TORTS IN THE NINETIES, Nicholas J. Mullany, ed. (Sydney: LBC Information Services, 1997)

Torts in the Nineties[1] is a collection of eleven essays by preeminent authors from Australia, Canada, England, New Zealand and the United States. In my opinion, it is an excellent book which has the ability to appeal either in its entirety to readers interested in tort law or on a single essay basis to one researching a particular aspect of tort law.

Some of the essays are comparative and canvass developments in a number of common law jurisdictions, while others are more jurisdiction-specific. The essays cover a range of topics and, as the title suggests, tell us about the law as it is in the nineties or discuss the manner in which some of the "old" intentional torts can be applied to provide a remedy for situations which dominate the nineties.

The book commences with an essay entitled "The Recovery and Calculation of Economic Loss"[2] by the Honourable Sir Anthony Mason AC KBE.[3] The author traces the evolution of recovery for pure economic loss over the past twenty-five years and contrasts the approaches to this issue in the United Kingdom, where the House of Lords has severely limited recovery for economic loss,[4] Canada where the Supreme Court of Canada has taken a more expansive view of recovery in this area,[5] Australia where the notion of proximity has dominated developments in this area,[6] New Zealand where the approach of the New Zealand Court of Appeal has been the widest in scope,[7] and the United States where a categorical approach continues to dominate, due largely to the fears of indeterminate liability enunciated by Cardozo J. in *Ultramares Corporation* v. *Touche*.[8] As a Canadian reading this essay, one is struck by the influence of the Supreme Court of Canada on the development of recovery for pure economic loss throughout the common law world.

This essay is followed by a study of the leading House of Lords judgments which have moulded the various tests for defining a duty of care in negligence law. In "Incremental Approaches to the Duty of Care,"[9] Professor Keith M. Stanton[10] presents

---

1 N.J. Mullany, ed., *Torts in the Nineties* (Sydney: LBC Information Services, 1997).

2 A. Mason, "The Recovery and Calculation of Economic Loss" in Mullany, *supra* note 1, 1.

3 Chief Justice of Australia 1987-1995.

4 See *D & F Estates Ltd.* v. *Church Commissioners for England*, [1989] A.C. 177; *Murphy* v. *Brentwood District Council*, [1991] A.C. 398; and *Spring* v. *Guardian Assurance PLC*, [1995] 2 A.C. 296.

5 See *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; and *Winnipeg Condominium Corporation No. 36* v. *Bird Construction Co.*, [1995] 1 S.C.R. 85.

6 See *Caltex Oil (Aust.) Pty Ltd.* v. *The Dredge "Willemstad"* (1984) 155 C.L.R. 72; *San Sebastian Pty Ltd.* v. *Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 C.L.R. 340; and *Sutherland Shire Council* v. *Heyman* (1985) 157 C.L.R. 424.

7 See *South Pacific Manufacturing Co. Ltd.* v. *New Zealand Security Consultants and Investigations Ltd.* [1992] 2 N.Z.L.R. 282 (C.A.); and *Invercargill City Council* v. *Hamlin* [1994] 3 N.Z.L.R. 513 (C.A.).

8 174 NE 441 (N.Y. 1931).

9 K.M. Stanton, "Incremental Approaches to the Duty of Care" in Mullany, *supra* note 1, 34.

a superb analysis of the House of Lords' rejection of the *Anns* test[11] and the incremental approach now used in England, but not necessarily followed in the other common law jurisdictions.

The third essay completing a type of "trilogy" on the economic loss topic is "Preventive Damages"[12] by the late John G. Fleming.[13] Professor Fleming analyzes two situations in which an award of damages can serve as prevention rather than compensation for harm: damages for the cost of repairing dangerous defects and damages for the cost of monitoring the health of victims of toxic exposure. He makes a compelling case for the award of both types of damage and is critical of the House of Lords' narrow approach to these issues.

A second theme in the book is the analysis of intentional torts and their application to current situations. In "The Modern Tort of False Imprisonment,"[14] Francis A. Trindade[15] traces the development of the tort of false imprisonment and demonstrates how courts are willing to be flexible in the application of this tort to new situations. This is particularly true with respect to the requirement of "directness" necessary to establish any of the torts which descended from the old action in trespass. This essay is followed by a thorough discussion of the Canadian experience with sexual battery litigation. Professor Bruce Feldthusen[16] presents a detailed discussion of Canadian cases and contrasts this with the relatively few cases from the other Commonwealth jurisdictions. "The Canadian Experiment with the Civil Action for Sexual Battery"[17] is an important source for any lawyer doing research in this area.

In "Protection of Privacy,"[18] Stephen Todd[19] tackles the difficult issue of the courts' general reluctance to create a specific tort which protects privacy, while also giving the reader some very thoughtful approaches as to how privacy might be protected by recognized causes of action in tort. This essay, written largely from the perspective of the law in New Zealand, demonstrates how some jurisdictions are prepared to recognize a right of privacy where a defendant discloses either private facts about the plaintiff, or facts which were once public, but occurred many years ago (for example, a previous criminal conviction). The essay also discusses a cause of action for breach of confidence, commencing with the seminal case of *Duchess of Argyll* v. *Duke of Argyll*.[20] Under the heading, "Intrusions Upon Solitude,"[21] the author analyzes the

---

10 University of Bristol.

11 *Anns* v. *Merton London Borough Council*, [1978] A.C. 728.

12 J.G. Fleming, "Preventive Damages" in Mullany, *supra* note 1, 56.

13 Shannon Cecil Turner Emeritus Professor of Law, University of California, Berkeley.

14 F.A. Trindade, "The Modern Tort of False Imprisonment" in Mullany, *supra* note 1, 229.

15 Sir Owen Dixon Professor of Law, Monash University.

16 University of Western Ontario.

17 B. Feldthusen, "The Canadian Experiment with the Civil Action for Sexual Battery" in Mullany, *supra* note 1, 274.

18 S. Todd, "Protection of Privacy" in Mullany, *supra* note 1, 174.

19 Professor of Law, University of Canterbury.

20 [1967] Ch. 302.

21 *Supra* note 18 at 196.

notions of trespass, nuisance, harassment and intentional infliction of emotional suffering as possible means of protecting one's privacy.

Professor Nicholas Mullany, well-known for his work in the areas of nervous shock and emotional distress, is the author of a lengthy and meticulously researched essay on the future of the law of tort in this difficult area. In "Fear for the Future: Liability for Infliction of Psychiatric Disorder"[22] the author focuses on the Australian and the American experiences in addressing claims which fall outside of the traditional nervous shock domain. The most notorious situations are the so-called "AIDSphobia" cases,[23] where due to contact with a needle or due to a false positive HIV reading in the course of a blood test, the plaintiff suffers serious emotional distress caused by the belief that he or she will contract AIDS. Mullany's thorough research into the Australian and American experiences with these claims concludes with an analysis of when such claims ought to be allowed and what tests a court should apply when assessing these cases. This essay is a must for anyone doing research in this area. The footnotes alone are a goldmine.

One of the more thoughtful essays in the book is the contribution of the Honourable Justice Dennis Mahoney.[24] In "Defamation Law — A Time to Rethink"[25] Mahoney J.A. reflects upon the law of defamation from his experience as a judge of over twenty-five years in what he describes as the "defamation capital of Australia."[26] The author believes that a law regulating the harm that words can do is necessary in a modern democratic society. However, in his view the existing law of defamation is defective in at least two important ways: in the principles adopted to control what words may do and the procedures used in defamation cases to apply those principles.[27] The law of defamation, while giving effect to the right of free speech, must control that speech when it causes hurt to an individual. Mahoney J.A. forcefully makes the case that the development of mass media and the use of words as a means of exercising power have rendered some of the aspects of the law of defamation inadequate. For example, the defence of "fair comment on a matter of public interest"[28] should be narrowed to require that the public interest ought to expose a public mischief or the abuse of public power. The author is also critical of the law of damages where the principles for assessing quantum are very uncertain. While the essay is written from the perspective of Australian law, much can be applied in the context of the law of defamation in Canada.

---

22 N.J. Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder" in Mullany, *supra* note 1, 101.

23 *Ibid.* at 128.

24 President of the New South Wales Court of Appeal.

25 D. Mahoney, "Defamation Law — A Time to Rethink" in Mullany, *supra* note 1, 261.

26 *Ibid.* at 261.

27 *Ibid.* at 262.

28 *Ibid.* at 268.

From a practical perspective, one of the more interesting chapters in this book is "Heart Valves, Class Actions and Remedies: Lessons for Australia?"[29] by Harold Luntz.[30] In response to a "scare" in Australia due to legislative reforms addressing mass tort claims, the author examined an American case involving Shiley Inc., a California company which introduced a tilting disc heart valve for use in surgery to replace the human heart valve with an artificial valve.[31] These valves ultimately developed strut fractures. Numerous types of lawsuits loomed, including manufacturers' liability and actions by shareholders of the corporation for suppressing information. Lutz's essay traces the progress of these claims and their ultimate settlement.

Another practical essay is the contribution of the Honourable Justice Robert S. French.[32] In "Statutory Modelling of Torts"[33] the author explores the relationship between the common law and the statute law of torts. He argues that a body of "statutory principles of tort are conducive to a more ordered, rational and legitimate basis for judicial law-making in the contemporary age than the common law of torts can offer."[34] By using the analogy of the Australian experience with the *Trade Practices Act* 1974 (Cth), the author presents a persuasive case for a statute-based tort system.

In the final essay, "Judicial Independence of a Different Kind"[35] Gerald H.L. Fridman[36] analyzes developments in the law where the courts of Canada and Australia have strayed from "the mother," England, and judicial developments where "the children" have led the way. Using examples from the areas of economic loss, liability of public authorities, statutory negligence, consent to medical treatment, the illegal plaintiff, conspiracy, defamation and strict liability, Fridman contrasts the law in the various jurisdictions. It is a thoughtful and fitting conclusion to the book.

In conclusion, I very much enjoyed this collection and I highly recommend it. As so aptly stated in the forward by The Honourable Sir Gerard Brennan AC KBE:[37]

> This is not a student's textbook, nor a casebook extracting passages from a judgment for use as stand-alone propositions. It is a book for the lawyer who is concerned to understand where the law is at in its development, the interests it is designed to serve and what are the concepts which are guiding that

---

29 H. Luntz, "Heart Valves, Class Actions and Remedies: Lessons for Australia?" in Mullany, *supra* note 1, 72.

30 George Paton Professor of Law, University of Melbourne.

31 *Supra* note 29 at 80.

32 President, National Native Title Tribunal, Australia.

33 R.S. French, "Statutory Modelling of Torts" in Mullany, *supra* note 1, 211.

34 *Ibid.* at 227.

35 G.H.L. Fridman, "Judicial Independence of a Different Kind" in Mullany, *supra* note 1, 305.

36 Q.C., FRSC, Emeritus Professor of Law, University of Western Ontario.

37 Chief Justice of Australia.

development. It is informative and provocative. Those are qualities which one would expect to be exhibited in writings by the experienced and reflective contributors.[38]

Patricia A. Rowbotham, Q.C.
Associate Professor
Faculty of Law
University of Calgary

[38]G. Brennan, "Foreword" in Mullany, *supra* note 1, v at vi.