BOOK REVIEWS

CLERK AND LINDSELL ON TORTS (Sweet and Maxwell Ltd). 12th edition. 1961 clxxv + 2049 + (Index) 59 pp.

This new edition of Clerk and Lindsell is an imposing addition to the Common Law Library. Its companion work, Chitty on Contracts (22nd edition), has been produced by a team of Oxford writers: a group of Cambridge law teachers under the wing of Mr. A.L.Armitage as General Editor is responsible for Clerk and Lindsell. The temptation to draw a comparison between the two publications must, however, be firmly resisted.

The 11th edition of Clerk and Lindsell was a source-book for practitioners, written mostly by practitioners. It contained a number of inaccuracies and could be referred to only with the greatest caution. Hence no doubt derived in part the current preference for the smaller books produced primarily for the student, Salmond, Winfield, and more recently Fleming's (mostly) admirable text-book, now in its 2nd edition. The 12th edition of Clerk and Lindsell will still find its greatest use in the hands of the practitioner, despite its value as a reference book for students, and despite the fact that it has been written exclusively by academic lawyers. Its accuracy and up-to-dateness (new cases up to July 1, 1961 have been included and cumulative supplements will be automatically supplied to all subscribers) mean that its usefulness as a working tool for the practitioner will be much greater than in the case of the 11th edition.

The Preface reveals that five major alterations have been made in the arrangement of the contents. In addition, the Occupiers' Liability Act 1957 (U.K.) has necessitated "virtually a new chapter." Now that the Occupiers' Liability Act 1962 (N.Z.) has been enacted, and in its final form bears a close resemblance to the English legislation, the specialist treatment of this head of liability by Mr. F.J.Odgers should prove useful here. His discussion of the unravished Common Law will, however, become increasingly of historical interest if, as is to be hoped, litigation under our Act follows the present English pattern. In England, the result of litigation turns on the facts, not on the interpretation of pre-1957 decisions.

Perhaps no oneapart from the General Editor has actually

read the book from cover to cover: certainly this reviewer has not done so. In any case it is not intended to be that sort of book. But since Negligence is far and away the most frequently encountered tort in practice, it is not unreasonable to evaluate the chapter on Negligence (Chap.14 - by R.W.Dias), and to assume that the part is representative of the whole.

Mr. Dias's opening discussion is both sophisticated and full of common sense. No attempt is made finally to answer the old question "Is Negligence subjective or objective?" for "in order to visualise how the reasonable man would have behaved in a given situation it is necessary to gauge first what consequences he would have foreseen in that situation and then how he would have regulated his conduct in the light of them" (p.359).

Mr. Dias deprecates any answer to the question "When is there a duty of care?" expressed in terms of "proximity": he states, correctly it is submitted, that once it is understood that proximity does not bear its ordinary meaning of physical nearness "it ceases to have any value in relation to negligence and can be discarded." (p.363)

The author proceeds with an orthodox discussion of Donoghue v. Stevenson and his conclusion is that "there is no general duty of care." This does not mean that Lord Atkin's proposition should be disregarded for it is "valuable whenever the courts wish to expand the existing area of liability, and it will then be utilised as being the ratio decidendi of that case." In other words, Donoghue v. Stevenson is not a binding precedent in favour of Lord Atkin's proposition: it is merely a weapon in counsel's armoury when a novel type of case arises. Not all will agree with this conclusion. It is a pity that Dias does not refer to Heuston's valuable article in (1957) 20 Mod. L.R. 1 at this point. Articles in the Law Reviews on the whole receive adequate deference throughout Clerk and Lindsell, but here is one notable omission.

Without going into details, the discussion of Re Polemis on page 373 is confused as it stands (a more ample discussion admittedly appears at p.708) and the assertion that Thurogood v. Van den Berghs and Jurgens Ltd. [1951] 2 K.B. 537 has not

been "affected" by the Wagon Mound decision requires, with respect, considerably more argumentation than the learned author gives it. In this connection it is difficult to see that there is much value in alleging, without elucidation, that "Professor Goodhart's criticism of it (sc. Thurogood's Case) in 68 L.Q.R. at p.524 is misleading." (p.373 n.98b)

Brevity is ordinarily commendable, but surely the condensation of the decisions in Bourhill v. Young, Woods v. Duncan, and Palsgraf v. Long Island Railroad attempted on page 374 is inadequate. Each decision receives more adequate treatment in the shorter text-books. In connection with Bourhill v. Young, should not a reference have been given to the valuable analysis of that case offered by Fleming (21 Can.Bar Rev.65), not to mention other writers?

The learned author's survey of the nervous shock cases (pp.374-379), while lucid, is marred by two defects. First, it is difficult to follow his argument that the emphasis in Hambrook v. Stokes on what Mrs. Hambrook herself saw as opposed to what by-standers told her has "probably not been affected" by what Paull J. said in Schneider v. Eisovitch [1960] 2 Q.B. 430, at 441. For, says Dias, (p.379) "the relevance of the [latter] dictum lies ... in the realm of remoteness." But if remoteness is itself governed by the criterion of foreseeability (The Wagon Mound), is not Paull J.'s "dictum" important in that it admits that defendants should foresee that plaintiffs may well hear about physical injury to others, and suffer nervous shock themselves in consequence? Or does Dias mean that Hambrook v. Stokes is of higher authority than Schneider v. Eisovitch and to be preferred accordingly? If so, it would have been better to say so less obscurely.

Secondly, Lord Simonds in The Wagon Mound [1961] A.C. 388, 426, adopted Denning L.J.'s view that "the test of liability for shock is foreseeability of injury by shock" (King v. Phillips [1953] 1 Q.B. 429, 441). Dias admittedly draws attention to this adoption (at page 378, n.27) but, with respect, attaches insufficient weight to it. After The Wagon Mound it is scarcely tenable to present the authorities as though they are equally poised between two alternative views, yet Dias does so in his discussion.

His treatment of breach of the standard of care (pp.381 ff) is of the same high standard as Heuston's in Salmond (13th ed.) and follows much the same lines. Some interesting new ideas however are advanced. There is for instance a valuable note about the standard of care to which learner-drivers of motor vehicles must conform (p.390 note 98). Paris v. Stepney B.C. [1951] A.C. 367, which decided that the seriousness of consequences must be taken into account when determining the degree of care required, has now been significantly glossed by the Court of Appeal's recent decision in Withers v. Perry Chain Co.Ltd. [1961] 1 W.L.R. 1314 which appeared too late to mention. Something more might profitably have been said about the answerability of parents for their personal negligence in not ensuring that their children cause no harm to others: the law is too bleakly stated (at p.392) although there is an adequate collection of cases in the relevant footnote.

Dias very properly draws attention (p.383) to the recent insistence by the House of Lords that it is undesirable to attempt to reduce to rules of law the question whether or not reasonable care has been taken. When he proceeds to deal with the duties owed by carriers it is therefore inconsistent to state (at p.394) that there is no liability on a railway company "if a passenger's hand is trapped in the door when shutting it", citing an 1877 and an 1878 case. Such cases obviously depend on their particular facts. The only excuse for the inconsistency can be the assumed desire of counsel for authorities illustrating specific fact-situations.

A special section is devoted to the duty of care owed by highway users. The effect of the Highway Code on negligence actions has often caused some puzzlement, yet is a matter of everyday concern. It is therefore disappointing to read that "it must not be assumed that compliance with the Highway Code will necessarily absolve a person from negligence" (p.736). The authority cited is White v. Broadbent and British Road Services [1958] Crim. L.R. 129 (C.A.). The latter reference seems the only one available apart from that in "The Times" for 29th November, 1957. As reported in the Criminal Law Review, the summarized decision of the Court certainly does not support Dias's proposition. It emerges that the (second)

defendant was liable for negligence totally unconnected with his correct road-signal to the overtaking vehicle, viz., for failing to keep a proper look-out.

The treatment of manufacturers' liability for dangerous chattels is neat and first-rate. One might perhaps object to the bare citation of Winterbottom v. Wright (1842) 10 M. & W. 109 and Earl v. Lubbock [1905] 1 K.B. 253, in support of the undoubtedly correct proposition that "A person who does work in pursuance of a contract is not liable for damage to third persons merely because he has negligently performed his contract." Admittedly the next case discussed is Billings (A.C.) & Sons v. Riden [1958] A.C. 240, but one would like to see the "privity of contract fallacy" more deliberately interred when it threatens to raise its ugly and now decapitated head. Winterbottom v. Wright received its quietus in Donoghue v. Stevenson.

The discussion of "Master and Servant" is also very good: in particular there is a searching appraisal of Davie v. New Merton Board Mills Ltd [1959] A.C. 604 (p.430). The treatment of res ipsa loquitur is clear and straightforward, but Diplock J.'s judgment in Fowler v. Lanning [1959] 1 Q.B. 426 is slightly misrepresented. Dias (at page 443) states that "the mere allegation of shooting does not disclose a cause of action and ... the plaintiff must give particulars of negligence in his statement of claim." At the end of his judgment([1959] 1 Q.B. at 440) Diplock J. stated that his objection to the plaintiff's pleading was that "it neither alleges negligence in terms nor alleges facts which, if true, would of themselves constitute negligence." (My emphasis). Dias thus ignores the first alternative: see Goodhart's note in 75 L.Q.R. 161, 163. It is gratifying to note the footnote reference to McGregor J.'s judgment in Beals v. Hayward [1960] N.Z.L.R. 131, but since Scottish and South Africa cases are cited on the nature of the defendant's task where res ipsa loquitur applies, disappointing that no reference is made to (at least) J.M.Heywood Ltd. v. Attorney-General [1956] N.Z.L.R. 668 C.A.

Because of the doctrine of contributory negligence, it is suggested that "volenti non fit injuria is hardly ever used now" (p.805). One might ask whether this means: "used by the Court" or "used by counsel for the defendant"? In either event

the statement is too sweeping. A reference to our very own Heard v. N.Z. Forest Products Ltd [1960] N.Z.L.R. 329 C.A. might have been judicious at this point. The section on Contributory Negligence is succinct and the learned author's catalogue (at page 825) of arguments in favour of a "quantitative blameworthiness" interpretation of the Law Reform (Contributory Negligence) Act 1945 is extremely cogent.

There are defects in Chapter 14 of Clerk and Lindsell; and since a particular reviewer can probably always find statements in books about torts with which he cannot agree the other chapters may be equally susceptible to criticism. But, by and large, the present edition of Clerk and Lindsell is a splendid newcomer to the practitioner's bookshelf; and to the student's, if the latter can afford the price (£7.12.6.) for a book to which he cannot be advised to make more than occasional reference.

D.L.M.

INTERNATIONAL RIVERS - A POLICY-ORIENTED PERSPECTIVE,
By George Ernest Glos, 1961.
George Ernest Glos, University of Malaya in Singapore.
viii + 245 + (Table of Treaties and Index) 6 pp.

The very title of this book immediately reminds one of the work of Professor Myres S.McDougal and his colleagues at Yale Law School and it is not surprising to read that it was submitted to that University as a doctoral dissertation. In accordance with the general approach of many publications produced under the aegis of Professor McDougal the author "contrary to the traditional method of treatment [has attempted] ... an analysis of the underlying processes affecting and influencing the actions of the participating entities". Dr. Glos considers and distinguishes three basic processes: "the process of use" (i.e. the uses to which international rivers are put); "the process of claim" (i.e. the assertions of right put forward by interested persons); and "the process of decision" (i.e. the methods and procedures used by "authoritative decision-makers" in determining various claims). Finally he surveys community policies, itemizes relevant factors, and analyses and evaluates past trends and decisions.

It will already be apparent from the author's stated approach and this brief summary that this book is concerned to a large degree with matters which in the strict sense at least relate to policy or the very substance of legal rules regulating particular river systems rather than to the general law of international rivers. It is, of course, frequently difficult to differentiate between law and policy and to say where one ends and the other begins. It is acknowledged that in one sense law cannot be separated from policy: the substance of the law is the expressed policy of the law makers; and in this regard a considerable debt is owed to Professor McDougal and his colleagues for their emphasising the real connection and inter-action between international law and politics. Nevertheless it must also be acknowledged that generally lawyers and, in particular international lawyers, are, because of the limits imposed by their expertise, concerned with the outward form of the law and not with the creation of its substance and its policy, except insofar as these matters

may be relevant to the determination of general rules of law. Therefore although it may be difficult to draw a theoretical line between law and policy, a functional line may often be established more easily. To take a current example: the negotiation of a Nuclear Test Ban Treaty is clearly a task for international politicians and diplomats; and only the reduction into treaty form of an agreement reached between those persons comes within the purview of the lawyers.

In this reviewer's opinion, then, a line should be drawn between, on the one hand, the claims to rights in respect of international rivers and the factors which are taken into account in making these claims and, on the other hand, the law which finally results from these claims and factors in the form of treaties, rules of customary international law, general principles of law or decisions of tribunals. It is submitted that it is the proper function of an international lawyer to investigate all relevant material in an attempt to determine the law. It is equally submitted that it is not his proper function to consider all data which is conceivably relevant to the topic merely to evaluate past trends and decisions and to suggest the nature of future developments, except insofar as that consideration and evaluation may be relevant to a determination of what the law is or, perhaps, should be.

Perhaps this point may be made more clearly by a consideration of the contents of the book under review.

In a short introduction Dr. Glos defines international rivers - clearly a legal issue which is a prerequisite to the substance of his book. In Part I the author lists "the participants in the process of use": Governments and individuals, riparian and nonriparian, the types of use demanded (navigation, irrigation, etc), and the physical conditions which are relevant (depletion of resources, population increases, etc). Finally, in this part he notes the rather obvious fact that there may be conflicting claims.

In Part II after briefly re-identifying the claimants Dr. Glos once again states their objectives. The methods of claim and the conditions in which it is put forward are

briefly mentioned. The substance of the part (navigation, irrigation etc) is then dealt with. This section, which is an expansion of a passage of 25 pages in Part I at times goes into quite astonishing detail about such matters as erosion and the importance of forests in water conservation, e.g. "While one hundred pounds of sand hold twenty-five pounds of water, and one hundred pounds of clay hold fifty pounds, one hundred pounds of humus hold two hundred pounds of water." p.88.

In Part III - the general process of decision - after nominating national and international officials as the decision makers, Dr. Glos, following McDougal, considers their policy objectives. Their most important objective he says "is probably the realisation of community expectation of a peaceful world order which will permit the promotion of the fullest, conserving use of all goal values free of coercion and threats of coercion" (p.117). This may be so. But it is suggested that this objective would be of little assistance in a determination of whether, say, a state boundary on a bridge crossing a boundary river is in the centre of the bridge or over the centre of the thalweg. Moreover it would surely be more realistic to concede that "national decision makers" (generally a euphemism for the officials negotiating on behalf of each interested state) are concerned to get the best possible arrangement for their own state, taking into account all relevant factors. Again international decision makers, in the absence of any direction to the contrary, are required to apply relevant rules of international law rather than to "concern themselves with the pursuit of inclusive objectives." Finally the functions of these two groups of officials should clearly be distinguished.

The author then sets out the conditions which affect decision making. In any particular case the national officials will be fully aware of all these factors - and there would always be others which are not mentioned - and will doubtless take due account of them in presenting claims. From the point of view of the judicial officials however these conditions will be relevant only so far as the law allows. Unfortunately there is little indication of the extent to which judicial officers can take these conditions into account and the legal - as opposed to the possible political -

situation is accordingly left uncertain. This results inevitably from Dr. Glos' supposition that the decisions of judicial officials are regulated by the same considerations as those which regulate the decisions of other officials. Dr. Glos then turns to the functions of the decision makers. This is "the prescription of policy" and its application: this policy may be prescribed by custom or by agreement. Consistent with his general approach, the author makes no attempt in the few pages given to this topic to determine the rules of law established by custom.

In the fourth Part, which relates to classification of policies, the author attempts a "formulation, in the highest abstraction, of the broadest community interest in uses of international rivers and their resources as the accommodation of exclusive and inclusive claims which will produce the largest total output of community values at the least cost" (p.129). This is a rather general section and speaks of such concepts as the common interest in securing a balance between exclusive and inclusive uses. Indeed it cannot be other than general since the policy of claimants to the uses of differing international rivers will also differ in detail and often in substance. The national negotiations may well have the general object of increasing world order by a greater production and distribution of values. However it may often be difficult to give practical shape to this very general aim in a particular river dispute; it does not, for instance, help to solve the question whether state A should have 50% or 60% of the volume of the river flow irrigation. A fortiori it does not aid the solution of such a problem according to law. The fifth Part of the book is "Trends in the process of decision and conditioning factors." This section is an "analysis and evaulation of past decisions ... with a view to a possible anticipation of the likely decisions and solutions that may be arrived at under probable future conditions." Dr. Glos then analyses the history of claims to each of the principle uses. This material may be interesting, but it deals chiefly with negotiated settlements and not with determinations according to law.

In his appraisal and recommendations, the final section of his work, Dr. Glos actually acknowledges his lack of expert knowledge in most of the field he has been discussing. He says that the skill of geologists, the judgment of geographers, the advice of hydrologists and climatologists, the knowledge of agronomists, the experience of foresters, the opinion of economists, the views of social scientists, and the skill of engineers are all essential to the determination of the problems raised by international rivers. The reviewer here agrees whole-heartedly. How can a lawyer consider and evaluate matters on which the advice of so many experts is necessary, particularly when it is remembered that the opinions of all these experts will differ substantially according to the particular river system and other relevant factors? In other words it issuggested that Dr. Glos has concerned himself with matters to which his competence as a lawyer does not extend. An important and regrettable result of this treatment is that Dr. Glos largely excludes from his consideration an exposition of the rules of law which regulate rivers in the absence of negotiated settlements. Surely it is this latter topic with which a lawyer is competent to deal and with which he must primarily concern himself. Nor can it be said that as a general work on international rivers the work is a success. It inevitably suffers on account of its size: a treatment in such a short space of such a complex subject matter on which so many factors impinge by an author who as he himself acknowledges is not an expert in many of the fields, cannot be other than superficial, and so general as to be virtually useless. As a source book it may have some value.

K.J.K.