REVIEW ARTICLE*

Torts Tomorrow: A Tribute To John Fleming, by N MULLANY and A LINDEN (eds) (Australia: LBC Information Services, 1998) pp xxxiii + 355. Recommended retail price $137.50 (ISBN 0 455 21607 X).

This collection of essays is another splendid tribute to Professor John Fleming. His distinctive contribution to modern thinking on the law of torts is reviewed and celebrated in the opening chapter written by Justice Michael Kirby in his own inimitable style. In keeping with the Fleming tradition of comparativism, the essayists represent a variety of jurisdictions and, for the most part, bring to bear cross-jurisdictional perspectives.

The book is much more than a tribute to John Fleming. As he would have wished, the authors grapple with many of the central issues that beset the law of torts today, seeking in each instance to rescue the law from the "chaos" and "confusion" into which, in Sir Owen Dixon's judgment, it had fallen, no doubt in consequence of *Donoghue v Stevenson* [1932] AC 562. Nowhere is that chaos or confusion more apparent than in the tortious liability of public bodies and the recovery of economic loss.

Strangely enough, economic loss gets fairly short shrift in this book. According to Professor Klars, it should be "downsized", an approach which John Fleming himself would have vigorously opposed. Professor Klars considers that the law of torts should return to a more realistic notion of fault – a view which is gathering strong support – and leave to more efficient régimes loss distribution and social security in a welfare state.

Chief Justice McLachlin, writing with customary verve and clarity, looks at causation in negligence, noting that the 'but – for' test no longer holds exclusive sway. Her essay examines other tests which may play a part in resolving the increasing complex array of causative issues coming before the courts. So far we have not travelled far along this path of discovery.

Professor Todd makes a valiant attempt to bring order and clarity to the liability of public bodies, particularly by discussing misfeasance in a public office and the liability of public bodies for negligent omissions. His proposal that a duty to act can be founded on his five key elements is not far removed from the approach taken in *Crimmins v Stevedoring Industry Finance Committee* (1999) 167 ALR 1, though his insistence that the duty can be seen to arise

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specifically in relation to a known plaintiff rather than generally in relation to the public at large, may prove to be too restrictive.

As Professor Davis demonstrates, the way forward does not lead us to the action for breach of statutory duty. The general duty of care provides an adequate basis for relief. That said, we should still give thought to the circumstances in which an action for damages for breach of a statutory right can arise. That may become an important element in a statute based régime of fundamental rights.

Bryan v Maloney (1995) 182 CLR 609 is a decision which has excited controversy, certainly among builders and their supporters. Justice Brooking identifies a series of questions not resolved by *Bryan v Maloney* which call for resolution. They are:

(i) What amounts to a *latent* defect?

(ii) What constitutes a defect which is to be avoided by exercising reasonable care?

(iii) Is the duty recognised in *Bryan v Maloney* simply a prima facie duty which can be negatived, and does it depend for its existence on all the factors present in that case?

Justice Brooking asks whether the demise of proximity spells the end of *Bryan v Maloney*. That would seem to be an unlikely result. If the decision is to be sacrificed, the sacrifice would presumably be associated with substantive considerations. Justice Brooking concludes by suggesting that liability in this area should take account of legislative provisions.

Professor Stanton, no admirer of *Rylands v Fletcher*, does not lament its disappearance in Australia as a result of *Burnie Port Authority v General Jones* (1994) 179 CLR 520 and doubts that it has a useful future in England after *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264. Though against the erection of a general principle of liability for ultra-hazardous acts, he considers that we should endeavour to evolve a coherent basis for imposing strict liability where that may be appropriate.

Professor Burrows' essay on reform of joint and several liability is an illuminating account of the pros and cons of proportionate liability and views favourably the possibility of professional defendants limiting their liability by contractual and non-contractual disclaimers and the impact upon them of the *Unfair Contract Terms Act* 1977 (UK). The author welcomes the apparent demise of joint liability and urges English courts to follow *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

New directions in product liability engages the attention of Professor Waddams who advocates the adoption in Canada of a non-contractual principle of strict liability. Such a reform would bring Canada into line with other jurisdictions and remove anomalous distinctions.

Although Professor Martin Davies arrives at the "rather trite" conclusion that there are no compelling reasons for saying that all consumers injured by the same products in different parts of the world should be entitled to compensation on the same basis, his comprehensive discussion of product liability in international markets is fascinating. He is surely right in saying that if anything

needs reform, it is conflict of laws rules governing jurisdiction and choice of law.

Justice Englard tackles the problem of informed consent, noting the tendency of the law to become pre-occupied with violation of the patient's autonomy and to use that violation as a vehicle for awarding compensation for non-negligent medical accident. The suggested remedy is to reshape informed consent into a straightforward doctrine able to contribute to effective patient autonomy, leaving injuries resulting from medical treatment to be dealt with otherwise.

Nicholas Mullany reviews the developing law on negligently inflicted psychiatric injury, an area in which Australian courts have performed rather better than their English counterparts, and concentrates on the question whether means of communication of trauma should matter. Not surprisingly, the author returns a negative answer to this question.

Vicarious liability for sexual torts is, as far as I am concerned, an entirely new field of legal endeavour. Bruce Feldthusen tells us that actions in sexual battery and related actions in tort concerning sexual abuse have flourished in Canada. He notes that court decisions make it virtually impossible to impose vicarious liability unless the facts support independent liability based on the employer's fault or breach of fiduciary duty. The author deplores the conservatism of this approach and urges the courts to jettison the employer's fault restriction. The author's views have been substantially vindicated by the recent judgment of the Supreme Court of Canada in *Bazley v Curry* (1999) 2 SCR 534, cf *Jacobi v Griffiths* (1999) 2 SCR 570. In *Bazley*, McLachlin J referred (at 552) approvingly to Fleming's discussion of the policies underlying vicarious liability.

It is astonishing that our lawmakers alone are incapable of appreciating the compelling necessity of enacting a uniform law of defamation in Australia.

Michael Tilbury suggests that any further review of defamation law should be by a national body set up by the Standing Committee of Attorneys-General. He also undertakes an instructive comparative evaluation of *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, noting that the "crucial difference is a methodological one". His discussion of the two decisions reveals that other differences are doctrinal rather than substantive or policy driven.

The evolution of new torts leads Gerald Fridman naturally to harassment, discrimination and interference by unlawful means with the trade or business of another, where the evolution of new torts is taking place. On the other hand, *Northern Territory v Mengel* (1995) 185 CLR 307 has circumscribed liability for intentionally inflicted harm and there are few signs of tortious action in relation to breach of fiduciary duty and good faith. For my part, I would have welcomed a more extended discussion of privacy.

The cost and inefficiency of our tort-based compensation system invites the reader's attention to Stephen Sugarman's essay on "Personal Injury and Social Policy – Institutional and Ideological Alternatives" in which other possible régimes are discussed. He agrees, rightly in my view, with Fleming's prediction that the law of tort will yield ground to accident compensation.

Justice Linden in his concluding essay "Torts Tomorrow – Empowering the Injured" proposes the future mission of tort law as empowering the injured in various respects, a novel and interesting perspective.

It will be apparent from what I have written that the authors offer a variety of perspectives on current issues in tort law.