
BOOK REVIEW

Weaving the Fabric of Torts



TORTS LAW: TEXT AND MATERIALS

*By Mark Lunney and Ken Oliphant
(Oxford University Press 2000 pp 819)*

THE fabric of torts law is complex and multi-layered. The authors of a book designed for students must find a balance between providing clarity for the beginner and revealing the richness of their subject.

The challenge for people teaching and learning torts law is to draw the multiple strands of this subject into a coherent pattern. The cultural, philosophical and political influences provide different hues in the fabric. The facts of the particular cases provide the bulk and the texture, and sometimes seem to be the whole cloth. The concepts and principles move in linear patterns, then double back in circles and overlays. The cloth has different uses and seems poorly designed for many of them.

The authors have presented this book as part of a new generation of torts textbooks. Their aim is to provide the law student with a treatise that is both a simple textbook and a casebook. To this end, the book combines extracts from primary and secondary sources with extensive introductory explanations and commentary. The reader is introduced to the materials in each section with an overview that summarises the topic in point. This explanatory material is commendably clear and makes the extracts that follow accessible to the beginner.

Critical and historical perspectives are provided both in the commentary on the case extracts and in the extracts of secondary materials. The authors have given more space to secondary materials than other casebooks and this provides the reader with a sense of the multiple hues of the torts law fabric. The book has been kept to a practical size by a corresponding reduction in the quantity and length of the case extracts. The risk in this approach is that the extracts may oversimplify the cases. The case extracts have been carefully chosen, however, and the students

who use this book will be grateful for their brevity.

The book does not attempt to cover the vast expanse of torts law, but it includes the foundation areas that make up most undergraduate torts courses. Four chapters are devoted to the basic elements of negligence and the defences to it. A further four chapters deal with the more problematic areas of negligence, such as causing psychiatric illness, the liability of public authorities, economic loss and omissions. Coverage is also given to a selection of other torts, including those that address interference with the person, nuisance and the rule in *Rylands v Fletcher*¹ (which, of course, no longer applies in Australia). Special areas of liability that are governed principally by statute, including occupiers' liability, product liability, employers' liability and breach of statutory duty are dealt with collectively and briefly in one chapter.

Defamation is not always included in books aimed at undergraduates, but Lunney and Oliphant have included a substantial chapter on this area. On the other hand, they have not included trespass to land or goods or the economic torts.

Lunney and Oliphant have given special emphasis to the history of the law of torts. Legal history as a 'stand alone' subject is no longer a core part of most university law courses. There is, therefore, a good argument for incorporating it in other foundation courses, both to ensure that students have some understanding of the historical process in the development of law and to ensure that they fully understand the particular subject. The ability of torts law to deal with contemporary problems is constantly constrained by its past, making it an ideal vehicle for studying legal history. The prominence Lunney and Oliphant give to the historical perspective is illustrated in the introductory chapter, which begins with a substantial outline of the history of torts law. The stated purpose is to shed light on the contemporary development of the law and its limitations. The value of this approach is illustrated in the authors' analysis of the historical and contemporary role of the nuisance action in their commentary on *Hunter v Canary Wharf Ltd*² in chapter 12. On the other hand, a number of opportunities to exploit this approach have not been taken. For instance, the development of the requirement of 'imminence' in assault, and the effect this has had in impeding the application of this tort to contemporary social problems, is a potentially rewarding illustration that has not been explored.

There are some omissions from the selection of secondary materials that seem surprising. Little prominence is given to the work of feminist legal scholars who have provided insights into the gendered nature of some of the fundamentals of torts law. Bender's critique of the reasonable person in 'A Lawyer's Primer on Feminist Theory and Tort'³ is perhaps the most obvious example. The chapter on intentional

1. (1868) LR 3 HL 330.

2. [1997] AC 655.

3. (1988) 38 J of Legal Ed 3.

interference with the person overlooks the work of Connaghan and Mansell,⁴ and Feldthusen,⁵ which explores the application of torts law to family violence and sexual harassment.⁶ The topic of damages for personal injury might have been illuminated by extracting some of the work of Graycar⁷ on cultural and gender biases in the assessment of damages. The work of these writers deserves to be included in a selection of extracts that aims to be representative of the contemporary literature on torts.

Australian readers of this book will be interested primarily in comparing English and Australian torts law. The book does not place special emphasis on a comparative approach, but it does contain a reasonable selection of cases from other jurisdictions. The parochial Australian reader will note more citations to Australian cases than any other common law jurisdiction apart from England. However, the discussion of the comparative cases is very brief. This is disappointing in those areas where there has been a clear division in the direction taken by the law in England and Australia. For example, only brief mention is made of the High Court decisions in *Cook v Cook*⁸ on variable standards of care in negligence and *Kars v Kars*⁹ on damages for gratuitous care. These decisions represent a radically different approach to these issues that goes to the heart of the negligence action and an analysis of them would have been illuminating for both English and Australian readers.

One aspect that strikes the Australian reader is the emphasis given to human rights legislation by the authors. The European Court of Human Rights decision in *Osman v United Kingdom*¹⁰ has forced torts lawyers in the UK to confront the relationship between torts law and human rights. Human rights legislation has not yet had the same impact on Australian torts law. The stolen children litigation¹¹ has given an impetus to this issue, but it has not yet found a prominent place in the mainstream of Australian torts textbooks.

The presentation of the book is excellent. It lives up to its claims to clarity and easy use. One minor irritation is the use of initials in the text. Many readers will not

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4. J Conaghan & W Mansell 'Feminist Perspectives on Tort Law: The Example of Sexual Harassment' in *The Wrongs of Tort* (London: Pluto Press, 1993).
 5. B Feldthusen 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence?' (1993) 25 Ottawa L Rev 203.
 6. See C Tobias 'Gender Issues and the Prosser, Wade and Schwartz Torts Casebook' (1988) 18 Golden Gate Uni L Rev 495, which makes similar criticisms. See also M Frug 'Re-reading Contracts: A Feminist Analysis of a Contracts Casebook' (1985) 34 American Uni L Rev 1065.
 7. R Graycar 'Woman's Work: Who Cares?' (1992) 14 Syd LR 86.
 8. (1986) 162 CLR 376.
 9. (1996) 187 CLR 354.
 10. [1999] 1 FLR 193.
 11. *Kruger v Cth* (1997) 190 CLR 1; *Williams v Minister, Aboriginal Land Rights Act 1983* (No 2) [1999] NSWSC 843 (26 Aug 1999); *Cubillo v Cth*; *Gunner v Cth* [2000] FCA 1080 (11 Aug 2000).

find 'ME' an easy substitution for myalgic encephalomyelitis and for international readers the initials 'MIB' and 'NAO' will not immediately evoke the Motor Insurers' Bureau and the National Audit Office. A list of abbreviations is provided but the need to refer to it is a distraction. A useful addition would have been an index of the secondary materials that are extracted in the book.

The casebook method is based on a pedagogy that emphasises active learning. The student must engage in the process of extracting the principles from the primary sources. It has been said that good teaching 'helps students to understand the essence of scholarship and investigation ... by providing an opportunity for them to practise the art of enquiry'.¹¹ A good casebook, then, must provide the resources for students to practise the 'art of enquiry'. How well does Lunney and Oliphant's book achieve this objective?

Australian readers will use Luntz and Hambly's classic casebook *Torts: Cases and Commentary*¹² as the benchmark to evaluate any new textbook on torts. The outstanding feature of Luntz and Hambly is the critical framework within which the case extracts are presented. That framework is established by the materials in the introductory chapter which provide an extensive critique of torts law. The stance is maintained in the notes and commentary on the caselaw and in the questions in each chapter that overtly promote critical thinking in the reader. Students are challenged to engage in the critical process for themselves and are referred to a wealth of sources to support that process.

Lunney and Oliphant provide students with a safer world and place less demands on them. The introductory sections give the reader initial guidance and the commentary provides some feedback for students against which they can evaluate and develop their understanding. A critical perspective is introduced in the commentary and expanded in the extracts from secondary sources. These are necessarily brief but they do give a taste of a variety of different perspectives to undergraduate students. Overall, Lunney and Oliphant give a supportive introduction to the art of enquiry.

The authors of torts books for students have the challenging task of finding a balance between a threadbare and impoverished cloth and a rich brocade that can be overwhelming. Lunney and Oliphant have achieved a well-judged balance and have produced a valuable resource for teaching and learning torts.

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11. P Ramsden *Learning to Teach in Higher Education* (London: Routledge, 1992) 101.

12. H Luntz & D Hambly *Torts: Cases and Commentary* 4th edn (Sydney: Butterworths, 1995).