

THE LAW OF TORTS

JOHN G. FLEMING

FIFTH EDITION

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by

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PREFACE

This, the fifth edition retains the basic philosophy of its predecessors. Let me therefore reiterate my credo from the Preface of the last:

“Fundamental remains my belief that the law is neither occult, arcane nor oracular, but to the contrary dedicated to the rational solution of social conflicts through the legal process; that because law is only a means, not an end, it falls to be adjudged not by any internal standard peculiar to it as a closed system, but by the degree to which it furthers relevant social ends; that accordingly legal solutions or ‘rules’ have to stand the test of functional adequacy in terms of contemporary values—for short, that there should be a twentieth-century reason for all rules, judicial or legislative, with any pretence for survival.

“Moreover, I deem it as nothing less than a renunciation of our professional responsibility to assert, as one occasionally hears from brethren who should really know better, that the effect or the ‘good or bad’ of a precedent or mooted decision is no concern of ours as *lawyers*. Surely, our training and constant familiarity with the problems of social ordering endow us with a key to approach even irreducible tasks of forming final value judgments in the light of a clearer perception of the issues to be resolved, of the available alternatives, and of their likely impact. For, though it be true that in the choice of ultimate values lawyers will be found scattered right across the broad ideological spectrum much like other people (except perhaps for their more pronounced conservative bias), most of us are at all events better equipped to recognise and guard against the insidious distortions of prejudice, the ill digested and unadjusted folk-judgments that so often pass as currency in the market place.

“‘Fairness of mind,’ as Lord Ratcliffe once poignantly observed ‘cannot involve such innocence as the credo that judges do not make law or that the personal element does not creep into the making of decisions. . . . Judicial decisions, no matter who gives them, must always be related to basic beliefs about the nature and purpose of a human being . . .’ How much less, then, can teachers and writers acquit themselves of their task of explaining and criticising these decisions without recourse to a scale of policy-directed values, as they see them?

“It is therefore due to deliberate choice that the profile of the law of torts which this book seeks to depict is frankly more function-oriented than many of its competitors, more concerned with the effect and operation of legal rules, with their aims and reason, than with mechanistic problems of the internal consistency of decisions within the framework of any given system of precedent. The customary prominence given to the latter type of inquiry in legal texts strikes me as not only all too convenient an escape from facing the really critical questions, but the more stultifying at a point of time when the winds of change testify to much and increasing restlessness in the law as in other spheres of human thought and endeavour. For much the same reason, this book, though taking Australia as its *point d'appui*, fixes its horizon beyond the law of any one jurisdiction, in the belief that the common core of ideas about torts makes a larger perspective at once possible and more rewarding.”

This edition is, alas, more than fifty pages longer than the last. The reason is not that I failed to weed out the dead stalks before planting the new crop; rather it reflects the increasing complexity in an era of rapid transition. Law reform, statutory and judicial, even within traditional areas and scope has not proceeded in lockstep in all common law jurisdictions, thus adding to diversity but also to the potential for more wide-ranging experience with alternative solutions to common problems. In addition, the creeping erosion of fault-based tort liability has now broken surface in the enactment of several compensation plans, complementing or altogether replacing conventional tort liability. Besides funds for compensating victims of crime, the last few years have witnessed a dramatic break in the earlier resistance to 'no-fault' compensation for motor accidents. While these, essentially conservative, plans have as yet made more progress in Canada and the United States than in Australia (with adoptions so far confined to Victoria and Tasmania, but lately with some signs of interest in New South Wales), even more ambitious and radical schemes have been hatched in the Southern hemisphere. Three years ago New Zealand boldly embraced the Woodhouse Report replacing all tort liability for personal injury from accident with an accident compensation fund, and Australia was only diverted from the same brink by a last-minute political vagary. These momentous developments do not augur well for a sustained role of tort liability over the long future, since their underlying social and economic motives are transnational in appeal.

For the time being, however, this book remains primarily focussed on traditional tort doctrine and the above-mentioned developments must content themselves with a subsidiary spot: a new chapter (19) has been added, at the end of strict liability, under the title of "Private and Social Insurance" in recognition of their increasingly important role on the contemporary scene. Readers familiar with earlier editions will also notice that the contents of the last chapter have been re-allocated: joint tortfeasors and contribution among tortfeasors, now a separate chapter, follow "Remoteness" as a natural follow-up to the problems of multiple causation; survival of actions has been absorbed in the chapter on "Domestic Relations," following the discussion of fatal accidents. I have of course sought to incorporate all significant statutory and judicial material of the intervening years that caught my attention and became available to me by mid-1976. Besides, our vision has been enlarged by periodical literature and the publication of most chapters of the torts volume of the International Encyclopedia of Comparative Law. A nod of recognition has also been spared here and there for the contemporary, mainly American academic interest in economic analysis of legal problems.

JOHN G. FLEMING

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