Book Reviews

Tort Liability of Public Authorities by Susan Kneebone (Sydney, LBC Information Services, 1998) pp xlvi, 405.

For nearly thirty years, one of the primary resources on the liability of government has been Peter Hogg's *Liability of the Crown,* first published in 1971 and now about to go into its third edition.[1] The genesis of that book was the author's PhD thesis from Monash University. Now, another book based on a Monash PhD thesis has joined Hogg's admirable monograph as required reading in this domain.

Susan Kneebone's scope in *Tort Liability of Public Authorities* is narrower than that of Hogg. It focuses, as the title indicates, almost exclusively on the amenability of government writ large to various forms of traditional tort liability as well as the one tort peculiar to those exercising public power, misfeasance in a public office. Within that lesser compass, Kneebone does, however, provide a detailed and insightful account and analysis of the variegated principles, case law, and statutes that comprise the law governing this aspect of the government's civil liability.

Her work is strong on history, powerful in its demonstration of the inconsistencies that have prevailed both among and within the various areas of tort law to which governments are subject, at many points useful in its drawing upon the case and statutory law of other similar common law jurisdictions, and especially rigorous in its analysis of the relevant Australian jurisprudence. To anyone seeking to understand the law or particular aspects of it in this complicated domain, be it judge, practitioner, academic or student, this will be an immediate port of call. Indeed, given the extent to which the law in this field both in Australia and elsewhere has continued to evolve at a rapid rate since the work's cut off date of December 1997, it is to be hoped that a new edition will appear in the near future. It has the potential to be the continuing standard Australian work on the subject.

Kneebone's ambitions, however, stretched much further than simply providing a source book for the law and even beyond standard case analysis and commentary. Her major objective was to diagnose the major policy objectives on which the diverse judicial approaches to governmental tort liability are conditioned and, having identified the various perspectives arising out of the case law (sometimes explicitly but often only implicitly), to express and justify a preference for the further evolution of the law in this domain.

The author's reading and analysis of a vast amount of case law covering all the torts to which governments are subject revealed three separate strands or policies which tended in most cases to have a decisive impact on outcomes. The first of those strands ('the core'), she identifies as one which focuses on whether the governmental role to which the plaintiff is seeking to attach

[1] The second and present edition was published by Carswell Co Ltd in Canada in 1989 and involved a change in direction from Australian to Canadian law.

liability has analogies in typical private law relationships. If there is a private law analogue, then there is a strong possibility that the court will hold the government subject to normal principles of tort liability. To the extent that the activity is one which has no private law equivalent, the chances of the application of any principle of liability diminish dramatically. The second strand ('administrative'), and one which complements the first, concentrates on whether the wrong alleged fits readily into the principles governing judicial review of administrative action. Thus, if it is feasible to characterize the possible misconduct as an abuse of discretion or a failure of procedural fairness, then it is highly likely that the aggrieved person will have to be content with whatever remedies the public law regime of judicial review provides and will be unable to seek financial or other relief on the basis of tort. In general, Kneebone sees both these strands as ones which have had a tendency to perpetuate a 'protective culture' of immunity as opposed to one of liability.

In contrast, the third strand ('control-reliance') is one which springs much more directly from a philosophy of liability. Cases, or indeed whole areas of governmental tort responsibility, which are based on this approach are ones where the inquiry is whether there has been 'reliance based upon control or assumption of responsibility for the activity by a [government] defendant' (p 376). In such instances, principles of public trust emerge and both the corrective and loss distribution policies of general tort law will often lead to imposition of principles of liability.

Throughout the substantive chapters of the book, Kneebone constantly analyses the jurisprudence by reference to these three categories. In so doing, she demonstrates convincingly that, even within particular categories of tort, the courts not only of Australia but also of other similar Commonwealth jurisdictions have been quite inconsistent in the extent to which they have relied on these three fundamental policies.

Nonetheless, there have been domains where there has been a general pattern of judicial support of one or more of the three strands. Thus, in the area of negligence liability, Kneebone sees the courts of both England and Australia (in somewhat of a contrast to those of New Zealand and Canada), as currently more committed to policies of immunity than those of liability, of being more inclined to deny such liability on the basis that the activity in question is without private law analogues or that the wrong alleged is the preserve of public law judicial review. In contrast, and for no particular reason that the author can identify, she argues that these same courts in all four jurisdictions are much more likely to appeal to principles of liability or the corrective and loss spreading objectives of general tort law in situations where they are interpreting a statutory exemption from liability or deciding whether the defence of statutory authorization will prevail in nuisance, trespass, or *Rylands* v *Fletcher* claims against government. In other words, limitation and exclusion clauses of all kinds tend to be read narrowly, and governments nowadays generally have a difficult time making out a defence of statutory authorization.

Having identified these inconsistencies in judicial approach, Kneebone is not shy about expressing a preference for the strand or policy that she prefers. First, she treats both of the first two strands as predicated on an inappropriate

basic rule, one under which the principles of public law judicial review are treated by and large as a regime entirely distinct from those of tort liability leading to a situation of largely mutual exclusivity between the two. For Kneebone, the more appropriate basic rule is one founded on a public trust and reliance-based model of public law. Under this vision, public law should provide not just the remedies of quashing, prohibition, and, sometimes, mandated consideration or reconsideration but also financial redress for the breach of public trust associated with various forms of public body misconduct and in recognition of the extent to which the public, and specific members of it, rely upon appropriate behaviour by public bodies.

Among the culprits responsible for the current state of affairs, in which the first two strands prevail frequently and the domains of the public law of judicial review and tort liability are kept apart, Kneebone identifies judicial fear of both imposing indeterminate liability on governments ('the floodgates') and the withdrawal of government, because of concerns about possible liability, from certain activities in a way that is contrary to the pubic interest ('overkill'). For anyone at all familiar with the relevant case law, these are indeed worries or liability limiting factors that judges articulate explicitly from time to time. However, Kneebone will have none of it:

> [T]he floodgates and overkill arguments which reflect anti-distributive and anti-corrective policies are overstated. They are overstated because they embody misleading and inappropriate assumptions about the economic nature of cost-benefit analyses and because they lack strong empirical foundation. Quite often they reflect the idea that the issues are not justiciable.[2]

All of this leads the author to conclude by advocating a new approach which would apply across the whole range of government activity and its intersection with tort law. The first question should be whether the powers in issue have been exercised properly by government. Secondly, the court should inquire whether the interest at stake is one which requires protection, an inquiry that is predicated not on whether the activity has a private sector analogue but on whether there is 'a relationship of dependency'. Thirdly, to the extent that governments might then assert that the claim is not justiciable, the courts should take a broad view of that concept with all exercises of discretionary power treated as prima facie justiciable.

The overall consequence of such an evolution in the law (and one which Kneebone advocates should be the responsibility of the courts, not the legislature) would in effect mean a reversal of the maxim voiced frequently by those approaching the issue of government liability from an immunity rather than a liability perspective: Invalidity is not the test of fault and should not be the test of liability.[3] In other words, liability would exist not just in the traditional domains where government is performing roles with private sector

[2] Susan Kneebone, *Tort Liability of Public Authorities* (1998) 393.

[3] This is one of the two texts with which Kneebone starts Chapter 1, 'Introduction: The Intersection of Tort and Administrative Law'. The quote is from KC Davis, 3 *Administrative Law Thesis* (1958) 487.

analogues, but also much more frequently and readily in the territory of traditional judicial review law.

How might this work in practice? To take a fairly typical judicial review case, such as denial of an occupational licence without a fair hearing or for reasons amounting to abuse of discretion, the disappointed applicant would presumably have the right to not only a quashing of the original decision and an order for reconsideration but also some form of financial compensation for the breach of a public law duty by the licensing authority.

Under current conditions in many jurisdictions, there will, however, be at least a couple of difficulties with the financial compensation aspect. First, as a matter of civil procedure or remedies, there may need to be reform of the relevant statute or Rules of Court to enable this new regime to function effectively. Financial compensation would have to become available in the context of an application for judicial review. (Indeed, generally, that would be a good thing.) Secondly, and somewhat more problematically, there would be the issue of the quantum of compensation. What are the applicant/plaintiff's losses? Clearly, the financial costs associated with having to seek judicial review and to go through two application processes rather than one are real losses to the disappointed applicant. Whether there is any further substantial entitlement will depend on whether the applicant would or would not have succeeded on the application for a licence. That is something on which the court cannot speculate in the context of the initial review proceedings; it is still a matter for the designated decision-maker. However, presumably the rules of civil procedure could, if necessary, be amended to provide that the court can retain jurisdiction over the matter until the mandated reconsideration has taken place. Thereafter, if the applicant succeeds on the reconsideration, the court can then assess the losses sustained as a consequence of the delay in obtaining a licence.

Another area where Kneebone is clearly opposed to the current trends in English and Australian law is that of the negligence liability of public authorities and, in particular, the movement away from or just plain rejection of much of the thrust of Lord Wilberforce's judgment in *Anns* v *Merton London Borough Council*.[4] Without going into great detail, the application of the Kneebone approach in this domain would involve the reversal of a number of aspects of the more recent English authority. It would necessitate an increased judicial willingness to find a duty of care arising between government actors and the public with whom they deal, less of a propensity to discern overriding public interest reasons for not imposing liability, greater embracing of liability for pure economic loss, resistance to the reinsinuation of the nonfeasance/misfeasance distinction as a basis for restricting liability, and, also, an eschewing of any tendency to treat policy making (as opposed to policy implementation and operational activities), as an automatic excluder of liability.

The costs of implementing both of these examples are, of course, very difficult to estimate. Would there be all that many cases in which the victims of botched licensing proceedings would actually sue for and recover damages

4 [1978] AC 728 (HL, Eng.) ('*Anns*').

under this expanded principle of liability? What would be the costs to government of defending these proceedings? Would the overall result be overkill in the sense of licensing authorities adopting excessive procedures in order to avoid any possibility of liability under this head? Or, would the imposition of this form of liability actually act as a much more effective corrective to these kinds of official misconduct than the current 'limited' regime of judicial review?

As Kneebone herself would suggest, it would be highly speculative to even attempt an answer to these questions particularly given that, save in the case of malice, the law in the jurisdictions under review has never attached financial consequences to such misconduct. However, in the second example, there are some indicators of the possible costs of expanding liability. After all, the Kneebone theory would in fact have led to the imposition of liability in a number of prominent cases in which the plaintiffs lost. Indeed, even in Canada with its more hospitable environment for plaintiffs, the change would lead to a diminution in significance of the policy/operational distinction, a device that the Supreme Court has deployed to advantage on occasion as an 'immunity' device. In short, it is highly likely that there would be a significant increase in exposure to liability across a broad range of government activities.

Nonetheless, Kneebone has a consistent response to all such arguments. There is no reason in principle for starting from the proposition that government in general needs special treatment or immunities even in areas or domains which find no equivalent in the private sector. Rather, a properly working system of administrative justice requires that citizens be able to look to government for financial redress as much as they can look to private sector actors when there has been a legal wrong causing damage. There is nothing so different about government wrongdoing that it requires different or special treatment as a general proposition. Moreover, considerations of corrective and distributive justice present as strong a claim here as they do in the domain of private sector wrongdoing. As well, there is in general no reason to believe that governments are any less effective loss spreaders or distributors than the private sector either through the use of liability insurance or meeting liabilities out of increased tax levies or dedicated tax reserves. In other words, the resolute response that Kneebone provides to all criticism of her position is 'let government demonstrate that it needs special treatment'. Otherwise, a wrong is a wrong is a wrong no matter by whom it is committed, and, under our system, financial compensation flows presumptively from most forms of legal wrong.

At a time when the barriers between the public and the private are breaking down or becoming more blurred and indistinct, there certainly is an intuitive appeal in this consistent, principled position. As courts increasingly recognize the public dimensions of power exercised by the private sector, as mixed forms of public and private enterprise proliferate, and as governments in all jurisdictions contract out or privatize significant aspects of what for at least a time were conceived of as public functions and enterprises, the more difficult it becomes to justify a system of tort law that draws such a sharp line of

demarcation between the private and the public sector for purposes of liability. In this increasingly blended world, our tendencies to regard government as unique in much of what it does have begun to be eroded.

It may, however, be far too sanguine to believe that such an expansion of liability as a consequence of judicial acceptance of this new or different basic rule will be without effects or reactions. Kneebone is undoubtedly on strong ground when she urges that most of the fears about floodgates and overkill, argued by government lawyers and accepted by some judges, are advanced without a solid evidential base either in the particular instance or generally. They may also be overstated. Nonetheless, at least in Canada, anecdotal evidence and specific examples suggest that they are not without foundation. Municipalities in particular, confronting the spectres of increasing costs, often a shrinking tax base, and enhanced principles of liability, are reducing the range of optional public services that they are offering. A couple of major churches in Canada or their relevant constituent organs are apparently facing financial ruin because of their legal liability for the sins of the past perpetrated by their clergy and employees in the running of residential schools and orphanages under a mandate from government.

Understandably, these phenomena create fears for those who favour a perpetuation of a significant role for government in the delivery of social services and the achieving of social goals and public protection through regulation. An increase in principles of liability may actually play into the hands of the advocates of deregulation, smaller government, and the vision of a more self-reliant society, the latter being a position that Kneebone herself criticizes in her evaluation of the reasons for the House of Lords' and Privy Council's retreat from *Anns*. On the surface, loss distribution goals may seem socially sound and defensible. Indeed, in some instances, they might even suggest that governments should be liable on a theory of enterprise risk even without proof of fault and, for example, that the principles of *Rylands* v *Fletcher* should be extended to create compensation rights in those who are the chance victims of compulsory or highly touted government programmes such as vaccination against measles.[5] However, another reaction for governments is simply to ensure that there are no losses to distribute by no longer participating. Often, this is a posture that has considerable appeal to politicians bent on self-preservation in an era where lower taxes seems to be a call that few governments at any level are able to resist.

None of this is, however, meant to suggest that Kneebone is wrong in advocating the adoption of the new rule. As Hogg has argued,[6] there are considerable benefits in forcing governments to face up to and assess, prior to adoption, all the costs of their various programmes, including the likelihood of harm that will result from any maladministration or wrongdoing and even the possibility that there will be chance victims in their operation and maintenance. The imposition of a strong principle of prima facie liability for most

[5] As argued for but rejected by the Supreme Court of Canada in *Lapierre* v *Québec (Attorney General)* [1985] 1 SCR 241.

[6] See Peter W Hogg QC, 'Compensation for Damage Caused by Government' (1995) 6 *National Journal of Constitutional Law* 7, particularly 20-21.

forms of government-caused harm may provide a greater assurance that such a planning stage evaluation will take place and either that the possibility of liability will in some way be factored in to the costs of the programme or that exemptions from liability will be created statutorily.

Indeed, once again, the Canadian experience suggests that, even if this is not done at the legislative planning stage, Canadian legislatures are not above shutting the door to the stables after the first horse has escaped. Thus, Kneebone is perhaps justifiably content with the principles of municipal liability adopted by the Supreme Court of Canada in *Kamloops (City)* v *Nielsen*.[7] However, the reality is that the City of Vancouver thereafter secured a legislative amendment to its Charter, in effect reversing the ruling for future victims of negligent inspections within its jurisdiction.[8] Similarly, there is the Alberta *Safety Codes Act*[9] enacted to ensure that the Supreme Court's increasing willingness to find government bodies liable for the torts of their inspectorate did not impinge on the work of all kinds of inspectors in that province.

There is also a sense in which these Canadian legislative experiences may raise questions about Kneebone's preference for the common law as the way of achieving the change that she advocates or, perhaps more accurately, the triumph of the third 'liability' strand over the two 'immunity' strands. First, that position assumes a complicit judiciary, something by no means to be relied upon. Secondly, there is perhaps a stronger possibility that the legislatures will not overreact in the way they did in the two Canadian examples if they have been involved in the creation of the general principles through prior overarching legislation.

At a number of points in the work, Kneebone adverts to constitutional principle as a justification or basis for the position that she is advocating. At one level, this appeal to constitutional values is premised on a new or preferred constitutional order in which concepts of public trust and respect for individuals, as reflected in concepts of fiduciary duty, inform the struggle for supremacy at common law among the three strands. This, it is said, will enhance representative democracy and a sense of citizenship far better than the existing principles of restricted liability. I have no difficulty with this argument. However, there are indications both early and later (in the discussion of the intersection between section 64 of the *Commonwealth Judiciary Act 1903* and the provisions of the *Australian Constitution*) that Kneebone believes that these are constitutional values that perhaps should cause a re-evaluation of the validity of legislation modifying or excluding any such liability on the part of government bodies. Particularly in the context of a jurisdiction without an

[7] [1984] 2 SCR 2.

[8] See *Vancouver Charter*, RSBC 1953, c 55, s 294(8) (as amended). Subsection 9 also creates bars to suing in nuisance, *Rylands* v *Fletcher*, and injurious affection in relation to various services provided or operated by the City.

[9] SA 1991, c S-O.5 restricting liability for failures in broad range of inspection functions carried on within the provincial and municipal governments to situations where the plaintiff can demonstrate bad faith.

entrenched Bill of Rights, this is an argument that almost certainly required further elaboration and discussion and, in its most absolute sense, is one that should in any event be approached with a considerable degree of scepticism. The idea that government regulatory initiatives should not include the possibility of liability adjustment to make those initiatives workable or acceptable is one with which I have difficulty as a matter of either policy or constitutional principle. However, Kneebone never actually makes the argument completely so perhaps I am being unfair in reacting to it.

In sum, this is a fine piece of scholarship and advocacy with respect to a very difficult and controversial area of public law.[10] Even if one does not agree with the author's general policy prescriptions or some of the detail of those prescriptions, they are argued well and represent a position that both deserves and has found an articulate spokesperson. Beyond this, the author has provided a singular service by developing a very useful framework for thinking about a very diverse area of the law and showing how, in terms of that framework, there are inconsistent forces at work in the evolution of the case and statutory law both within and as among discrete areas. Beyond this, this book provides a very full synopsis of the existing law in a format that will assist its varied intended audience in unravelling the detail of the jurisprudence and the numerous statutory provisions. Finally, both the author and the publisher are also to be commended for the cleanness of the final product. In what is a lengthy and very fully documented work, I detected no more than four or five minor production errors.

DAVID MULLAN
Osler, Hoskin & Harcourt
Professor of Constitutional and
Administrative Law
Queen's University
Kingston, Ontario, Canada.

Legal Aspects of the Information Society by I Lloyd (Butterworths, UK, 2000)

Professor Lloyd's *Legal Aspects of the Information Society* is a timely new addition to the growing body of literature relating to the impact of information technology on law. What perhaps sets this book apart from other recent legal texts, however, is its emphasis on the relationship between the legal issues discussed and the social, political and economic context in which they have arisen.

[10] A strong sense of the complexities involved is conveyed by the title of a comparatively recent article by Professor Carol Harlow, the eminent British legal academic: 'State Liability: Problem Without Solution' (1995) 6 *National Journal of Constitutional Law* 67. The author's degree of despair is underscored by the fact that the title ends with a period, not a question mark!

Professor Lloyd includes useful social and historical perspectives on the development of past laws. These perspectives prove very helpful in understanding why certain laws are framed the way they are today. This is a useful starting point in discussing ways in which relevant laws need to develop to keep pace with new technological innovations. Intellectual property laws are an obvious example here. Professor Lloyd deals extremely well with explaining the historical development of concepts like copyright and patents. He then goes on to discuss where these concepts fall short of effectively fulfilling the needs of commerce and society in relation to items such as computer software and electronic databases which arguably fall between the gaps of these existing concepts. He then sets out current legislative and judicial responses to these problems with suggestions for future reform.

He does not debate, as some other authors have, whether there is such a thing as a body of law that might be described as 'information technology law' or 'Internet law'. However, he does canvass the broad areas of law that are significantly affected by the development of a globalised information and service-based economy and describes ways in which laws are adapting to meet society's more recent needs in these areas.

The book covers a very broad spectrum, including: (a) privacy legislation; (b) intellectual property laws; (c) criminal laws relating to computer viruses, computer hacking etc; (d) defamation in cyberspace; (e) contractual, tortious and statutory liability for defective software; (f) electronic contracts; (g) evidentiary issues; (h) consumer protection issues; (i) taxation; and (j) and private international law. It is also notable for its inclusion of entire chapters and large sections of other chapters on the socio-political and commercial impacts of information technology.

Another useful feature of the text is its simple and accessible descriptions of how various facets of information technology developed historically and how they work. It is certainly most useful for lawyers not versed in technical aspects of information technology to be furnished with simple descriptions of how the Internet developed and how it works, what computer software really comprises in technical terms etc.

In terms of style, the text is presented in a somewhat 'informal' manner. The writing style is clear and simple and the book is easy to just 'pick up and read'. The author also shows some nice flashes of humour, particularly when making analogies between the development of the Internet and the UK road system!

There are no lengthy citations to other works and no footnotes or endnotes. This has its advantages as it allows the reader to focus clearly on the issues presented in the text without being distracted by constant references to other sources. However, in the final analysis, it might be useful in future editions to include a list of 'suggested further readings' on each topic perhaps at the end of each chapter. This would give the reader somewhere else to go if particularly interested in a specific area of law and information technology.

The main focus of the book is on UK and EU law and its development within the emerging global information society. There are useful comparisons with approaches taken in other jurisdictions, notably the United States, and detailed

descriptions as to where and why various legal systems have taken different approaches to certain issues, again in a socio-political context.

One of the nice things about the book in relation to its UK coverage is that the author makes distinctions between English and Scottish law where necessary. This is often an omission in books focusing on UK law and, as can be seen in Professor Lloyd's description of, for example, criminal law approaches to information technology related offences, there may be significant differences between the two in certain circumstances.

The work is also very up to date in terms of the legal issues discussed, although one cannot help feeling that with the current pace of technological development, new editions will be required at regular, and fairly short, intervals.

One minor omission is a chapter focusing on electronic payments systems and the legal and regulatory issues related to them. There is a brief section on Electronic Data Interchange (EDI) in a chapter relating to the 'commercialisation of cyberspace' and there are some brief references to electronic payments systems such as CHAPS, SWIFT and Mondex. However, a further edition of the work may benefit from a separate chapter devoted to such payment mechanisms and the legal and regulatory issues arising from their increased use globally. Some interesting work is currently being done about the legal concept of money and payments systems in the global information age and a more detailed look at this area of law and commerce could be useful in a book focusing on law and the information society. This is not a major criticism given the broad scope and coverage of the current edition. It is merely a suggestion for future addition.

Another possibility for inclusion in a future edition may be a more detailed look at electronic share trading. Again, the author makes a brief mention of the Crest system currently operating in the UK, but there may be significant scope to make comments about legal, regulatory and even commercial issues arising in relation to systems like Crest, CEDEL, Euroclear etc in a future edition, space permitting. Certainly the globalisation of national share trading systems is a matter of some social and commercial significance in the modern world. It was not so easy ten years ago for an Australian to sit in front of his or her home computer and trade electronically on the US stock market or vice versa as it is now with the advent of electronic share trading.

In terms of its appeal to a potentially broad audience, the current edition displays the obvious advantage of providing simple explanations of all the areas of law it discusses. It describes in basic terms how things like contract law, tort law and criminal law work and sets out the bases of the English and Scottish legal systems in terms of parliaments, court structures etc. This makes the book very accessible to those with no legal background. It could, therefore, be used, for example, as a text for university courses in a number of schools dealing with legal, political and economic impacts of globalisation and information technology on society. Because of its focus on UK / EU legal responses to these phenomena, it might also be of particular interest to scholars and legal or commercial practitioners in other jurisdictions who want to compare the legal

climate in their own jurisdiction with that in the UK and the EU more generally.

Overall, the book is a very important and useful addition to the available literature on the impact of information technology on law and society. It is highly readable and covers a broad variety of issues of particular interest to anyone who wonders about the future development of law in the information society. This reviewer looks forward to future additions with interest.

JACQUELINE LIPTON
Senior Lecturer
School of Law
University of Nottingham

Lionel Murphy A Political Biography by Jenny Hocking (Cambridge University Press) 2000 pp xx + 382

A paperback edition of this 1997 biography is timely. Lionel Murphy continues to be a source of fascination, controversy and inspiration. A new epilogue addresses not Murphy's judicial legacy but his place in Australian history more generally, which continues to be contested. His judicial legacy has been discussed in greater detail elsewhere and is also touched on by Justice Michael Kirby in a new foreword, but Kirby also stresses Murphy's other contributions, political and personal, and these are at the heart of the book.

The book is subtitled "a political biography". This could be seen as a contrast to a judicial biography, but it has been said that Murphy did not so much transfer from a political to a judicial career as continue his political career on the bench. How one feels about his politics is likely to affect how one feels about his law.

The story begins with the context of Murphy's father William's emigration from Ireland and life in Australia. William Murphy later visited Moscow. It is a convincing portrayal of experiences which would influence his son.

Born in 1922, Lionel Murphy lived through the Great Depression as a child. Although the family were not poor, young Lionel saw much desperate poverty around him, and his brother's death from tuberculosis. He was spurred to achievement and the pursuit of a fairer society.

He first studied science and later brought scientific method to his law. He began his political career in student politics, appropriately with a constitutional dispute. The Second World War had already begun and he was exempted from military service to work in the chemical industry. In 1944 he was among the leaders of a demonstration against the federal (Labor) government's attempts to censor the press. He was a man who acted on his principles.

Murphy entered the University of Sydney Law School in 1945 only four years after the long reign of the conservative Professor John Peden had come to an end. He joined the ALP in 1946. He befriended Neville Wran and others later to be prominent in the tribal world of NSW law and politics. He worked

hard but he also partied hard. He sat the bar exam in 1947 after only two years' legal study and began practice while still a student. He finally graduated with First Class Honours in 1949, by which time he already had a thriving practice centring on labour law.

He met Nina Morrow, a Russian-born married woman with a daughter. He helped her through the ordeal which was divorce in 1950s Australia. No doubt this stimulated his interest in family law. He married Nina in 1954 and they had a daughter but were later divorced. He later married Ingrid Gee and they had two sons who were still adolescents when he died.

Murphy was embroiled in the controversy over communism in the 1940s and 50s and took a strong civil liberties approach to it. He was frequently briefed in intra-union disputes by, among others, solicitor Morgan Ryan, often opposing John Kerr and Jim McClelland. He took silk in 1959.

The mid 50s were bitter times in industrial law with frequent disputes between "Groupers" and former communists. These factors precipitated the ALP split of 1955 which continued to divide the party even after the split was supposedly healed. Murphy was anti-Grouper and this gave him both stalwarts and enemies for life.

The Petrov allegations and subsequent Royal Commission reignited fear of communism and gave great scope for the smearing of political opponents and showed Murphy the potential of commissions of inquiry to abuse civil liberties, something he was later to denounce from the bench then experience himself.

In 1956, Murphy unsuccessfully sought preselection for a federal seat. At this time, a rumour that he was actually Jewish was circulated. This rumour stayed around for years despite his Irish Catholic ancestry (Murphy on both sides). In 1960, he was successful in gaining preselection for the Senate and was elected in 1961. He was in a hurry to make his mark and was impeded by a comfortable regime which favoured seniority over ability. He succeeded through force of personality, seeing the possibilities for the Senate as a house of review rather than the retirement home and check on democracy that it had become. Ironically, his energy in promoting its role contributed to its subsequent role in the Whitlam government's downfall, and later still his own.

Labor still had plenty to go through before it won government. Calwell hung on as leader until 1967. The new leader, Whitlam, did not see eye to eye with Murphy, not least on the importance of the Senate, but when Labor won power in 1972, Murphy was the obvious choice for Attorney-General.

Murphy worked well with Clarrie Harders, the permanent head of his department, and this helped him get his massive program of law reform implemented. He began work on the Family Law Act, created the office of Ombudsman, introduced freedom of information, and established the Australian Legal Aid Office and the Australian Law Reform Commission. His awareness of American law encouraged him to develop consumer and environmental law in Australia. He arranged for Australia to take France to the International Court of Justice over nuclear testing. He arranged

implementation of international covenants on racial discrimination enabling the Racial Discrimination Act.

He wanted to make ASIO accountable to the elected government, but his raid on ASIO headquarters in March 1973 looked erratic. He had upset the intelligence community which had plenty of material to use against him from his connections with former communists to the ridiculous allegations of his Jewish origins. While he continued to pursue his reform agenda, the controversy of the raid enmired him. This was the beginning of the creation of a fiction: Murphy as a sinister clown.

1974 saw the passage of his great Trade Practices Act. It was also the year he suggested directly raising loans in the Middle East, bypassing the Loans Council, a proposal which also attracted great controversy and was instrumental in bringing down the government.

The Family Law Act finally passed in 1975, another enormous and revolutionary achievement. By this time, Murphy had been appointed to the High Court. He was ambivalent about leaving government for the bench, but the imminent demise of the Whitlam government was apparent and his appointment was one of its most significant legacies. Although the appointment was controversial, Hocking shows that it was amply precedented. This did not prevent some of his political enemies from being determined to bring him down.

His elevation coincided with the death-throes of the government, culminating with its dismissal by Sir John Kerr on the advice of Chief Justice Barwick. Murphy and Barwick were scarcely on speaking terms even before the dismissal, but they were to continue to serve together for another six years. The gregarious Murphy did make some friends on the bench though.

Murphy was one of the defendants in a private prosecution for conspiracy in connection with the "loans affair". This was only the first of the many proceedings brought against him.

In her two chapters on Murphy's judicial work, Hocking concentrates on his radical approach. It was a complete contrast to the legalism of Barwick and the Dixonian tradition. Instead he stressed the social and political context and the primacy of civil and political rights. Hocking also describes his clear and concise style, another contrast, and his attention to language. She explores in detail only a few of his notable judgements and gives a general overview of his work. His notable judgements have been well collected by others.

In the end, many of the threads of his earlier life tangled to trap him. Hocking covers the release of the "Age" tapes in 1984 and the events which followed in great detail. Murphy had tried to eradicate illegal telephone tapping of the kind which was used to destroy him. The *National Times*, which initially ran material from the taps, became relentless in its pursuit of him. The tapes and alleged transcripts became fodder for attacks under parliamentary privilege and portrayal of him as a drunken lecher who consorted with criminals: an even more sinister clown. Such fare was irresistible to the media and took on a life of its own.

The Labor government was swept up in it The Attorney-General Gareth

Evans, a former staffer when Murphy was Attorney-General, was perhaps too keen not to be seen to favour Murphy and did not take decisive action to put the matter to rest. The government wished that he would just go away. It acquiesced in the appointment of a Senate committee to investigate Murphy's alleged conduct. This provided a splendid forum for further allegations to be made. The most notable of these, by the NSW Chief Magistrate, that Murphy had tried to influence him over a case involving his friend Morgan Ryan, was considered sufficiently serious for a second committee of inquiry to be convened. This flushed out further allegations. Rather than put its findings to the Parliament and propose Murphy's removal, Evans referred the matter to the DPP who charged Murphy with attempting to pervert the course of justice. Two years, a trial, conviction, successful appeal, retrial and acquittal later, Murphy was a broken man. Incredibly, yet more allegations immediately surfaced or were revived. Incredibly, the government ordered yet another enquiry, this time by three retired judges. The announcement that Murphy had terminal cancer caused this enquiry to be closed, but a draconian suppression of its proceedings has only left more fodder for suspicion and rumour.

Hocking has had access not only to most of the necessary papers but also to most of the people who knew Murphy well. She also makes extensive use of Murphy's own words. While the book is overwhelmingly positive about him, criticism is given where it is due.

Through his career at the bar and in Labor politics, she shows how his ideas were formed and put into action: a belief in fundamental rights and a relentless determination to put them into effect.

Murphy's legacy has been substantial. As a barrister, he helped to create more democratic trade unions. As a Senator, he had a major part in establishing the Senate committee system. As Attorney General he introduced landmark legislation in many areas, most of which is still in place. As a judge, he wrote clear, principled judgements which even when not in the majority were powerful statements of the law. Some of his dissents have since appealed to a majority. Perhaps most importantly, he is a shining example of the possibility of reform through action in civil society and all branches of government. It is a pity that his legacy is tarnished by scandalous rumours which cannot be proved but cannot be laid to rest. It seems appropriate that a nebula, glowing from deep, dark space, was named after him.

The new epilogue reveals how brightly he continues to glow in some minds. Hocking asks: "Did Lionel Murphy really happen?" The battle over his legacy continues. There are now several works acknowledging his judicial legacy but many of the unproven allegations against him now seem accepted by some as fact. An "imaginary Lionel Murphy" floats nebulously, both created and perpetuated by journalists.

Hocking makes telling criticism of the quality of the journalism which targeted Murphy. She identifies the legacy of the Watergate revelations as a dangerous predilection for anonymous, unverifiable "sources".

Perhaps most significant of the recent attempts to discredit him has been the airing of allegations that his old sparring partner Jim McClelland believed him

to be guilty. The airing had to await McClelland's death. Hocking shows how thin and distorted the allegations are.

This book sets out his achievements for all who care to read it and convincingly rebuts most of the allegations. It is readable, if a little eccentric in its punctuation. I would have preferred footnotes to endnotes as I was constantly referring to them.

MATT HARVEY
Research Assistant
Faculty of Law
Monash University