

JOHN G. FLEMING

THE LAW OF TORTS

SIXTH EDITION

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by

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SIXTH EDITION

THE LAW BOOK COMPANY LIMITED

1983

Published in Sydney by
The Law Book Company Limited
31 Market Street, Sydney
389-393 Lonsdale Street, Melbourne
6 Sherwood Court, Perth

First edition	1957
Second edition	1961
second impression	1963
Third edition	1965
second impression	1967
third impression	1969
Fourth edition	1971
second impression	1972
third impression	1973
Fifth edition	1977
Sixth edition	1983

National Library of Australia
Cataloguing-in-Publication entry

Fleming, John G.
The law of torts.

6th ed.

Previous ed.: Sydney: Law Book Co., 1977.

Bibliography.

Includes index.

ISBN 0 455 20547 7.

ISBN 0 455 20548 5 (pbk.).

1. Torts. I. Title.

346.03

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Typeset by Keyset Phototype Pty. Ltd., Sydney, N.S.W.
Printed at Griffin Press Limited, Netley, South Australia.

THE LAW OF TORTS

UNITED KINGDOM

Sweet & Maxwell Ltd.

London

CANADA AND U.S.A.

The Carswell Company Ltd.

Agincourt, Ontario

PAKISTAN

Pakistan Law House

Karachi

SINGAPORE : MALAYSIA : BRUNEI

Malayan Law Journal (Pte) Ltd.

Singapore

PREFACE

This, the sixth edition, marks the twenty-fifth anniversary of the first — an event that excuses some introspection. To complement our courts' "nostalgic reluctance to recognise change" (Lord Reid), a respectable academic text must be sensitive to movement and direction. Rather than taking a snapshot frozen in time, it should be concerned with *whence*, *whither*, and, most important, with *why*. (You cannot understand, let alone apply, a rule of law unless you know the reason behind it.)

The last quarter-century has seen a great deal of change, not only in detailed rules and added complexity, but most noticeably in the growing loss of confidence in the law of torts as an ideal system of accident compensation. In what has become fashionable to call the welfare state, with its emphasis on public responsibility and cooperation rather than on individualism and belief in the efficiency of a free market, collectivist tendencies are relegating to increasing irrelevance considerations of interpersonal equity on which the classical law of torts was based. Instead, no-fault compensation systems for work, traffic and some other accidents, are proliferating and straining in the direction of New Zealand's total abolition of tort claims for personal injury and death. In England, the Pearson Commission noted with scarcely suppressed satisfaction, that the social security system had long since become the "senior partner" to torts, and its recommendations aimed at accelerating this process. In the meantime, the residual tort system is disintegrating under the combined pressure of no-fault policies, overt or hidden, and the inordinate cost burden thereby imposed on the collective public. While the writing is most clearly on the wall in America, it plainly reveals the general direction of tort obsolescence in other common law, indeed in all, Western countries.

This edition, like its predecessor, has sought to capture these realities. Concern with the "philosophy" of torts law and its future, so pervasive in contemporary American academic discourse, is reflected especially in the Introduction which has been largely rewritten and is recommended for general orientation. As past readers know well, this book while taking Australia as its *point d'appui*, fixes its horizon over other Commonwealth jurisdictions, especially England and Canada, in the belief that the common core of ideas about torts makes a larger perspective at once possible and rewarding. It is thus a modest exercise in comparative law.

The law is brought up to date on materials available to me up to September 1982. The unremitting flow of case law, statutes and reform proposals since the last edition has necessitated much rewriting. Some highlights only may be mentioned. The impact of *Hedley Byrne* in sanctioning the incursion of torts into the area of economic loss, with resultant blurring of the frontier between tort and contract, is now becoming increasingly profound. (I well remember from my own student days the lag in testing the reaches of *Donoghue v. Stevenson*.) The case of *Anns*, completing the trilogy of landmarks, not only accelerated this process but opened the gates for negligence liability into public law. Most

obvious of all has been the continuing, frustrating campaign to systematise the assessment of damages and address among others the problem of inflation, a sore challenge to the endemic judicial distaste for economics.

My debt to other writers in the field is evident throughout the text; I am especially grateful to Harold Luntz for his frequent reports on the Australian scene (including his analyses in the *Annual Survey of Australian Law*) but for which I would surely have been guilty of more omissions.

JOHN G. FLEMING

Berkeley, California
October 1982

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