BOOK REVIEWS

SALES AND CONSUMER LAW IN AUSTRALIA AND NEW ZEALAND, by K. C. T. Sutton. 3rd Edition. Sydney. Law Book Company, 1983. lxx & 658 pp. New Zealand price: cloth $45.00; limp $35.00.

Consumer protection law is far from new. Its emergence as a subject in its own right, however, is much more recent. When the previous edition of this text appeared in 1974 as *The Law of Sale of Goods in Australia and New Zealand*, consumer protection legislation in Australasia consisted of a small number of diverse statutes and a large number of proposals for reform.

Today, ninety years after the original Sale of Goods Act was passed, consumer-oriented legislation has begun to supersede the largely "neutral" common law rules on which the Act is based. It is this legislation which has prompted Professor Sutton to re-title and revise the third edition of this work.

As was to be expected, reform has not proceeded at an even pace throughout Australasia. Wide-ranging consumer legislation was already in place throughout Australia when this text was in preparation; subsequent State consumer credit legislation was able to be discussed in an appendix. Our own Credit Contracts Act, however, was enacted too late to permit inclusion; whilst our Sale of Goods Act is still under review.

Much of the legislation discussed in this text is necessarily of purely comparative interest to the New Zealand reader. Nevertheless the reader looking for an up-to-date discussion of the New Zealand law on sale of goods will not be disappointed, and will find detailed and helpful discussions on peculiarly local topics, such as the effect of the Contractual Remedies Act 1979 on contracts for the sale of goods, together with commentary on a variety of other New Zealand statutes.

Unlike so many Australian-oriented texts which claim coverage of the law on both sides of the Tasman, this text does not relegate New Zealand law to footnotes or to discussions too brief to be helpful.

The main strength of this text, however, is that on which the reputation of its two previous editions was based: thorough and scholarly treatment of relevant case law. This edition continues to fulfil the

author's intention of publicising "a wealth of local decisions which has been virtually untapped by English writers in this field".

English and Canadian decisions, are not neglected. Occasional reference is also made to American case law and legislation.

Despite the change of title, the text retains much the same format as the previous edition: the subject-matter is divided into six parts which in outline follow the structure of the Sale of Goods Act. The text deals with all facets of the contract of sale: from the effect of innocent misrepresentation, through contractual capacity, frustration, implied terms, the passing of property and title, to delivery and acceptance and the remedies of buyer and seller. A general section consists of an expanded treatment of consumer protection, together with chapters on exemption clauses, auctions, and export sales.

It has often been observed that the provisions of the Sale of Goods Act are little suited to the needs of the modern consumer and ripe for reform. Certainly much of the case law in the area reflects this inadequacy. The author's comments on the use of collateral contracts are apt to describe many of the decisions on the Act:

> . . . it is impossible to escape the conclusion that the courts are straining to seek a way out from the straitjacket in which the Common Law and the Sale of Goods Act have placed them, and are doing violence to legal principle in order to give the purchaser relief . . . (p.19)

However, despite the increased pace of legislative intervention, the judicial interpretation of the provisions of the Sale of Goods Act remains the basis of the law in this area. Recent case law developments have been fully incorporated into this new edition of a text which continues to justify its reputation for comprehensive coverings.

It is pleasing to find a clear and critical survey of the complex area of implied terms, especially in view of the continued applicability in New Zealand of the condition/warranty dichotomy to contracts for the sale of goods. However it is surprising to note that in an otherwise excellent discussion of sales by description the author nowhere refers to the decision of the House of Lords in *Reardon-Smith* v. *Hansen Tangen* [1976] 1 W.L.R. 989, in which Lord Wilberforce criticised a number of authorities discussed in the text as "excessively technical and due for fresh examination in this House" (p. 998).

A new section on reservation of title clauses has been included in the text in response to the *Romalpa* decision ([1976] 1 W.L.R. 676) and its subsequent qualification in *Borden (U.K.)* v. *Scottish Timber Products* [1979] 3 W.L.R. 672.

The topic of exemption from liability has continued to receive attention, both legislative and judicial. In a revised and expanded treatment of the subject, Professor Sutton considers the ramifications of the decision of the House of Lords in *Photo Production* v. *Securicor*

[1980] 1 All E.R. 556, for courts applying the common law. The author concludes that the courts, deprived as they are of fundamental breach as a doctrine, will continue "the straining of rules of construction to find a just solution" (p. 470). To the text's discussion of legislative attempts to combat the problem must now be added the caveat that a New Zealand court is empowered by section 10 of the Credit Contracts Act to re-open any credit contract whose terms are held to be "oppressive".

Also worthy of note is an updated discussion of contractual damages, which includes commentary on the decisions of the Court of Appeal and House of Lords in *Lambert* v. *Lewis* [1980] 2 W.L.R. 299 (C.A.); [1981] 1 All E.R. 1185 (H.L.); and of the Privy Council in *Tai Hing Cotton Mills Ltd.* v. *Kamsing Knitting Factory* [1979] A.C. 91.

The author's task was decidedly more difficult in this than in previous editions: the amount of law common to all of the jurisdictions covered in the text has decreased, and the number of differences and local peculiarities increased proportionately. It is inevitable that occasionally the text reads like a comparative treatise. Thus in his discussion of pre-contractual representations the author must deal with the position both at common law, under the Misrepresentation Act 1967 (U.K.), the Trade Practices Act 1974 (Cwth.), and the Contractual Remedies Act 1979 (N.Z.).

Nevertheless, despite these difficulties not of the author's own making, the new edition remains well-structured and the discussion of statute and case law careful and reasoned. The relevant law for any one jurisdiction is readily accessible, and footnotes provide invaluable references to a wealth of cases, texts and articles.

However a flaw, perhaps apparent only to the New Zealand reader, is the author's occasional reference to New Zealand as if it were a State of Australia. Thus on p. 69:

> New Zealand also adopted the English Act, but both that *State* and New South Wales . . . (emphasis mine)

Despite such minor defects, *Sales and Consumer Law* deserves from the commercial lawyer and student the warm welcome due to an authoritative guide at an affordable price. This third edition can only enhance the work's reputation as a leading commercial text.

N.J.H.

THE LAW OF TORTS, by John G. Fleming, D.C.L. Sixth edition. Sydney. The Law Book Co. Ltd., 1983. 1ii and 702pp. (including index). Approximate New Zealand price $55.42; paperback $42.24.

In the face of strong rivalry from a freshly revived *Salmond and*

Heuston on the Law of Torts, (eighteenth edition, 1981), one might well ask why should any bouquets from students, practitioners or academics here go to Professor Fleming for his textbook, which admits to taking Australia as the *point d'appui* in relation to the law of torts, especially when Salmond and Heuston, which, being edited by a New Zealand resident hints at close applicability to New Zealand, so successfully sets forth the principles of the law of torts with as much precision, coherence, and system, as the subject admits.

There are two basic reasons why one might have recourse to a particular text-book on the law of torts. One would be for its sheer substantive utility in New Zealand and the other for the overall perspective it provides on the protean principles and policies of tortious liability. What the new Fleming has to offer must be assessed in both these contexts.

In the six years since the previous edition of Fleming, there has been, as far as New Zealand is concerned, no legislation enacted, or even contemplated as far reaching as the Accident Compensation Act 1975 was to further decimate the ranks of the compensatable wrongs. Nor has there been a judicial decision of the magnitude of *Hedley Byrne* v. *Heller* [1964] A.C. 465 to graft onto the law of torts any whole new category of harm for which recompense can be sought. Nevertheless there have been significant developments, and not merely by the process of encrustation. Of most note perhaps, has been the steady, judicially condoned, encroachment of tortious liability into the hallowed areas of contract law (*Junior Books* v. *Veitchi* [1982] 3 W.L.R. 477 (H.L.); and *Rowe* v. *Cleary* unreported, [1980] N.Z. Recent Law 71) and public law (*Anns* v. *Merton L.B.C.* [1978] A.C. 728). As far as New Zealand is concerned such legislation as has been enacted has been addressed only to tortious incursions into contract law. It has either prevented these (e.g. Contractual Remedies Act 1979) or else subsumed them into the law of contract (e.g. Contracts (Privity) Act 1982).

Professor Fleming, far from being inward looking, is clearly and succinctly *au fait* with the substantive changes in the law of torts in New Zealand, in so far as they have been actually reported or enacted up until September 1982. This gives his textbook a slight edge over Salmond and Heuston, which has as its cut off point December 1980. It is unfortunate that the one New Zealand decision *Donselaar* v. *Donselaar* [1982] 2 N.Z.L.R. 97 (C.A.) which may well become a minor landmark in the law relating to exemplary damages just missed the boat. Considered compression is the main characteristic of Professor Fleming's treatment of the substantive law. One would not go to his book to wallow in the facts of cases, indeed they are most economically measured out, but nor need one be already adept at legal

reasoning or versed in case details to use the book to best advantage. Professor Fleming's clear exposition of the substantive law is constantly inter-laced with comments or rhetorical questions concerning the balancing of competing interests and the social ends the laws of tort are meant to serve. As he himself says, one cannot understand, yet alone apply, a rule of law unless one understands the reason behind it. Also accompanying the text are highly informative and stimulating footnotes which draw generously on the academic literature. Although Professor Fleming may not take a particular stance, especially where theories of general principles of tortious liability are concerned, he never pretends that that stance does not exist, and if it does have some serious merits, these too are aired, even if briefly.

Unfortunately there are a few shortcomings relating to access to the substantive law which the author has so well updated and reflected upon. Again in this edition there is felt a lack of a table of statutes and a table of cases accompanied by full citations. The index is not as full as it might be, thwarting access by the bare initiate to discussion in the text, by way of random example, to the doctrines of *novus actus interveniens* and the egg-shell skull. This difficulty is exacerbated by the fact that Professor Fleming has kept his headings to a workable minimum in the table of contents. There is for example no general chapter relating to damages in the law of torts. Why Professor Fleming has avoided such minute pigeonholing is no doubt for the sound reason that it can easily lead to artificiality and the loss of vision of the overall principles on which tortious liability is based. The value of the new Fleming is that it steers well clear of this fate and that is not the least of the reasons why it is well worth purchasing.

M.L. L-P.

A HISTORY OF CUSTODIAL AND RELATED PENALTIES IN NEW ZEALAND, by P. M. Webb, LLM. Government Printer, Wellington, 1982. 190pp. and index 7pp. New Zealand price $12.50.

P. M. Webb, the former chief legal adviser to the Department of Justice, has written an informative and concise history of New Zealand's experience with custodial penalties. Her approach is to look at each of the various innovations in penal policy in terms of the history of the idea, its implementation, experience with the policy, and its eventual abandonment when the cycle is repeated.

Thus, in the period prior to 1954 we had penal servitude, which arose as an alternative to transportation when the colonies protested against being used as a dumping ground for the English criminal

classes; indeterminate sentences, which in reality allowed people to be detained for longer periods than the maximum period which the law prescribed for the offence with which they were charged; habitual offender legislation; borstal detention to provide the moral and intellectual climate of a hard-working training school; and numerous other schemes.

If one was to take at face value all the public statements which marked the implementation of each new proposal, the impression would be of a system going from strength to strength. The reality comes a little harder. Each innovation in penal policy owed more to the failure of its predecessors than to any other single factor.

The Criminal Justice Act of 1954 made some important innovations. It abolished the distinction between imprisonment with and without hard labour (largely academic anyway), further restricted the imprisonment of young people, introduced detention centres for young people (prison by another name?) and strengthened the role of pre-sentence reports. In this latter context, the Probation Service, which New Zealand pioneered in 1886, plays an increasing role.

Probation, which receives a chapter of its own (ch. 6) fills a sometimes uncomfortable position. The pre-sentence reports fulfill a quasi-judicial function in that a probation officer's views frequently mean the difference to an offender between being sentenced to prison and being able to remain in the community. The probation officer's task of supervision, control and guidance however, is more strongly welfare oriented. It is a task not made any easier by the sheer volume of report writing which now occupies such a significant proportion of their time.

Since 1954 penal policy has been conducted within the framework of a set of objectives laid down in the Justice Department review, "A Penal Policy for New Zealand". These were incorporated in the Criminal Justice Act of 1954. Briefly, they were:

(a) to divert the comparatively inexperienced from a life of crime;
(b) to regard imprisonment for the young or inexperienced offenders only as a last resort;
(c) to reduce the number of short prison sentences to an absolute minimum and replace them with less "contaminating" influences;
(d) to bring every possible reformative influence to bear on those incarcerated; and
(e) to remove from the community for a long period those who fail to respond positively to the earlier efforts to keep them from a life of crime.

Thus far, there is little to quibble about in Webb's history. For a book which purports to look at the development of penal policy in

perspective however, there are a number of questions which the work raises but leaves unanswered.

Notwithstanding the rhetoric surrounding successive developments in penal policy, has not the actual intention more frequently been to remove the troublesome from the scene? One does not have to go much beyond the very high rates of recidivism, or the dubious distinction of having one of the highest proportions of our population (among developed nations) incarcerated, to suggest that real reform of the penal system in its various forms has more illusion than substance. The Scandanavians and the Dutch, for example, have achieved significantly better results both in keeping people out of institutions and in reducing the likelihood of return for those they feel obliged to incarcerate.

Are we less law-abiding than they, or is there something in the New Zealand character that still demands revenge against and removal of, the socially inconvenient? In these supposedly enlightened times such motives are dressed up with the gloss of "rehabilitation" or "reform", but are not these and similar words merely catch-phrases from the bureaucratic glossary? One clue is provided in the chapter on prisoner's rights, or more accurately the removal thereof. This is the shortest chapter in the book, and the emphasis contrasts oddly with the trend in Denmark where, for example, the retention in prisons of as normal a social structure as possible, including the prisoner's choice of activities, sexual access to other prisoners, and the emphasis on developing the prisoner's individuality, are all perceived as contributing to low rates of recidivism.

Another disappointment in the book, and related to this last point, is the failure to see the prison population other than as objects for successive notions of policy. Maoris, who constitute 40 per cent of the inhabitants of our various institutions, are not discussed at all. Yet surely different expectations between Maori and European culture and the imposition of a European legal system upon the indigenous population are of more than passing relevance to an understanding of why a particular policy succeeds or fails.

For those interested in the detail of the historical evolution of our penal policy this book will prove an invaluable source. If one is interested in an analysis of the social conditions which underlie policy formulation however, then the diligent researcher will need to seek elsewhere.

J.O'N.