BOOK REVIEWS

Accidents, Compensation and the Law, by P. S. ATIYAH, B.C.L., M.A.; Professor of Law in the Australian National University, (Weidenfeld and Nicholson, London, 1970), pp. i-xxviii, 1-633. Australian Price $8.15.

The skids are under the traditional Torts course, and so they ought to be. Anyone who has attempted to teach to a reasonably orthodox syllabus must recognize that the task is unmanageable.

To begin with, the course is too large, and it is never possible to cover it comprehensively—not, at all events, in the usual two formal class hours per week, or even, in my experience, when additional time is made available. I here confess that I have never taught defamation or nuisance satisfactorily, and more often than not I have been forced to omit them altogether. The economic torts have yet to see the light of day in my courses, and some years ago I bade a regretful farewell to *Rylands v. Fletcher* and dear old 'liability for animals'. Fun though they may be for teacher and students alike, there are other matters of more central importance which demand attention in their stead.

The task is unmanageable for an additional reason. What we call 'the Law of Torts' is not a coherent whole. It is not doctrinally unified. It serves no single social purpose. The patterns of liability and the interests protected are various and their inter-connections for the most part slight. From the practical point of view, that may not matter very much, but this characteristic of the subject certainly bedevils the teaching of it. For it is not really a 'subject' at all, in the sense of a single body of knowledge capable of systematic examination and exposition, but rather a series of subjects, loosely and uneasily held together by no very obvious or compelling bond, so that the task of shaping a year's course of any intellectual elegance and power is virtually impossible.

What is the bond which holds these subjects together? Dare I suggest that it is now little more than academic piety, a touching deference to the views of the great nineteenth century systematizers? 'The old-fashioned English lawyer's idea of a satisfactory body of law', wrote Thomas Erskine Holland in 1869, 'was a chaos with a full index'.[1] To that generation, such a state of affairs was a scandal. Classification, categorisation, codification, were the marks of scientific progress, and the law must be made to conform.[2] Hence in 1887 Sir Frederick Pollock invented the Law of Torts,[3] and we have been living in his shadow ever since.

However, another great common lawyer of that era had an insight which today we might find more appealing. Exactly one hundred years ago, Oliver Wendell Holmes Jr wrote a brief review of the American edition of an English treatise on Torts by C. G. Addison,[4] an edition prepared for use in Harvard Law School, at which Torts was first offered as a separate subject in 1870. 'We are inclined to think', wrote Holmes, 'that Torts is not a proper subject for a law book'; he went on to argue that the cohesion of various wrongs suggested by such a book as that under review was artificial, and that the natural legal relationships of wrongs and remedies were quite otherwise.[5]

[1] *Essays upon the Form of the Law* (1870) 171. Holland was professor of international law at Oxford from 1874 until 1910.

[2] Holland argued vigorously along these lines in the work quoted.

[3] '[T]he purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts—that it is a true living branch of the Common Law, not a collection of heterogeneous instances.' Pollock, *The Law of Torts* (1887) preface.

[4] Addison, *Wrongs and Their Remedies, being a Treatise on the Law of Torts* (1860). This was the first English text of any consequence, but it contained little discussion of principle.

[5] (1871) *American Law Review* 340. Reprinted in Shriver (ed.), *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* (1936) 44-5.

For the purposes of law teaching at all events (and that was the context in which Holmes was writing), the time has come to acknowledge that this view was the better one, and to re-shape our law school syllabuses accordingly. The hopeless and unwieldy Torts course we have suffered so long must go.

Brave words, but how realistic? They would not have been realistic at all a few years ago, because the books did not exist to service a different kind of examination of tortious liability. With the publication of Professor Atiyah's notable work, however, the possibility is brought a great deal nearer.

Professor Atiyah believes, as I do, in the necessity of redesigning the Torts course, and his own suggestions for doing so may be found on pages xvii and xviii of his preface. I find them very attractive. He argues that the economic torts should be dealt with as a part of labour law and trade competition law; that nuisance and *Rylands v. Fletcher* might be accommodated in a modernized land law course; that defamation and other torts such as false imprisonment ought to be part of a course in civil liberties or a re-modelled constitutional law course; that certain problems arising out of intentional conduct, such as the defence of consent, should be taught in the criminal law course; that conversion and detinue should be studied as part of the law of personal property.

Although Professor Atiyah is too modest to propose it in so many words, his own text could then form the basis for a splendid course on its own (if supplemented by more case material). The book 'attempts a comprehensive survey of all aspects of the problem of compensation for accidents' (xiv). Inevitably, then, it deals at length (although not exclusively) with the law of negligence, which in practice already dominates the conventional Torts course. However Professor Atiyah's treatment of his subject goes beyond the usual bounds.

> First it deals with many aspects of the tort system which are not normally treated as a part of the law of torts at all, and are therefore not included in books or syllabuses on the law of torts. In particular this book attempts to deal with the way in which the law of torts operates in practice, by paying full regard to the relationship between the law of torts and the institution of liability insurance, and also by examining the role of settlements as well as litigation in the compensation process. Secondly, this book is wider than the traditional torts book in that it deals with the many ways in which people may be compensated for accidents otherwise than through the law of torts; it deals with private insurance, with the criminal injuries compensation scheme, and with the social security benefits of the welfare state, and it also touches on the more personal social services which were recently the subject of the Seebohm Report. And thirdly, this book is wider than the traditional torts book in that it is as much a book *about* the law as a book detailing the law. It attempts, in other words, not merely to expound the ways in which people may be compensated under the law, but also to provide a serious attempt to study and evaluate the policies which underlie the different compensation systems operating today. (p. xiii)

Professor Atiyah has written a substantial work (620 pages of text) which will be of immediate value to all law teachers and students, no matter what their course structures may be. It has not been my intention in this review, however, to examine the detail of its contents but rather to concentrate upon the book's long-term significance for the development of more adequate, realistic and stimulating university courses in law. From this point of view, the appearance of the work is a landmark of the first importance.

I can see only one major drawback: the book is English, and much of its reference is local. However, Professor Atiyah now holds a Chair of Law at the Australian National University, so it may be reasonable to hope that he will, in due course, produce the material to adapt his book to the Australian scene.

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Precedent in the Southern Hemisphere, by THE RT HON. SIR GARFIELD BARWICK, (Magnes Press, The Hebrew University, Jerusalem, distributed in the British Commonwealth by the Oxford University Press, 1970), pp. 1-45.

In the *University of Chicago Law Review,* Professor Kurland[1] commented on the increasing readiness of distinguished American Judges to discuss in the public forum important aspects of legal controversies. He cited Mr Justice Black who observed that '[i]n a country like ours, where the people have a voice in their government, public lectures about the Constitution and government can doubtless stimulate, and even help to clarify, discussion of vital constitutional issues that face our society'.[2]

The address (originally given by Sir Garfield Barwick in Jerusalem, now happily reprinted in a separate booklet) on the attitudes towards judicial precedent of appellate courts in Australia and New Zealand, is not primarily devoted to matters of the Constitution and government. However, its subject is directly relevant to lawyers. It is stimulating that the Chief Justice should have set forth his own explanation of the changed views of these courts—both to their own precedents, and to the decisions of the House of Lords and the English Court of Appeal. His Honour joins a select and eminent, though limited, group of Australian judges (including Sir Owen Dixon, Sir Isaac Isaacs, Sir Victor Windeyer and Sir Douglas Menzies) who have given, in lectures and writings, valuable insights into the basic principles the High Court applies to certain trends in curial thinking.

Because he was speaking to an audience unfamiliar with Australian legal history, Sir Garfield Barwick traced elaborately the course of decisions that culminated in such cases as *Skelton v. Collins,*[3] *Uren v. Fairfax,*[4] *M.L.C. v. Evatt,*[5] and that led to the acceptance of the general proposition by the Privy Council itself that uniformity is not an overriding necessity. The highest courts now all agree that sufficient *unity* can be preserved in the common law world by a common adherence to principles while allowing for diversity in application. 'Cohesion' and 'independence' do not necessarily conflict.

In the last decade the Australian courts have moved a long way towards 'self expression'. One naturally is now led to seek the criteria they may employ in future in exercising this freedom. The reasons for diversity given so far by the judges have been the obvious ones: where a previous court has manifestly erred, where social conditions are divergent, where there has been established a peculiarly Australian tradition (for example, 'unreasonableness' of subordinate legislation as not being a separate ground of invalidity) or where a matter arises involving interpretation of the Commonwealth Constitution. Yet other criteria may interfere: only recently (in the *Geelong Harbour Trust* case[6]) the High Court (by a majority) confirmed an early decision of its own, which it now disliked, rather than follow a later and very carefully considered opinion of the House of Lords—simply on the ground that the 'unsatisfactory' Australian decision was now settled law. Moreover, the decision of the Privy Council in the *Evatt* case, reversing the High Court's decision (on the pleadings) shows the inevitable differences as to the *applying* of principles laid down and accepted by all the judges in the High Court, the Privy Council and the House of Lords.[7] Of course, complications may arise if the Privy Council, on a particular matter on appeal, should happen to be constituted by the same persons who have already declared their own opinion in the House of Lords.

1 Kurland, 'Toward a Political Supreme Court' (1969) 3 *University of Chicago Law Review* 19.
2 Black, *A Constitutional Faith* (1968) xvi; cited in Kurland, *op. cit.* 36.
3 (1966) 115 C.L.R. 94.
4 (1966) 40 A.L.J.R. 124.
5 (1968) 42 A.L.J.R. 316.
6 *Geelong Harbour Trust Commissioners v. Gibbs, Bright and Co.* (1971) 45 A.L.J.R. 205.
7 *Hedley Byrne v. Heller* [1964] A.C. 465; *M.L.C. v. Evatt* (1968) 42 A.L.J.R. 316 (H.C.); *M.L.C. v. Evatt* [1971] 2 W.L.R. 23 (P.C.).