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THE NEW LAW OF TORTS

SECOND EDITION

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PREFACE

'...in the present age, the doctrines of the common law evolve in the orbit of statute.'[1]

In the first ('Early Forms of Liability') of his brilliant Lectures on the Common Law, Oliver Wendell Holmes explained that in presenting a general view of the common law, apart from logic, which is needed 'to show that the consistency of a system requires a particular result', the 'life of the law ... has been experience' in the sense of:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

Justice Holmes' description of the dynamics of the law and legal reasoning are particularly pertinent to the modern law of torts, where several general principles developed by the common law have been refashioned by reform legislation in ways that both build on and depart from the past. During 2002–03, each Australian jurisdiction, apart from the Northern Territory, enacted legislation, referred to as the Torts Reforms, which codified large parts of the law of damages, the substantive elements of the law of negligence, the law of defamation and other important aspects of torts' jurisprudence. This book presents the post-Torts Reform landscape of the law of torts. It provides a detailed comparative analysis of the reform legislation in each Australian jurisdiction, pointing out similarities and differences between the common law and the new legislative tort regimes in various Australian jurisdictions. The book examines the law in the light of both statutory provisions as written, and general principles as articulated by the High Court (and, where appropriate, the intermediate courts) on the basis of the spirit and the words of the reform legislation. It seemed at one stage (between 2007 and 2009) that the reform legislation would be either ignored altogether or given a perfunctory nod and then construed to fit smoothly with the old patterns and approaches.

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1 *Raftland Pty Ltd v Federal Commissioner of Taxation* [2008] HCA 21, per Kirby J at [159]. His Honour referred to *Roads and Traffic Authority v Royal* [2008] HCA 19 at [93].

Then on 10 November 2009, the High Court of Australia handed down the case of *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48, in which their Honours signalled the start of systematic interpretation and construction of the reform provisions, a process which has already resulted in major re-expression of the fundamental tests for establishing the breach of duty of care and causation under the law of negligence. In addition, the High Court has made it clear that the failure to apply (as against mere acknowledgment of) the relevant statutory provisions, where the facts giving rise to litigation occurred after the enactment of torts law legislation, will be considered an appealable error of law.

The relatively recent determination by the High Court and some appellate courts to closely examine and construe statutory provisions as an expression of modern principles of Torts law has meant that several major chapters had to be re-written in a comparatively short time. Given this time constraint, this was a difficult but intellectually stimulating task.

This book is intended to convey an appreciation of the modern law of torts in the context of its historical development. The underlying theme that runs through the book is the question whether foundational principles and policies of torts law reflect the social and moral values of modern Australian society. Ulpian (193–235CE), the great Roman jurist said (D.1.1.10.1), that 'the main principles which a just [legal] system should seek to implement, [is] in particular the duty not to harm others and the duty to render each his due'. Is the law of torts just? This question is left for you, the reader, to answer.

Overview of the book

From its beginnings, the common law of torts was characterised by conceptual flexibility that has enabled it to continually transform itself, expand and re-define its purposes. Over many centuries the fundamental concepts of fault and compensation have been adapted to suit and reflect the values and expectations of society as it evolved from agrarian feudalism based on a system of land tenures and villeinage (serfdom) to the modern post-industrial polity based on universal franchise and espousing such notions as virtual property. For, as David Mendelson aptly put it, 'law, at its very essence, consists of words articulated into precepts which a society agrees to enforce'. [2]

The law of torts can be discussed from many perspectives, including history, philosophy, economics, sociology, politics, feminism, comparative law, minority and Aboriginal studies, and so forth. My approach is essentially chronological. The book does not aim to provide a comprehensive historical analysis of the law of torts. Rather, it locates the post-reform law in its chronological context by tracing sequentially the evolution of the most important areas of torts law, discussing the history of each tort, and where appropriate, its elements. The main focus is on common law torts; however statutory torts such as breach of statutory duty are included.

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2 David Mendelson LLB (Melb), BE(Hons) Melb., Grad CertAero Eng (RMIT), private communication, 20 April 2010.

As noted above, the characteristic of the common law of torts is its dynamism. It builds, not necessarily in a systematic manner, on the already existing body of laws, both legislative and judge-made. The recent history of the law of torts may give an impression of its jurisprudence being out of control – prone to sudden changes and shifts. Chronology provides an intellectual framework for ascertaining the development of doctrines and principles that explains why certain causes of action have particular elements, requirements and limitations.

The book is divided into four parts. Part I begins with a brief explanation of the nature and history of the law of torts, followed by an analysis of the law of damages, in particular, the nature of compensation, and methods of obtaining redress for civil wrongs. The law of damages is discussed at the outset because the notion of compensation is fundamental to the theory and practice of torts law.

Part II concentrates on the generic tort of trespass, one of the earliest writs issued by the Chancery, and its species. Some tortious causes of action tend to form distinct conceptual clusters—for example, trespass to goods, detinue and conversion. The genus of the action on the Case is initially explored through examination of various intentional torts on the Case (intentional infliction of physical injury or nervous shock, malicious prosecution, abuse of process, misfeasance in public office, deceit, injurious falsehood and so forth).

Part III focuses on the most prominent species of action on the Case—negligence. The elements of negligence (duty of care, breach of duty of care, causation, remoteness of damage) as well as defences to negligence and special categories of case (omissions, pure mental harm, pure economic loss) are examined in depth.

Part IV presents an analysis of the tort of nuisance, which though of ancient provenance, has been substantially modified in the nineteenth century and the relatively modern cause of action for breach of statutory duty and the tort of defamation, which has been codified only recently. The final chapter is devoted to a critical consideration of the strict liability regimes: vicarious liability and non-delegable duty of care, as well as solidary and proportionate liability.

The book analyses seminal cases determined by the High Court of Australia and, where relevant, the House of Lords. However, several interesting appellate cases from intermediate courts are also discussed in some detail. For I agree with Kirby J who observed in *Woolcock St Investments v CDG Pty Ltd* (2004) 216 CLR 515 (at [123]) that:

> the one lesson that has emerged from recent Australian cases about the law of negligence is that the facts and the evidence, taken as a whole, are critical for the resolution of the issues presented by the tort. It is out of the detail of the facts that the 'salient features' and pertinent factors will emerge that help the decision-maker to decide whether a duty of care exists, whether it has been breached and, if so, whether that breach caused the plaintiff's damage.

One could add that Kirby J's comments are equally applicable to all torts, and that the importance of facts is two-fold: they are critical to the process of judicial decision-making, while reminding us that the law is not an abstract science, it is about people. The facts of each case recount a story, which has invariably blighted the life of the plaintiff, and often that of the defendant.

I am grateful to Sharon Erbacher for contributing the important chapters on defamation, deceit and injurious falsehood. My thanks also to Katie Ridsdale, the publishing editor, who provided amiable and tactful support, and to Tim Campbell, the project editor, who guided the book to completion.

The friendship, consideration and wonderful counsel of my husband, George Mendelson, have been invaluable. Hannah, David and Anne were marvellous in helping me to crystallise and develop some nascent ideas and insights. I am indebted to my colleagues, the many torts scholars and members of the judiciary whose writings have helped me to appreciate and hopefully, elucidate the breath, depth and intricacy of the modern Australian torts law.

Both writing and updating-cum-re-writing this book was a fascinating voyage of intellectual discovery for me, and I hope that you, the reader, shall find it equally interesting.

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