

Ethics and the Legal Profession

Ethics, Professional Responsibility and the Lawyer, Duncan Webb, Butterworths, Wellington 2000

At over 500 pages, *Ethics, Professional Responsibility and the Lawyer* by Duncan Webb, is a detailed analysis of some ethical aspects of the professional role of a lawyer. Intended for both law students and lawyers, the book does not seek to be comprehensive in terms of covering the entire field, but rather aims to be detailed in the author's chosen areas. Furthermore, it does not concentrate solely on 'what is' or 'what was' but also looks to the future development of the legal profession as a whole.

Structurally, the book is divided into five sections and contains an appendix of the 1998 New Zealand Law Society's *Rules of Professional Conduct for Barristers and Solicitors*. There is also a good index to the *Rules of Professional Conduct* and to the book itself, and the text is well cross-referenced to the *Rules of Professional Conduct* where appropriate.

The first section of the book, as its title *Theoretical Foundations* suggests, examines two main issues. The first is the role and place of the legal profession in society, which is essentially a sociological issue. Two schools of thought, the functionalist approach and the market approach, are compared. Against this, Webb gives a brief analysis of the changes that have taken place in the organisation of the legal profession and predicts some future happenings. The second issue addresses the perception of the role of individual lawyers. The discussion of these issues forms an excellent basis upon which the rules and ideas throughout the remainder of the book may be placed.

Part Two examines the origin and role of the law societies as well as the creation and enforcement of professional standards through the *Rules of Professional Conduct*. In looking at the function of a law society Webb endeavours to present both the 'pluses and minuses' of self-governance of lawyers. He also briefly suggests an alternative governing procedure. This is particularly relevant in light of possible changes in the structuring of the legal profession in the near future. The chapter on professional standards discusses the role of the *Rules of Professional Conduct* as a whole. It also discusses procedural issues, such as disciplinary options available to law societies, and consequences thereof should the rules be breached. As in the previous chapter, a brief critique of issues raised and suggestions of alternative approaches is provided.

The lawyer-client relationship is addressed in the third part of the book. This is the main focus of the book to which almost two fifths of the book are dedicated. It examines the duties of the lawyer to the client and considers issues such as the cab-rank rule, loyalty, confidentiality, competence and fees. Much attention is directed to confidentiality, both to current and former clients. In the discussion of confidentiality, issues are raised about when information *may* be disclosed and when information *must* be must be disclosed. There is a discussion of Chinese walls, with an examination of *Russell McVeagh v Tower Corporation* [1998] 3 NZLR 641. This case is then compared with the House of Lords decision *Prince Bolkiah v KPMG* [1999] 2 WLR 215. Following this is a discussion on the duty to disclose information to the client. In keeping with the pattern of previous sections there is a discussion of when information should be disclosed to clients, with particular reference made to the role of the Privacy Act 1993.

In the fourth section, the focus shifts from lawyers' relationships with their clients to lawyers as administrators of justice. Emphasis is placed on the public interest aspect of the lawyers' services and the inherent paradox of the adversarial system which requires that lawyers be loyal both to their clients as well as the administration of justice. This issue, however is not considered in as much detail as the issues in the preceding sections of the book. The first chapter in this section looks at a range of issues in general form, including the duty to honour the law and improving access to justice. By contrast, the second chapter of the fourth section examines the duties specifically in relation to litigation. It includes matters such as what lawyers should do if their clients confess to crimes or witnesses commit perjury.

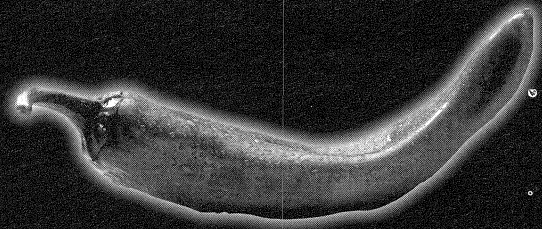
The final section of the book examines the duties on legal practitioners in the conduct of private practices and in collegial relationships. The discussion focuses on professional relationships between practitioners from other disciplines with specific consideration of multidisciplinary practices.

The book does not make for bedtime reading. It is noted that the role of the legal ethics courses in university "is not the same as instilling a system of rules or even values", but is rather one of encouraging students to engage with the issues discussed. Webb seems to be aiming to instil the rules (giving the book a rather didactic feel) and to provoke thoughtful consideration of the issues. While this is commendable approach, there is a risk of becoming overwhelmed in detail. Perhaps from the students' point of view, the whole subject may seem rather complex. It leaves this reviewer wondering how a lawyer is supposed to continually remember

and take into account all of the rules. Consequently, the author's aim of encouraging careful consideration of the issues raised is, to an extent, lost.

The book's strength lies, however, in the fact it is aimed at New Zealand law students and lawyers and hence has direct relevance. For students it may compel consideration of the role of the legal profession of which he or she is soon to become a part. While the book might have benefited from giving each part of it equal focus and attention, it does adequately connect all the issues raised. For example, discussion of the cab-rank rule is logically placed in the section on lawyer-client relationships. But it is also discussed later in the book under justice administration. Furthermore, the book does raise a number of very topical issues relating to the future structure of law societies and the possibility of allowing multidisciplinary practices. Given that these issues are increasing in significance and relevance in the profession, it is important to understand and be able to form views about them. From this point of view, the book is very successful and is recommended.

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Todd On Torts – The Revised Edition of this Essential Guide to the Principles of Tort Law in New Zealand

***The Law Of Torts In New Zealand*, edited by Todd (ed),
Brookers, Wellington, 3rd edition, 2001**

Todd on Torts, as this work is commonly referred to, is marketed as a comprehensive guide to the law of torts in New Zealand, and indeed provides an invaluable source of material for both law students and practitioners. The Third Edition of this volume is current as at 1 January 2001.

In the five years that have elapsed between publication of the second and third editions, the law of torts has advanced at a somewhat alarming pace, both in New Zealand and internationally.¹ The authors have substantially revised or rewritten many chapters to incorporate the numerous intervening decisions of the courts, together with the impact of several important statutes, and have by and large succeeded in cohesively and succinctly summarising the law in this area as it currently stands. Correspondingly, the book achieves one of its primary objectives: that of providing a comprehensive ‘first stop’ reference on the approach to tort law in New Zealand.

Notwithstanding their close examination of New Zealand decisions, the authors exhaustively analyse and critique the major developments in tort law in other common law jurisdictions. Inferences are drawn, where appropriate, as to the effect that overseas decisions may have on the direction of the law in New Zealand. This provides a useful foundation for academic and judicial debate, particularly in areas where the law in New Zealand is less well settled.

In reviewing the advances in tort law in postulated by the authors, the reader is left with two overwhelming impressions. Firstly, the focus of negligence litigation has extended well beyond product liability cases, and clearly into the realm of ‘assumption of responsibility’ for the task. Secondly, the interface between tort law and other disciplines is more complex and less clear at the margins.

Developments in the law of negligence, particularly the issue of whether a duty of care is owed in tort, have more recently been concerned with whether the defendant assumed responsibility for the task.

¹ The Second Edition of Todd on Torts was comprehensively reviewed in Volume 8, No. 2 of the Auckland University Law Review in 1997.

Depending on the nature of the relationship between the parties, reliance on the part of the plaintiff may or may not be an essential ingredient of the action. The authors have meticulously reviewed the wealth of case law in this area, and have carefully distilled and articulated the relevant principles of law. The thorough analysis of the approach to the determination of a duty of care in New Zealand, and the synthesis of the inquiry to a series of numbered bullet points, is an extremely useful practical aid to interpretation. However, at times the content is descriptive rather than explanatory, which, although necessary for a complete understanding, leaves the reader somewhat uncertain as to the doctrinal basis for the extended reach of the duty of care. In particular, the relationship between the modified two-stage *Anns* test adopted in New Zealand for establishing whether a duty of care exists in novel fact situations,² and the *Hedley Byrne* principle, which forms the basis for liability where responsibility for the task has been assumed by the defendant, are difficult to reconcile. Subsuming the *Hedley Byrne* principle into the first stage of the test as an element to be established is perhaps the only plausible explanation; certainly, extension by ‘analogy to decided cases’ appears to have no doctrinal basis whatsoever. Adding to this confusion, the authors rightly note that the courts’ application of the *Hedley Byrne* principle is generally confined to cases where the relationship between the parties may be categorised as an ‘almost contract’. Shades of consent appear to be muddying the ‘tortious’ waters: is this consistent with the imposition of liability for wrongful conduct?

These developments in the law of negligence require significant clarification if the law generally is to advance in a principled fashion. As the law consolidates in this area, it would be useful for the authors of future editions to examine the doctrinal basis for the *Hedley Byrne* principle, which has its roots in equity and fiduciary law, and to consider whether the current approach to the determination of a duty of care in New Zealand is sustainable in its present form.

The new edition of Todd on Torts comprehensively reviews the interfaces of tort with other areas of the law generally: in particular, the important developments in the areas of concurrent liability in contract and tort; the liability of statutory bodies in negligence for breaches of statutory powers; and the personal liability of directors acting on behalf of corporations.

New Zealand courts have vacillated on the issue of concurrent liability in contract and tort. The latest decision in *R M Turton & Co Ltd v Kerslake*

² The leading authority for this proposition is *South Pacific Mfg Co Ltd v NZ Security Consultants and Investigations Limited* [1992] 2 NZLR 282 (CA).

& *Partners*³ reinforces this impasse. The authors correctly identify that “[o]n the question of legal principle it is difficult to determine exactly what the case decides”.⁴ It is impossible to reconcile this judgment with the Supreme Court of Canada’s decision in *Edgeworth Construction Ltd v ND Lea & Assocs Ltd*,⁵ in which the Court reached the opposite conclusion on a sound and principled basis. Although the majority decision in *Turton* has undoubtedly unsettled the law in this area, the authors are firmly of the view that Thomas J (in the minority) was correct in his analysis that the existence of a duty of care in tort depends solely on whether the elements to *Hedley Byrne* are made out, and the general law should prevail unless it is negated by contract. The contractual matrix is merely an element – albeit an important one – in this analysis, and should not form the basis of the inquiry from which the duty of care devolves.

The tortious liability of public bodies is an area of increasing importance in New Zealand, particularly with the tendency in our deregulated environment for legislators to confer wide discretionary powers on administrative decision makers. The authors have substantially revised the section dealing with the liability of public bodies to include several important and influential New Zealand Court of Appeal and English House of Lords decisions. There is an excellent discussion of the various approaches of common law jurisdictions to determining liability and of the tests applied by the courts. The decision in *Barrett v Enfield LBC*⁶ perhaps signals a move away from the stringent public law test formerly applied by the English courts to the more general application of ordinary principles of tort, which was the approach of the New Zealand Court of Appeal in *A-G v Prince*.⁷ However, arguably the two approaches may yield the same end result in substance: a duty of care in *A-G v Prince* was held to exist only in circumstances where the decision-maker acted unreasonably in the *Wednesbury* sense. At a conceptual level, it is disappointing that the authors do not discuss in any detail the potential impact of rights-oriented jurisprudence on the development of the tort. It is conceivable that by establishing a violation of a fundamental right the duty of care hurdle will almost certainly, by implication, be overcome, and the focus of the action will shift to breach and the difficult area of causation.

Of considerable interest are the important developments in the

³ [2000] 3 NZLR 406 (CA).

⁴ See Todd (ed) *the Law of Torts in New Zealand* (3rd ed, 2001) 234.

⁵ [1993] 3 SCR 206 (SCC).

⁶ [1999] 3 WLR 79 (HL).

⁷ [1998] 1 NZLR 262 (CA).

liability of company directors in tort, culminating in the House of Lords' decision in *Williams v Natural Life Health Foods Ltd.*⁸ The authors carefully appraise this decision and explore its complex conceptual basis. At the heart of the issue is whether company law doctrines should be accorded primacy; that is, the rules of authority and attribution, over those of the law of torts. A detailed discussion of the policy justifications for imposing liability, with reference to the Supreme Court of Canada's decision in *London Drugs Ltd v Kuehne & Nagel International Ltd.*,⁹ is presented. This section offers an interesting 'torts' perspective on a complex company law issue and will be of considerable assistance to those wishing to extend their knowledge of this area of the law.

Other areas of the Third Edition that deserve special mention are the substantial revisions of the sections on nuisance and the rule in *Rylands v Fletcher*, the accident compensation scheme, mental injury, interference with intellectual property, interference with privacy, defamation, abuse of public office, causation and remoteness of damage, and vicarious liability.

Todd on Torts is to be highly commended for its comprehensive approach; in particular, the detailed information on recent cases and statutes and the pragmatic way in which the current state of the law has been presented. The authors' appraisals of the law are intellectually challenging and at times necessarily provocative. There is no doubt that this volume will be influential in shaping the future development of the law in this increasingly complicated area, both in New Zealand and internationally. Practitioners and law students will find Todd on Torts essential reading for a complete understanding of this important subject.

Jane Taylor

⁸ [1998] 1 WLR 830 (HL).

⁹ [1992] 3 SCR 299, 303-306 (SCC).