

## BOOK REVIEWS

ACCIDENTS, COMPENSATION AND THE LAW, by P. S. Atiyah, B.C.L., M.A. Weidenfeld and Nicolson, 1970. ix and 620 pp. New Zealand prize \$15.60 (cloth), \$7.30 (paper back).

The pace of the discussion about the compensation problem has noticeably quickened over recent years. Elliott and Street have produced their book on *Road Accidents*. The Winn Committee's unremarkable Report has appeared. In this country the Woodhouse Report was published in December, 1967, and sparked off a lively debate which is still being agitated before a Parliamentary Committee. Research papers and proposals for radical reform are rapidly multiplying in the United States. In these circumstances it is no small tribute to Professor Atiyah, now of the Australian National University, that he has been able to produce a book yielding so many fresh and provocative insights. Indeed, one may say at once that the reviewer's only sad reflection on *Accidents, Compensation and the Law* is that those who would find the author's reasoning entirely fresh and unbearably provocative will probably not be numbered among his readers.

It is the first in a new series entitled 'Law in Context' which is designed to achieve "breadth of perspective, intellectual vitality and closeness to the realities of the law in action". The idea, of at least some of the volumes in the series, will be to take a problem, and look at it rigorously in its political, social and economic context, as well as in legal terms. The editors, Professor Robert Stevens of Yale and Professor William Twining of Queen's Belfast, could hardly have chosen a better author with whose work to launch this ambitious project. He brings to his task all the formidable qualities needed to translate lofty aims into solid achievement—the technical scholarship, the capacity for sustained argument, the breadth of vision, and the lucidity which we have learnt to associate with his works on contract, the sale of goods and vicarious liability. He has consulted a vast range of materials which writers on the law of torts have usually not thought it necessary to bother about—the findings of numerous committees, empirical research from the other side of the Atlantic on how compensation systems actually work, Road Research Laboratory Reports, the annual reports of government departments, and statistics from many sources, to name but a few. All these he weaves, never oppressively, into a connected account of the whole problem.

Part I seeks to state the issues in perspective. What accidents does the law concern itself with? How does it seek to avoid them? Which accidents are, or should be, met by the payment of compensation? How is that compensation assessed? Who pays, or should pay, for it? How is a compensation system administered? Part II deals (at rather great length, it seems to me, having regard to the main purpose of the book) with the tort system and Part III with the tort system in operation. Part IV takes a detailed look at other compensation systems—"personal insurance" (which the author realizes would be unacceptable to the insurance industry as a label for a specific type of insurance risk, but which he uses as the antithesis of liability insurance); criminal injuries com-

pensation; national insurance; the English industrial injuries system; social security benefits; and other methods of compensation, such as sick pay. In Part V Professor Atiyah attempts to assess the overall picture, abundantly demonstrating that we suffer under a plethora of compensation "systems" and the complexity of the interrelation between them. The whole doctrine of subrogation comes in for some hard knocks here. He goes on to appraise the fault principle and offers a six-count indictment of it. This contains some arguments familiar enough to readers of the Woodhouse Report, but it is a measure of the author's originality that even here he finds some new points to make against the liability insurance-backed tort system. Some theoretical discussion about the distinction between accident and disease is followed by a shrewd assessment of the cost of the various compensation schemes. Part VI analyses the meaning and purposes of compensation; asks what role, if any, retribution, vindication and the aim of preventing accidents should play in a compensation system; and moves on to a discussion of Calabresi's theory of general deterrence. Part VII deals with possible reforms, and refers to the Elliott-Street proposals, the Keeton-O'Connell Plan (which he doubts, I think correctly, would be acceptable in England) and the Woodhouse Report. The book concludes with an inquiry as to what should be done about negligence actions in respect of property damage, and with some suggestions for easing the lot of the insurance industry and the legal profession should the author's preferred solution be adopted. The "right path for reform" is that the tort system so far as personal injuries and disabilities are concerned should be abolished, and the money presently poured into it should be used to improve the social security benefits, and the social services generally. He envisages a vast expansion of the English industrial injuries system to include diseases, natural disabilities, and non-industrial accidents.

Atiyah exposes himself to the charge that he has inadequately explored the various practical problems involved in a comprehensive scheme. In a sense all the previous discussion seems to be working up to a solution of the whole problem, yet in the end one is left with only the sketchiest of blueprints. This may, however, simply be a measure of the extent to which we in New Zealand have got down to details whereas in England there is as yet no evidence of any Governmental eagerness even to set up a Royal Commission to explore fundamentals. In New Zealand we know the approximate cost of the Woodhouse proposals but in England the cost of a comprehensive scheme "would of course have to be worked out with great care and this could not be accurately done even by the government actuary until a great deal more is known about the extent of disabilities in the population today, and about the amount of money at present devoted to the tort system" (page 612). It is somewhat irritating, all the same, that we are not given the benefit of the author's ideas on such burning issues as desirable levels of benefit, benefits over the first few weeks of incapacity, the appropriateness of awarding compensation for pain and suffering in a new comprehensive scheme, the comparative merits of individualised v. objectivised (Schedule or quasi-Schedule) assessments, and so on. This is, perhaps, a little odd, for nearly all these issues are touched on in earlier parts of the book, when describing and evaluating the present English arrangements. A little more space could profitably have been devoted to a blueprint and rather less to the discussion of the conceptual structure of the law of negligence.

Some attention might also have been given to the relationship between compensating and rehabilitating the accident victim.

*Accidents, Compensation and the Law* teems with new insights. A powerful analogy is drawn, for instance, between public and private law, between the compulsory acquisition of property, for the public benefit on payment of compensation, and the installation of some new device (e.g., the new half-barrier automatic crossings over railways in England) which is bound to cause some accidents, but at the same time will confer benefits on the public in terms of less delay and less public expenditure. If these two cases are truly analogous, those responsible for the installation should compensate those who suffer the statistically certain-to occur accidents, and equally without proof of fault. Atiyah substantiates, I think, another very important point, namely, that the fault principle leads us to seize on a number of limited and relatively obvious accident-causing factors, and to blame the party responsible for these as having been 'negligent', whereas, if we shift our vantage point, many accident victims who go uncompensated for want of an individual negligent defendant may be thought to have a good claim against society (which may, for example, have virtually compelled little children in slum districts to play on the streets by failing to provide suitable alternative play areas).

Atiyah is determined to push behind such glib phrases as "loss distribution", by asking what in fact is a "loss", and by stressing how fatally easy it is to assume that every instance of compensation must be a case of "loss shifting" or "loss distribution". A similar technique might have been usefully employed on "the fault principle" and the maxim "no liability without fault". It has long been a source of puzzlement to this reviewer why the meaning of "fault" is treated as self-evident by so many writers. It may stand for (1) negligence, and negligence alone; or (2) negligence or intention; or (3) legal blameworthiness. Legal blameworthiness in tort may be due to negligence, or intention, or the breach of a "strict liability" duty, or the breach of statutory duty, and not all statutory duties can be treated as types of negligence liability (although many nowadays admittedly can, as in statutes which lay down a duty to do something "so far as reasonably practicable"). These senses need distinguishing, especially in view of perplexing usages such as that in the title of Ehrenzweig's well-known monograph, *Negligence Without Fault*. In sense (1) "No Liability without Fault" falsely represents that personal injuries are never compensable except when negligence is proved, and the word "fault" is not really needed for "negligence" would do; in sense (2) the maxim still misrepresents the complexity of modern law, but "fault" at least serves as a useful umbrella concept; in sense (3) "fault" is divorced from any necessary association with personal culpability, and the maxim becomes simply tautologous: there is no liability unless one of several grounds upon which tortious liability may be based is established.

The author might also have considered what net of rules and practices is connoted by the word "insurance", and whether it is really appropriate to speak of the Woodhouse proposals as a "comprehensive State accident *insurance scheme*" (see pages 608-9). In reality, of course, it is a comprehensive *compensation scheme*. None of the incidents of an insurance contract would be present—there would be no closely defined risk, no policy, no premium, and no insurance company. There may be some danger in talk of "insurance": it may lead one to think

for example, that the insurance companies have a *prima facie* right to administer the Scheme.

I could take issue with a number of Atiyah's assertions as to what the law is (e.g., the unduly broad statement on page 461 that "the courts pay no attention to the fact that the plaintiff may have been doing something specially meritorious") but these would be carping criticisms and in addition would be only marginally relevant, for this is not essentially another book about what the law of torts is, but a discussion of the way in which the law operates in practice. In this it blazes a hitherto almost untrodden trail. It may be confidently recommended to those many lawyers, with or without vested interests, who are concerned about the fate of the Woodhouse proposals. Its publication may come in time to be regarded as the first thoroughly scholarly and really fruitful book adopting a "contextual approach" to the study of law.

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**COMMERCIAL LAW IN NEW ZEALAND.** Fourth Edition, by J. F. Northey, B.A., LL.M. (N.Z.), Dr Jur. (Toronto) and W. C. S. Leys, M.A., LL.M. Wellington: Butterworths & Co. (New Zealand) Ltd., 1969. XXXV and 769 pp (including index). New Zealand price \$9.00.

The book is in four parts. Professor Northey deals with General Principles of Contract in Part I, and combines in Part II on Special Contracts with Associate Professor Leys, who also deals with the Chattels Transfer Act and Arbitration in Part III and Insolvency in Part IV.

The reviewer of a Fourth Edition has the double duty of considering the book as a whole and comparing it with its predecessors. Whilst considering the first matter he cannot but bear in mind that the book must needs have found acceptance and the second matter involves some consideration of the purely practical question of the need to purchase the book as a replacement text.

The title, Commercial Law, could well have been borne by this book without any consideration of general principles of contract, i.e., the major part of Part I which also deals briefly with agency. Law students and practitioners may be more likely to refer to Professor Northey's New Zealand edition of Cheshire and Fifoot, but they will find this consideration of general principles convenient, whether alone or by way of back reference, when dealing with the special contracts in Part II. Accountancy students and practitioners may well find the book a complete text. This is not criticism of the treatment of the general principles of contract, but reinforcement of the fact that, aside from convenience, the importance of the book lies in its being the only New Zealand text to examine in some detail the subjects of Sale of Goods, Bills of Exchange, Sureties and Guarantees, Partnership, Insurance, Arbitration, Chattels Securities, Hire Purchase and Insolvency. It is also recognition of the fact that a tremendous field is covered and this in turn imposes limitations. The book has been designed for the legal and accountancy professions and students, and the diversity of their requirements coupled with space restrictions must dictate the approach and coverage. Most, if not all of the subjects listed have been the