



10th Edition

FLEMING'S THE LAW OF TORTS

Edited by Carolyn Sappideen and Prue Vines

Lawbook Co.



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Fleming's The Law of Torts

Edited By

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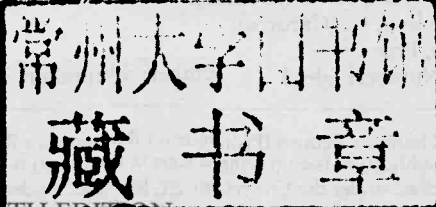
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Foreword

Chief Justice Robert French

High Court of Australia

The First edition of Professor John Fleming's book, *The Law of Torts*, appeared in 1957. Its appearance was the beginning of a long relationship between Fleming's scholarship and generations of law students, legal practitioners and judges in Australia that continued up to and including the publication of the Ninth edition of his book in 1998.

Fleming completed the Ninth edition just a few weeks before his death in 1997. It is fitting that his memory and contribution are continued in this the Tenth edition of his text. The Editors, Caroline Sappideen and Prue Vines, have followed the subject and chapter layout of the preceding edition. The chapters are contributed by scholars from Australia, Canada and the United Kingdom. The book is directed to readers in each of these jurisdictions. Fleming, the international scholar and comparativist, would no doubt have approved of that direction.

The choice of authors from different jurisdictions reflects the inescapable entanglement of laws across national boundaries and, a fortiori, across the boundaries of those countries which share the common law tradition. Fleming's international and comparativist approach was acknowledged in a review of the First edition by Professor Wolfgang Friedmann, published in the *Columbia Law Review*, in 1958. Friedmann described Fleming's new work as:

... an excellent systematization of the modern English and Australian law of torts, enhanced by ample use of comparative materials from American and Canadian cases and literature, and also a fresh, constructive, and critical appraisal of the present state of the law.¹

In 1984, upon the publication of the Sixth edition, it was compared with the treatises of Pollock, Winfield and Salmond and the comment made that:

Once again, a scholarly text was available, lucid, clear, elegant and comprehensively referenced to the periodical literature.²

In his foreword to the Ninth edition, Sir Anthony Mason wrote that:

The Law of Torts has been and still is a comprehensive statement of the principles of tort law spanning the common law jurisdictions. In a modern textbook that is not so much a virtue as a necessity, recourse to comparative law being a feature of the judgments of courts of final appeal. John Fleming has always seen the common

1 (1958) 58 *Columbia Law Review* 918 at 919.

2 Harlow, 'A Treatise for Our Times?' (1984) 47 *Modern Law Review* 487 at 490.

law of torts as a body of principles that transcended national boundaries. One element of that vision of the law was to encourage familiarity with the law as it developed in the various jurisdictions.³

Today, the comparativist imperative is no less pressing than it was at the time of the earlier editions of Fleming's work. A complicating factor, however, is the impact of statute law upon the common law of torts. In Australia the common law has been modified by statute in a variety of ways, not least by the recent enactment of Civil Liability Acts in various States. These modifications present challenges to the student, the practitioner and the court. Where differences exist between one Australian jurisdiction and another, fragmentation of the unity of the common law may result. Nevertheless, the common law provides the context in which such statutes are to be understood and applied and often sits side by side with them. The authors of the various chapters in this text are persons well aware of the challenges presented by those interactions.

It is a pleasure to be able to write this foreword. It is a particular pleasure for me, as one who studied Fleming's text in the 1960s, to see the continuation of his work, which, despite its comparativist emphasis, will be claimed by many Australian students of the law as an Australian text. It is a pleasure to see the memory and work of John Fleming so honoured.

January 2011

3 Mason, 'Foreword' in Fleming, *The Law of Torts* (9th ed, 1998), p v.

Foreword

Leonard Hoffmann

Member, Appellate Committee of the House of Lords

1995-2009

It is a great honour to have been asked to write a foreword to this 10th edition of Professor Fleming's renowned textbook, the first to have been edited by other hands since his death in 1997. Only six months earlier, Lord Cooke of Thorndon had described him in a judgment in the House of Lords as "the doyen of living tort writers": *Hunter v Canary Wharf Ltd* [1997] AC 655 at 717, a well merited encomium. Although John Gunther Fleming left his native Berlin at the age of 16 in 1935 and received his undergraduate education at Brasenose, at a time when the academic study of law in England was at a fairly low ebb, he seems to have brought to the common law world the high traditions of German scholarship: original, questing, systematising, undeferential, exposing the principles and policies (or the lack of them) underlying the formal reasoning of the judiciary.

When the first edition of this book appeared in 1957, it was unique in Commonwealth literature on torts. The standard textbooks such as *Salmond and Winfield* had followed the conventional path of stating the law, for the most part by reference to a summary of the decided cases, and leaving it there. There was little attempt to examine those cases by reference to some conception of what the law of torts was about; what function in the regulation of society it was supposed to fulfil. Fleming changed all that. He initiated what eventually (because it takes a long time for judges to change their habits) became a dialogue between academia and the judiciary. He challenged the judiciary and made them examine and defend the policies which underlay their decisions. The result has been not only a different style of text-book writing but also a different style of judgment-writing, in which judges are more open about the real reasons for their decisions and less inclined to think that the authority of their priesthood requires concealment of the inner mysteries of the craft.

The result was that Fleming's work became very influential in Commonwealth courts. Confining myself to England, I would particularly mention the decision of the House of Lords in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, which was founded upon Fleming's view of the policies underlying the doctrine of vicarious liability and has resulted in a striking extension of the liability of institutions for children and young persons for child abuse committed by persons employed there. Of course the respect with which his views have been received in the House of Lords has not always led to their acceptance and in *Hunter v Canary Wharf Ltd*, which I have already mentioned, his opinions on locus standi to sue in nuisance received only the antipodean support of Lord

Cooke of Thorndon: see also *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 305. But that is what a dialogue means.

Legal textbooks, however distinguished, become neglected if they are not kept up to date. Fortunately the vigour of the school of tort law which Fleming founded at the Australian National University is undiminished. The editors of this edition have ensured that the work will continue to influence the development of the law.

January 2011

Preface

We are privileged to be editors of the new and tenth edition of John Fleming's *The Law of Torts*. It is a special privilege as Fleming's book exemplifies the true common lawyer distilling the wisdom from around the common law world particularly the US, Canada, Australia, New Zealand and the UK. Our selection of authors from these jurisdictions seeks to emulate John Fleming's mastery of torts law in its many domains. It is notable that all editions except the first edition (1957) were written outside Australia. In this new edition, we sought to have authors who like John Fleming bring to the book expert knowledge, distilled wisdom and the broader perspectives of torts law.

The enormous influence of Fleming's book can be gleaned from judgments around the common law world. But he was not adverse to maintaining his views in the face of judicial reluctance. For example, Fleming staunchly refused to concede that Australian and UK courts had not followed his preferred approach in relation to breach of statutory duty. In this edition we have conceded the point for him, but retain in the text the powerful arguments that led to his position. The editors and the authors have sought to maintain Fleming's voice throughout the new edition. Nevertheless, where the law has set a different course, this has been reflected in the author's contributions. We assume that as things changed, Fleming would have too.

We are honoured by Lord Hoffmann and Chief Justice French writing Forewords to the new edition. These reflect the inspiration that John Fleming's book brought not only in Australia but in the common law world more generally.

We owe a debt of gratitude to Robert Wilson, our publishing manager, whose enthusiasm never waned despite a very long timeline, and to Lara Weeks, our very fine editor, whose patience and understanding were unwavering. We also would like to thank those whose background presence in our lives makes life not only tolerable but often delightful: Razeen for Carolyn; Olivia, Josh, Lachlan and William for Prue.

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PRUE VINES

March 2011

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Abbreviations and Select Bibliography

ACTR	Australian Capital Territory Reports
ALJ	Australian Law Journal
ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
ALR 2d	American Law Reports Annotated, Second Series
Annual L Rev	Annual Law Review of the University of Western Australia
Arg LR	Argus Law Reports
Atiyah, <i>Accidents</i>	Accidents, Compensation and the Law (ed, Cane, 7th ed, 2006)
Atiyah, <i>Vicarious Liability</i>	Vicarious Liability in the Law of Torts (1967)
ATR	Australian Torts Reports
<i>Bohlen, Studies</i>	Studies in the Law of Torts (1926)
CCLT	Canadian Cases on the Law of Torts
CLR	Commonwealth Law Reports
<i>Cane</i>	Tort Law and Economic Interests (2nd ed, 1996)
<i>Clerk & Lindsell</i>	Law of Torts (19th ed, 2007)
<i>Cooper Stephenson</i>	Personal Injury Damages in Canada (2nd ed, 1996)
DLR	Dominion Law Reports (Canada)
<i>Feldthusen</i>	<i>Economic Negligence</i> (5th ed, 2008)

<i>Fifoot</i>	History and Sources of the Common Law (1949)
FLR	Federal Law Reports (Australia)
FRD	Federal Rules Decisions (USA)
<i>Gatley</i>	Gatley on Libel and Slander (8th ed, 1981)
<i>Goff & Jones</i>	Law of Restitution (3rd ed, 1986)
Goodhart, <i>Essays</i>	Essays in Jurisprudence and the Common Law (1931)
<i>Harper, James & Gray</i>	Law of Torts (2nd ed, 1986)
<i>Hart & Honoré, Causation</i>	Causation in the Law (2nd ed, 1985)
<i>Holdsworth</i>	History of English Law (14 vols)
Int Encycl Comp L	International Encyclopedia of Comparative Law (1971-)
Ipp Report	Australia, Law of Negligence Review Panel, Review of the Law of Negligence Final Report (Sep 2002) (Chairperson Ipp J)
KIR	Knight's Industrial Reports
Klar	Tort Law (4th ed, 2008)
Knox	Reports of the Supreme Court of New South Wales (1877)
LGRA	Local Government Reports of Australia
LC	Law Commission (Eng)
Legge	Reports of Supreme Court of New South Wales (1825-1862)
<i>Linden</i>	Canadian Tort Law with Supplement (Linden & Felthusen, 8th ed, 2006)
<i>Luntz</i>	<i>Assessment of Damages for Personal Injury and Death: General Principles</i> (4th ed, 2002)
<i>McGregor</i>	McGregor on Damages (18th ed, 2010)

<i>Markesinis</i>	German law (3rd ed, 1994)
<i>Markesinis & Deakin</i>	Tort Law (6th ed, 2007)
Morris, <i>Torts</i>	Morris on Torts (2nd ed, 1980)
NSW	New South Wales
NZLJ	New Zealand Law Journal
NZLR	New Zealand Law Reports
North, <i>Animals</i>	Modern Law of Animals (1972)
North, <i>Occupiers Liability</i>	Occupiers' Liability (1971)
<i>Pearson</i>	Royal Commission on Civil Liability and Compensation for Personal Injury (1978)
<i>Pollock</i>	Law of Torts (15th ed, 1952 by PA Landon)
<i>Prosser & Keeton</i>	Handbook of the Law of Torts (5th ed, 1984)
Qld	Queensland
Qd R	Queensland Reports
QSR	State Reports, Queensland
QWN	Queensland Weekly Notes
Res Jud	Res Judicatae, Journal of Law Students' Society of Victoria
Rest 2d	Restatement of the Law of Torts, Second (ALI, 1965-1979)
Rest 3d	Restatement of the Law of Torts, Third
RPC	Reports of Patent Cases
SASR	South Australian State Reports
S Afr LR	South African Law Reports
SC	Session Cases (Scotland)
SCR	Supreme Court Reports, Canada

SCR (NSW)	Supreme Court Reports (New South Wales)
SR (NSW)	State Reports (New South Wales)
<i>Salmond & Heuston</i>	Law of Torts (21st ed, 1996)
SLT	Scots Law Times
<i>Stone, Province and Function</i>	Province and Function of Law (1946)
<i>Street, Damages</i>	Principles of the Law of Damages (1962)
TLJ	Torts Law Journal
TLR	Tort Law Review
Tas SR	Tasmanian State Reports
<i>Todd</i>	The Law of Torts in New Zealand (5th ed, 2009)
<i>Treitel</i>	Law of Contract (12th ed, 2007)
<i>Trindade & Cane</i>	Law of Torts in Australia (4th ed, 2007)
Vic	Victoria
VLR	Victorian Law Reports
VR	Victorian Reports (1957-)
WA	Western Australia
WALR	Western Australia Law Reports
WN	Weekly Notes (England)
WN (NSW)	Weekly Notes (New South Wales)
WW & a'B	Wyatt, Web and a'Beckett (Victorian Reports, 1864-1869)
WWR	Western Weekly Reports (Canada)
Waddams	The Law of Damages (2005)
<i>Weir</i>	A Casebook on Tort (10th ed, 2004)
<i>Williams, Animals</i>	Liability of Animals (1939)

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