BOOK REVIEWS

Canadian Negligence Law, by ALLEN M. LINDEN, (Butterworths, Toronto, 1972), pp. xv and 575.

It is a pleasure to welcome, albeit belatedly, a book on the law of negligence in Canada by Professor Allen Linden of the Osgoode Hall Law School. Professor Linden's writings on the Canadian law of torts are numerous and well-known and in one way or another, while reading this volume, we are reminded of his many earlier contributions. Nevertheless, it is interesting to find in a single very readable book his many thoughts on the subject and tort lawyers everywhere, and Canadian tort lawyers in particular, will be indebted to Professor Linden for undertaking the task of producing *Canadian Negligence Law*.

Australian tort scholars, however, are bound to have mixed reactions, at the present time, about a book devoted solely to the law of negligence. The proposals of the National Committee of Inquiry into Compensation and Rehabilitation in Australia, 1974, (popularly known as the Australian Woodhouse Committee) are to do away with the law of negligence, at least in relation to personal injuries, and there is little in Professor Linden's book to persuade Australian tort scholars that the common law action for negligence should be retained. However, the battle to implement the Woodhouse proposals, substantially, is still to be won and the Australian elections on December 13, 1975 will in a peculiar way determine whether Professor Linden's book will be substantially redundant for Australian tort lawyers or only partially so.

Professor Linden utilizes a six-part division of negligence to examine the tort in all its aspects: A cause of action for negligence arises if the following elements are present: (1) the defendant's conduct must be negligent, that is, in breach of the standard of care set by the law; (2) the claimant must suffer some damage; (3) the damage suffered must be caused by the negligent conduct of the defendant; (4) there must be a duty recognized by the law to avoid this damage; (5) the conduct of the defendant must be a proximate cause of the loss or, stated in another way, the damage should not be too remote a result of the defendant's conduct; (6) the conduct of the plaintiff should not be such as to bar his recovery, that is, he must not be guilty of contributory negligence and he must not voluntarily assume the risk. (p. 5). Whether this six-part division is any more illuminating than the traditional English (and Australian) three-part division, the American (Prosser) four-part division or Professor John Fleming's five-part division each reader will have to judge for himself. What can be said, however, is that the sixth part of Professor Linden's six-part division is more clearly seen as containing the defences to, rather than the elements of, a cause of action in negligence. And if this is so, why not go the whole hog and add a seventh part "a cause of action for negligence arises . . . unless the action is time-barred" etc.

This reviewer found the chapter on Custom extremely interesting and the chapter on Violation of Penal Statute the most boring. And the chapter on Products Liability the most familiar as nearly thirty pages of this chapter (pp. 399-432) are virtually identical to Professor Linden's essay in Studies in *Canadian Tort Law*[1] (pp. 220-249).

Quite naturally, Professor Linden concentrates very heavily on the Canadian decisions and Australian decisions are given what might be politely described as "extremely low profile". Even when Australian decisions *are* dealt with, this reviewer has been left with the impression that they have not been given very careful attention.

[1] (Butterworths, Toronto, 1968.)

For example, in dealing with *Chapman* v. *Hearse*[2] (at p. 291) Professor Linden refers to "Dr Chapman" who was killed. In fact, Chapman was the initial tortfeasor and it was Dr Cherry who was killed in the accident. Again, on p. 290 Professor Linden writes:

> The Australians also recognized the duty to the deliverer on the ground that "a reasonable person would have foreseen the possibility of rescue".

His authority for this statement is the judgment of Evatt J. in *Chester* v. *Waverley Corporation*.[3] And Professor Linden relies on the judgment of Evatt J., without indicating to his readers that Evatt J. was the *dissenting* judge in that case—albeit a dissenting judge whose views were eventually accepted by the High Court of Australia.

But it will be Professor Linden's chapter on the Future of Negligence Law to which Australian lawyers will be the least receptive both in relation to his ideas and as to the way in which they have been expressed. It will be difficult for them to accept the view that "tort trials enrich our society with ritual and symbolism" (p. 488) or that "tort law is an ombudsman" (p. 493). And they will be, frankly, horrified to be told that "as agnosticism supplants religion in the modern world, such rituals as court proceedings are gaining in importance" (p. 488) and that "eventually tort law may become very much like a Gothic cathedral—a rather elaborate structure, but one that continues both to function and to uplift the human spirit" (p. 504). This sort of legal writing is just not seen in Australia and it would be ungracious to enquire, in a review, whether this is because Australian lawyers are less tolerant or less civilized than their Canadian counterparts.

As this review is being written for an Australian university law review, one is expected to evaluate the usefulness of the book to Australian readers, particularly Australian university students. Regretfully, this reviewer has come to the conclusion that the material on Australian tort law is so scanty and so casually dealt with in this book that it cannot be wholeheartedly recommended to the Australian law student. The Australian torts teacher will, however, profit considerably from the stimulation which is obtained from a close reading of Professor Linden's book and from the controversial stance which Professor Linden takes on so many issues. This reviewer will jealously guard his copy of *Canadian Negligence Law* which, at $48.50, must surely be the most expensive torts textbook in the entire British Commonwealth.

F. A. TRINDADE

Explaining Crime, by GWYNN NETTLER, (McGraw-Hill, New York, 1974), pp. viii and 301. A$4.50 (paper-bound).

There is nothing particularly new or desirable in this book. It is a straight forward, readable but generally simplistic discussion of the concepts of crime, criminal statistics and theories of criminality. In writing upon legal matters the author seems to be largely out of his depth and, in relation to theoretical criminology, he has such a pronounced bias towards sociological theories of crime that the reader might be given to wonder whether Freud had ever made any contributions to the analysis of human behaviour. To his credit, however, the author does cope with his sociological theories quite competently particularly by way of an additional section of criticism on each theoretical position discussed. However, the lay reader, for whom apparently the book was written, can hardly find enlightenment in the "roster of criminogenic conditions" which Nettler offers in his final chapter. Despite a blanket *caeteris paribus* warning, he lists, as causes of crime, such generalities as: "the movement of people", "crowding", "social mobility", "relative deprivation", "child

[2] (1961) 106 C.L.R. 112.
[3] (1939) 62 C.L.R. 1.

neglect and misuse of youth", "mass media", "the comforting chemicals", "anarchy and authority", and "laws and their enforcement". Since each of the often contradictory explanations of crime described in the text contains some grain of truth, readers seeking unitary and simple explanations of crime will be gravely disappointed. So too will readers looking for something above first year University level discussion.

RICHARD G. FOX

The New Liberty, by RALF DAHRENDORF, (Routledge & Kegan Paul, London, 1975) pp. x and 102. £1.50.

Professor Dahrendorf's Reith Lectures read well; he has something to say, and he says it eloquently. His metaphors and autobiographical allusions help to sustain the sense that one is *listening* to a lively intelligence at work, rather than merely reading the expanded script of a series of lectures delivered in the past. But the merits of retaining the lecture style and content carry with them certain defects. Too many problems are touched on too lightly, and before one can come to grips with some of Professor Dahrendorf's terms and arguments, he is off to something new, which one vaguely realizes is related to what has gone on before, but one is unable to place all the connecting links together. Going back to the printed word will not always help, because, as Professor Dahrendorf says, "I must have written a thousand pages in order to produce the one hundred of the final text" (p. viii), and I suspect that some of his arguments and connecting links have been left behind in the 900 unpublished pages. For this reason, although Professor Dahrendorf's lectures are interesting as a statement of his views, many of which I find agreeable, he is unlikely to win over those who do not already share his deep concern for individual liberty in a world beset with grave economic and social problems.

I find his central concept, "the new liberty", somewhat puzzling. It is, he says, "a liberal response to a world which is in a process of radical transformation" (p. 4). But what exactly is new? Is it simply the unusual economic and social conditions that, over the last few years, have developed in advanced, industrial countries? However, new situations do not necessarily lead to an abandonment or radical modification of old principles. Yet Professor Dahrendorf is quite sure that "an older liberal approach is plainly about to lose its relevance" (p. 6). He refers to the importance of improvement rather than expansion, and argues a case for the breakdown in the rigidities of the division of labour, and for the availability of educational opportunities throughout a person's life. He also attacks some fashionable views on, for example, the alleged absence of a class structure in Communist countries, or on the indiscriminate pursuit of equality and of participation. But what remains unclear is whether, or how, the changed circumstances and his various proposals lead to a new *concept* of liberty, or to the formulation of new *principles* of liberty, different to those which liberals in the past have put forward. Perhaps what is new is merely the *application* of old liberal principles to new situations. But if this is so, then Professor Dahrendorf misleads in suggesting that the older liberal approach and attitudes have to be changed. No one who formulates a principle can anticipate all the circumstances that will arise in future. But from this it does not follow that the principle is irrelevant in the new and unexpected circumstances.

Professor Dahrendorf does briefly indicate his disagreement with Milton Friedman on the threats to individual freedom, and Friedman is considered by him as an example of an old liberal. However, not all those who call themselves liberals will accept Friedman as such a representative thinker. But there is one thinker who will almost universally be accepted as a liberal political theorist, John Stuart Mill. It is therefore interesting to note that at the end of his first lecture, Professor Dahrendorf poses the problem of liberty by quoting from Mill's essay *On Liberty*. But he does

not state Mill's solution to the problem of "the nature and limits of the power which can be legitimately exercised by society over the individual", and how his own solution differs from Mill's. Instead, he comments on various issues, which are interesting enough in themselves, but which do not bear in an obvious manner on Mill's question. Does he believe that Mill's solution is irrelevant in the context of today's problems?

However, Professor Dahrendorf has not discarded the 900 unpublished pages, and he tells us that one day he will organize these materials into "a second, rather bigger book" on the "new liberty". No doubt we shall then be clearer about what exactly the "new liberty" is. Meanwhile, we shall have to be content with a mixture of acute commentary and some homespun truths on various topical issues, usually delivered with panache. Professor Dahrendorf's views are likely to gladden the hearts of democrats, and infuriate those of the extreme right or of the left, who have never cared much for liberty, old or new, and who are not about to do so now.

C. L. TEN

Australian Industrial Law: The Constitutional Basis, by J. J. MACKEN, (Law Book Co., Sydney, 1974), pp. xi and 237. $12.05.

This well documented work of almost two hundred and fifty pages is one of the most interesting books on Australian labour relations law which I have had the pleasure of reading in the last two years. It is of course primarily designed for, and ought to be read by, under-graduate as well as graduate law students as it provides an excellent introduction to Australian industrial law. The book is divided into four parts which in turn explore, first the federal constitutional powers in labour relations, secondly the contents and operation of the Commonwealth Conciliation and Arbitration Act, thirdly the complexities of federal state relations and finally an examination of the way ahead and the possibilities of reform.

I particularly enjoyed his historical account of the strikes of the 1890s which lead to the subsequent inclusion of the Conciliation and Arbitration Power in the Australian Constitution. The tale is told in a delightful style which never failed to hold my attention. Similarly, the account of the evolution of the Conciliation and Arbitration Act is well written; and in the space of a few pages the main amendments to this statute over the last seventy years are clearly and concisely explained.

To a reader familiar with the Conciliation and Arbitration Act, it was tedious to find so many of its lengthy provisions quoted in the text of Part Two. To set out all the provisions relating to the Flight Crew Officers Tribunal in a work of this size seems a little heavy handed. Of course for the young law student unfamiliar with the Act, it is often helpful to be able to examine some of its provisions; perhaps they could have simply been placed in an appendix.

In Part Three, Mr Macken examines the spider-like web of federal state industrial relations; and in particular the problems posed by *Moore* v. *Doyle*.[1] However, as he admits in his preface this work pre-dates the Sweeney Inquiry[2] and of course the subsequent amendments to the Act[3] which in general implement the recommendations of the inquiry.

When turning his mind to the future, the author, correctly in my view, recognizes that in the foreseeable future responsibility for Australian labour relations will be shared between federal and state governments. In a carefully constructed argument at the conclusion of his book, he asserts that Australian industrial relations can be improved by federal and state co-operation through a series of legislative reforms,

1 (1969) 15 F.L.R. 59.
2 *Report of the Committee of Inquiry on Co-ordinated Industrial Organizations*, (Australian Government Publishing Service 1974).
3 *The Conciliation and Arbitration (Organizations) Act 1974*, (No. 89 of 1974).

whereby the state industrial tribunals would fill in the gaps in federal constitutional power and for example, safeguard the interests of non-industrial and non-employee workers. If all seven Australian jurisdictions could agree on such moderate and sensible reforms our system would indeed function more smoothly; but even then, with the rapidity of change in labour relations, new constitutional problems will almost certainly arise to test the skills of future generations of lawyers.

Mr Macken's book is an excellent addition to the steadily growing body of academic literature on labour relations law and ought to find its way on to the shelves of every student and practitioner in the field.

RONALD C. MCCALLUM

1975 Australian Master Tax Guide (C.C.H. Australia Ltd.) *Tax and You '75* (C.C.H. Australia Ltd.).

In the rapidly expanding and changing area of income tax law it is essential for taxpayers and their advisers to be informed of developments as soon as practicable after they take place. C.C.H. Australia Ltd. is providing a valuable service through its several publications in making such information promptly available.

The Australian Master Tax Guide published annually is, in the words of the publisher, "designed primarily to help taxpayers in preparing their income tax returns" (p. 2). Given the complexity of the statutory provisions and cases forming the basis of our tax law it is perhaps expecting a little too much of the average layman to hope, that with the aid of the Guide, he will be able to fully comprehend the finer points of our tax system thus enabling him to accurately and most advantageously complete his return. The Guide does, however, provide him with a precise and comprehensive summary of current income tax law which will enable him to obtain a deeper knowledge of the basic principles of the system.

A simpler summary of the tax system more suitable for the layman who does not wish to struggle with intricacies is "Tax and You" another C.C.H. publication. This booklet omits references to sections and cases and avoids using technical language wherever possible. It also includes samples of completed tax forms to aid the reader. While undoubtedly of benefit to the layman it is likely to be of little assistance to the initiated, the professional tax advisers. For them, however, the Master Tax Guide provides a convenient summary of the current law. Tables of the tax rates for the different tax entities and deduction allowances are set out, together with a useful check list to ensure nothing of significance has been overlooked in preparing returns. Highlights of recent changes in the law and important dates are listed on the first few pages. Numerous examples are included illustrating how certain calculations should be made e.g. § 12 explains with examples the property income surcharge which was applicable only in the 1974/75 financial year, § 121 deals with retention allowances for companies and § 1125-27 with the methods of depreciation. Being a summary, reference is made to only a limited number of cases, with emphasis on the most recent decisions of Courts and Boards of Review. For an exhaustive examination of any area reference must be made to more comprehensive works such as C.C.H.'s Australian Federal Tax Reporter which is conveniently referred to in footnotes throughout the Guide.

Apart from the interested layman and the professional adviser the Guide can also serve as a useful companion for the tax student. With its emphasis on practical questions and being well up-to-date it is a helpful supplement to the basic text books in the area. Provided therefore that the reader recognizes the limitations of both himself and the Guide it can prove a valuable acquisition.

KEVIN POSE

Radical Nonintervention: Rethinking the Delinquency Problem, by EDWIN M. SCHUR, (Prentice-Hall, Inc., Englewood Cliffs, N.J., 1973), pp. x and 180. U.S.$2.45 (paper-bound).

It is unusual to find a sociologist advocating legalism. But that is precisely what the author of this book on juvenile delinquency does. One of his major conclusions is that individualized justice based upon the aim of "rehabilitation" should give way to a "*return to the rule of law*" (Schur's emphasis) complete with such traditional safeguards as specificity, uniformity and non-retroactivity in the legislative proscriptions applicable to juveniles. This conclusion alone hardly justifies the adjective "radical" in the book's title, but Schur does carry the argument further. He firstly sets out the basic assumptions on the origins of delinquent behaviour and the major theories and research findings offered to explain juvenile criminality. He then identifies four "reaction patterns" that characterize present official interventionist policies. One is the *get-tough anti permissive approach* which emphasizes that wrongdoers must be dealt with sternly and that misconduct "will not be tolerated". Schur does not, however, regard this form of response as currently exerting a significant influence on delinquency control policies. The second form of response he discerns is the *individual treatment approach* which is predicated on principles of psychosocial determinism emphasizing the differentness of offenders and attributing delinquency primarily to the special, and impliedly pathological, characteristics of individual delinquents. Not unreasonably, with this orientation the focal point for treatment programmes is individual therapy and counselling. The *liberal reform approach* is based upon concepts of social determinism and, perceiving that delinquency appears (at least from official statistics) to be concentrated in the lower classes, regards the individual as being more constrained to delinquency by subcultural pressures than by individual pathology. Treatment programmes following this third approach therefore concentrate upon community-based action, street-gang work, and piecemeal socio-economic reforms. Schur next moves on to a description of what he advances as the most desirable communal reaction to delinquents namely *radical nonintervention*. Relying on self-report data by juveniles on their delinquent behaviour, he notes that the distribution of delinquent acts is more widespread through the community than official statistics disclose and, consequently, it must be recognized that only certain of those individuals who commit delinquent acts are stigmatized as delinquents. Once officially stigmatized, however, the label sticks. The significant factor in these youngsters' situation is, according to Schur, neither their special personal characteristics nor the vagaries of socio-economic factors. They are rather to be seen as "suffering from contingencies". This is a concept which is not elaborated in the book and seems an unhelpful way of merely saying that delinquents are those who are unlucky enough to get caught and officially processed.

Schur argues that a great deal of labelling of delinquents is socially unnecessary and he urges that policies be adopted that accept a greater diversity in youth behaviour. He denies that the individual treatment or liberal reform policies are effective in any meaningful way and, rather than attempt to force as many individuals as possible to "adjust", he exhorts law makers to "leave the kids alone wherever possible". This is the core of his concept of radical nonintervention. It is really the adult court's decriminalization argument (abolish "victimless" crimes of vagrancy and public drunkenness) applied to the juvenile jurisdiction (consider for example the multiple grounds of intervention authorized under s. 31 of the *Social Welfare Act 1970* (Vic.)—all ostensibly for the "care and protection" of the child). For those more serious offences that cannot simply be defined away through greater legislative and communal tolerance of diversity, Schur calls for uniformly applied punishment not disguised as treatment and increased formality and legal regularity in juvenile hearings in order to limit official intervention to those cases in which actual anti-social acts have been proven. This means, in theory, that while fewer types of youthful behaviour will be considered offences, cases of more serious misconduct will be dealt with more in the formal adversarial manner of the adult court. Schur

sees the introduction of these changes as the result of major shifts in legislative policy, but in fact almost the same results can be brought about by the simple expedient of allowing juveniles access to effective legal aid. This experiment has yet to be tried in Australia.

RICHARD G. FOX

OTHER BOOKS RECEIVED

N.B. Books which will be among those reviewed in the next issue of this journal are included in this list.

Civil Procedure

M. M. G. BRITTS, *Pleading Precedents* (Law Book Co., Sydney, 1975).

Commercial Law

T. HADDEN, *Company Law and Capitalism* (Law in Context Series) (Weidenfeld and Nicolson, London, 1973).

Criminal Law and Criminology

I. TAYLOR, P. WALTON AND J. YOUNG, *Critical Criminology* (Routledge and Kegan Paul, London and Boston, 1975).

Family Law

P. E. NYGH, *Guide to the Family Law Act 1975* (Butterworths, Sydney, 1975).

Marriage, Divorce and the Family (C.C.H. Australia Ltd., North Ryde, N.S.W., 1975).

Foreign and Comparative Law

Legal Issues of European Integration—1974/2 Law Review of the European Institute (European Institute, University of Amsterdam).

European Competition Policy (edited by the Europa Institute of the University of Leiden) (A. W. Sijthoff, Leiden, 1973).

Jurisprudence

P. BRETT, *An Essay on a Contemporary Jurisprudence* (Butterworths, Sydney, 1975).

W. TWINING, *Karl Llewellyn and the Realist Movement* (Law in Context Series) (Weidenfeld and Nicolson, London, 1973).

Legal Aid

W. PFENNIGSTORF, *Legal Expense Insurance* (*The European Experience in Financing Legal Services*) (American Bar Foundation, Chicago, Ill., 1975).

R. SACKVILLE, *Legal Aid in Australia* (Law and Poverty Series) (Australian Government Publishing Service, 1975).

Maritime Law

G. GILMORE AND C. L. BLACK JR., *The Law of Admiralty* (2nd edition, The Foundation Press, Inc., 1975).

Private International Law

E. I. SYKES AND M. C. PRYLES, *International and Interstate Conflict of Laws* (Butterworths, Sydney, 1975).

Public Law

J. A. FARMER, *Tribunals and Government* (Law in Context Series) (Weidenfeld and Nicolson, London, 1974).
T. C. HARTLEY AND J. A. G. GRIFFITH, *Government and Law* (Law in Context Series) (Weidenfeld and Nicolson, London, 1975).
P. W. YOUNG, *Declaratory Orders* (Butterworths, Sydney, 1975).
R. R. S. TRACEY assisted by E. I. SYKES, *Brett and Hogg Cases and Materials on Administrative Law* (Butterworths, Sydney, 1975).

Miscellaneous

P. S. ATIYAH, *Accidents, Compensation and the Law* (Law in Context Series) (Weidenfeld and Nicolson, London, 1973).
ELSE—MITCHELL, *Legacies of the Nineteenth Century Land Reforms from Melville to George* (University of Queensland Press, St. Lucia, Queensland, 1975).
E. A. FRANCIS, *Mortgages and Securities* (Butterworths, Sydney, 1975).
J. R. PEDEN, *Stock-in-Trade Financing*, (Butterworths, Sydney, 1975).