Law of Negligence,*[5] and even more so since Lord Atkin's judgment in *Donoghue v. Stevenson,*[6] there has been a tendency to regard negligence as a separate tort governed by a general concept of duty of care based upon a reasonable foreseeability of risk to a person or persons affected by the defendant's acts or omissions.[7]

As the scope of liability for negligence has expanded, the conceptual issue of regarding negligence as self-contained tort rather than as basis of liability which may be applied within the context of any particular category of interest has to be determined. There exists a tension between the principle of an abstract duty based upon a touchstone of reasonable foreseeability and the principle that wrongful conduct will attract legal liability only where the category of right or interest violated is within the defendant's duty of care. This problem is particularly acute in cases of omissions, of negligently occasioned 'purely' emotional harm traditionally referred to as 'nervous shock', of 'pure' economic loss, negligent misstatement, and negligent conduct leading to damage in the course of joint illegal activity. Efforts to provide economically and administratively sustainable criteria for establishing the existence of duty of care which are also just and humane has bedevilled the law of torts for the last 150 years or so.

In 1984, in the case of *Jaensch v. Coffey,*[8] Deane J of the Australian High Court introduced the concept of proximity as a control (an additional qualification) upon the touchstone of reasonable foreseeability. The function of proximity as a control mechanism is to limit the scope of the duty of care, either by negating the duty of care altogether on the grounds of public policy, or by limiting the class of people to whom the duty of care applies. The nature of the requisite element of proximity as a separate concept from reasonable foreseeability has been defined by Deane J in *Gala v. Preston*[9] in the following way:

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5 Beven, T. 1889, *Principles of the Law of Negligence,* Stevens and Haynes, London.

6 [1932] AC 562.

7 Id at 580; 594-5.

8 (1984) 54 ALR 417 at 445.

9 (1991) 172 CLR 243.

> The requirement of proximity constitutes the general determinant of the categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid reasonably foreseeable and real risk of injury. In determining whether the requirement is satisfied in a particular category of case in a developing area of law of negligence, the relevant factors will include policy considerations.

Over the years, the High Court has identified several legal relationships which may be sufficient for establishing the requirement of proximity; these include circumstantial, causal, relational proximity as well as proximity based upon policy considerations.[10] It is the court which decides whether and upon what basis the requirement of proximity is satisfied in any given case. Proximity-based concept of tortious negligence which is ultimately determined by policy considerations lacks jurisprudential probity and gives the courts an unacceptable ambit of discretion. To quote Professor Fleming: *'one may well ask what purpose any generalisation about "duty" can hope to serve as a guide to reaching a reasoned judgment in the great variety of individual cases. It were better to abandon the effort altogether'.* [emphasis provided by Fleming][11]

Indeed, two possibilities come to mind. One is that of Professor Fleming's interest-oriented concept of negligence as standard of liability. This approach seems to have been implicitly espoused by the majority of the High Court Bench in the case of *Nagle v. Rottnest Island Authority*[12] which re-examined criteria for reasonable foreseeability in standard of care applicable to occupier's liability.

An alternative approach is to treat the concept of liability for unintentional conduct in negligence as analogous to the concept of liability for intentional conduct in trespass. Like trespass with its species of intentional torts of battery, assault, false imprisonment, trespass to land, etc., negligence could develop its own species of unintentional wrongs including the tort of dangerous premises; the tort of nervous shock; the tort of professional negligence, the tort of products' liability; the tort of 'pure' economic loss, and the tort of negligent misstatement. These separate torts based on categories of interests violated by negligent con-

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10 The House of Lords in *Alcock and Others v. Chief Constable of South Yorkshire* [1991] 3 WLR 1057 adopted Justice Deane's concept of proximity.

11 Fleming, fn. 1 at 139.

12 [1993] 67 ALJR 426.

duct could develop their own individual requirements for legal liability tailored to their respective jurisprudential, political and economic contexts.

The book - all 720 pages of it - reads well. Professor Fleming is one of the great legal stylists; he has an ability to present complex concepts and principles in an elegant, pithy, and colourful, language. Colourful language is particularly manifest when polemical aspects of law are discussed. Thus, with the burden of proof in trespass, the judgment of Diplock J in *Fowler v. Lanning*[13] argued that the onus of establishing negligence in all personal injury actions, including trespass, should lay with the plaintiff is cited with approval *'as a guide to modern burden of proof* which has *'finally laid to rest the ghost of the long buried forms of action'*.[14] While acknowledging that Lord Diplock's approach *'has not (yet) been uniformly accepted as definite in Australia'*, Professor Fleming attributes the hesitation to follow the English lead to *'a misplaced cult of historicism'*.[15]

With regard to this issue, Professor Fleming's analysis of the English position was correct until recently. However since 1992 the question of who has the onus of showing fault (either negligence or absence of consent) in trespass has been re-examined in England in relation to consent to medical procedures. *In re W*[16] Lord Donaldson of Lymington MR explained the legal purpose of consent to medical treatment in the following way: *'The legal purpose [of consent] is ... to provide those concerned in the treatment with a defence to a criminal charge of assault or battery or a civil claim for damages for trespass to the person.'*[17] Lord Donaldson's statement has been echoed by Lord Mustill in *Airedale NHS Trust v. Bland*[18] who said that *'Any invasion of the body of one person by another is potentially both a crime and a tort. At the bottom end of the scale consent is a defence both to the charge of common assault and to a claim in tort'*.[19]

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13 [1959] 1 QB 426.

14 Fleming, fn. 1 at 21.

15 Fleming, fn. 1 at 22.

16 *In re W (a Minor) Medical Treatment.: Court's Jurisdiction* [1992] 3 WLR 758.

17 Id at 765.

18 [1993] 2 WLR 316.

19 Id at 292.

In Australia, although the High Court has not conclusively established whether it is the plaintiff or the defendant who has to show fault in trespass, the weight of authority supports the notion that consent should be regarded as a defence to trespass to be proven by the defendant. Justice Fisher of the New South Wales Supreme Court in *Hart v. Heron,*[20] the majority of the New South Wales Court of Appeal in *Platt v. Nutt*[21] (though with a powerful dissent by Kirby P), and Miles CJ in the case of *Sibly v. Milutinovic,*[22] and Justice McHugh in his dissenting judgment in *Secretary, Department of Health & Community Services (NT) v. JWB and* SMB[23] all have accepted the view in order to establish the absence of wrongful intent, it is the defendant who must prove, on the balance of probabilities, that the plaintiff consented to the acts in issue.

Rather than a *'misplaced cult of historicism'*, the reason for resting the burden of proof upon the defendant seems to lay in the re-evaluation of the concept of fault or wrong for the purposes of trespass to person. Traditionally, the wrong which gave raise to the cause of action in trespass lay in the breach of the royal peace by way of intentional or reckless interference with another person's physical integrity and his or her sense of honour and dignity. The modern concept of wrong, particularly in relation to medical treatment, has been extended to incorporate unjustified nonconsensual invasion of the plaintiff's right to autonomy in the sense of personal self-determination. It is indeed a great pity that Professor Fleming, in his otherwise comprehensive treatise has omitted to examine tortious implications of medical treatment.

The absence of a detailed analysis of medical liability aside, by providing the reader with intellectual tools for critical evaluation of legal doctrines and their application, Professor Fleming's book should become an indispensable tool of any lawyer practicing in the field of torts, of any academic involved in this area of the law, and of any student who wants to gain a deeper understanding of tortious concepts.

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20 [1980] Aust. Torts Reports 80-201.

21 (1988) 12 NSWLR 213.

22 [1990] Aust. Torts Reports 81-013.

23 (1992) 66 ALJR 300 at 337.