

Introduction to Torts by David Baker (Law Book Company, Sydney, 1985) pp.1-300 (includes index). Price \$37.50 (hardback), \$21.00 (soft cover). ISBN 0 455 20557 4; 0 455 20558 2 (soft cover).

You will be disappointed if you buy David Baker's *Introduction to Torts* in the belief that it is merely a simplified summary: a sort of 'Law of Torts in a Nutshell' for use in the three weeks before exams. True, it is compressed (at only 300 pages); nevertheless, it is a thoughtful and rather scholarly piece of work by an author who has no compunction about taking sides in many of the more controversial issues. In short, you have to read what Mr Baker says slowly, carefully and often several times to get the full point of it.

In approach, the book is — if one may say so without disrespect — unashamedly conservative: the author eschews, for instance, any attempt to make it primarily a work about accident compensation, or any other particular aspect of the torts process. Black-letter law predominates: so, noticeably, do English authorities. It is the sort of book, in other words, which may surprise and perhaps disconcert those brought up on *Luntz, Hambly & Hayes*.

Chapter 1, *Introduction*, having introduced the subject, then launches into matters of procedure and proof; in particular, *res ipsa loquitur*. Like most introductions, this introductory section is difficult, and best left until last. Chapter 2 deals with trespass and case, lamenting (quite rightly) the developments in *Williams v. Milotin* and *McHale v. Watson* which have preserved this somewhat archaic distinction and made a disproportionately large coverage of it essential in any Australian text.

Chapter 3 covers interference with the person, Chapter 4 the property torts, Chapter 5 trespass to land, and Chapter 6 defences to intentional torts. Chapters 7-13 deal with negligence; 14-19 with liability without fault, including vicarious liability; 20 with 'injuries to relational interests' (*i.e.* largely wrongful death); 21 with remedies, and 22 with capacity. Some subjects are left out entirely: malicious prosecution for instance (presumably because it is unimportant), and, more significantly, defamation and the economic torts. The omission of the latter two, which is at first sight surprising, the author justifies on two grounds: space, and the fact that most basic torts courses do not include them. The argument based on space may be justified: as for the other, I have my doubts. Both defamation and economic torts raise very important issues in the theory of tortious liability: their omission leaves a slightly lop-sided effect. While on space, incidentally, surely two subjects *could* have been eliminated without much loss: first, *Bridges v. Hawkesworth* and the rights of finders against owners and third parties (pp.40 ff), and, secondly, the action in ejectment (pp.60 ff). True, historically, both are tort actions. Nevertheless neither is very relevant to tort: both raise difficulties, and both, in my experience, can be (and almost universally are) taught elsewhere.

In such a compressed and concentrated book as this, it is difficult to pick out particular bits for special mention. Nevertheless, I found interesting, lucid and useful the summaries of the law on consent to medical treatment (pp.65 ff): the coverage in Chapter 8 of what amounts to a breach of the duty of care: and the treatment of the rules on causation in Australia as developed on the basis of *Beavis v. Apthorpe* (pp.137 ff). More controversial, but nevertheless in my view thoroughly sound, are other details. Mr Baker is at pains, for instance to dispel the confusion that has arisen through inadequate distinction between agency and vicarious liability (p.206) (though in this connection he might have mentioned *Kooragang* (1981) 36 A.L.R. 142). Again, his careful dissection of the question whether nuisance is a strict liability tort (p.255) is worth studying. Moreover, Mr Baker is one of the few people who have realized the incongruity of the statutory rule allowing survival of practically all causes of action in favour of a deceased person's estate, at least in its present form (see *e.g.* Administration and Probate Act 1958 (Vic.), s. 29).

I disagree with the author in gratifyingly few cases. As a matter of legal history, it is surely wrong to suggest (p.17) that a person bringing trespass when he should have brought case (or *vice versa*) not only lost but could not start again. On the contrary, he was generally non-suited, which left him free to start again, provided he brought the right form of action. For the purposes of the property torts, it is, I submit, misleading to say (p.34) that a servant cannot possess his master's goods. As against the master he cannot, but as against third parties he can (*cf. R v. Harding* (1929) 21 Cr. App. Rep. 166). Again, it is surely perverse to suggest (p.135) that the 'egg-shell skull' rule does not apply to property damage: why ever not? And surely one can be slightly less tentative on the question of whether damages for personal injury can be claimed in private nuisance (*cf. p.223*). True, no authority is directly in point, but both *Fleming* (6th ed., p.380) and *Trindade & Cane* (p.528) assume they can: as, incidentally, did Veale J. in *Halsey's case* ([1961] 1 W.L.R. 683, 696).

On the question whether the 'master's tort' theory à la *Darling Island v. Long* controls the Australian law on vicarious liability, I fear Mr Baker's justified enthusiasm may have outrun his prudence. True, the 'master's tort' theory is a nonsense; true, it has been rightly excoriated from English law. Nevertheless, since in *Darling Island v. Long*, its last direct pronouncement on the matter, the High Court did say it was part of Australian law, it is surely illegitimate (p.209) simply and cavalierly to dismiss the case as having been wrongly decided, and as not representing the law. With respect, only the High Court can do that.

But these criticisms are minor. *Baker* is a book sometimes idiosyncratic, sometimes controversial, but always scholarly, always informative and always readable. For any student who wishes a text to complement, prepare for, even in extreme cases to replace, a casebook, I have no hesitation in recommending this one as representing \$21.00 well spent.

ANDREW TETTENBORN*

* Fellow of Pembroke College, Cambridge.