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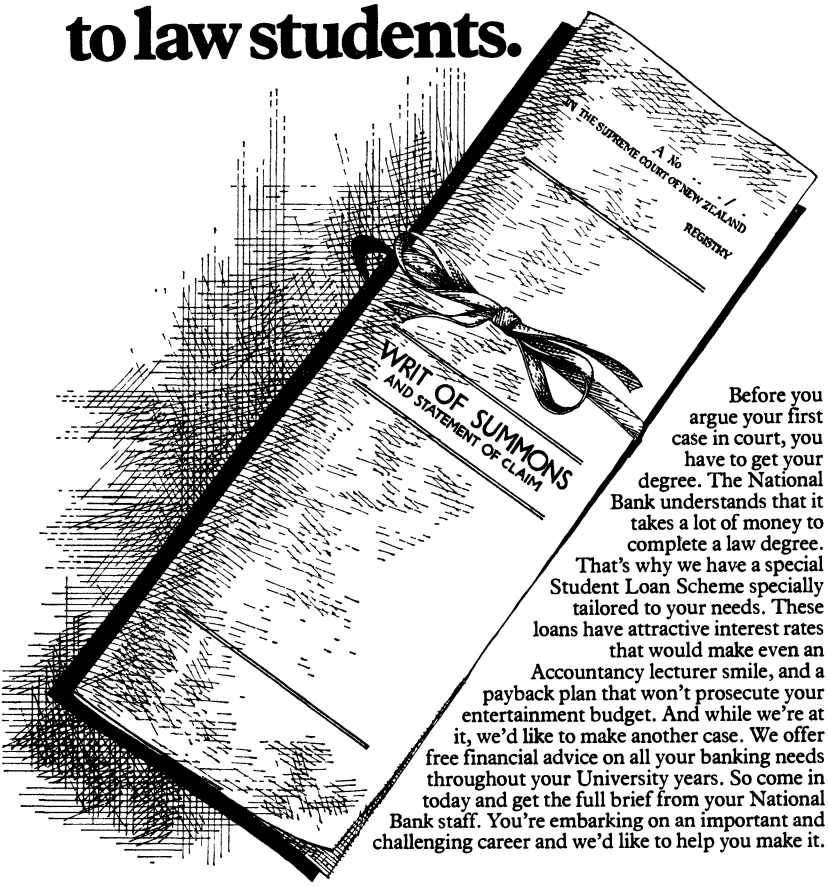

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Book reviews

LAW FOR NURSES by John O'Sullivan, 3rd ed., Law Book Company Ltd, Sydney, 1983, xi and 282 pp. (including index). Price Aust.$19.50 (limp). Reviewed by W. R. Atkin*

A book on law for nurses appears at first sight to be an unlikely prospect. Yet the success of O'Sullivan's book is indicated by the fact that a third edition has now been published only seven years after the first edition. Apart from a rather false start, this book should prove extremely valuable for nurses and those who are engaged in nursing education. Beyond that, there will be relevant and useful material for all those interested in the relationship between law and medicine. While written essentially for an Australian readership, New Zealanders will learn much, so long as they note the caveat that New Zealand law will differ markedly in places, most particularly where the accident compensation scheme has an effect.

Law can in fact impinge quite frequently on the day to day work of nurses. When can they administer medical treatments? What consents do they need to obtain? Can they be sued for mistakes made in administering treatment? What can they do with hospital patients' property? What can they do with a deceased patient's body? What laws govern drugs and poisons? What degree of confidentiality does the nurse/patient relationship attract? What records are secret? What rights of entry does the community health nurse have? What obligations are there when a nurse suspects that a child has been battered? And so on. The answer to these questions calls for an expertise in a vast range of legal areas — not just the more obivously medical areas of law such as poisons, coroners, and medical privilege, but criminal law, torts and contract law in general — and an ability to state the legal position succinctly and in a way that relates to the nursing profession. O'Sullivan (with the help of Mr. Philip Bates) has done this admirably. The book is readable, comprehensive, thoroughly up to date and not limited in its resources Citation of cases from many jurisdictions is made in a way which should be interesting and understandable to the non-legally trained reader and where appropriate United States decisions are also called in aid.

Criminal law, including abortion and euthanasia, and the law of negligence, assault and battery receive extensive treatment. A more particular topic which is discussed at length is the question of consent. As a general rule, the law requires medical procedures to be preceded by properly given consent or else, absent an emergency situation, a battery will have been committed. In more recent times, the law has also demanded what has come to be known as "informed consent",

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i.e. the patient must be to some degree aware of the risks involved in the proposed procedure. The doctrine of informed consent has been developing in most jurisdictions,[1] including New Zealand where *Smith* v. *Auckland Hospital Board*[2] invoked the *Hedley Byrne*[3] principle to found liability. But a number of questions arise in connection with the doctrine. How much information need be disclosed to a patient? To what extent can this be determined by standards adopted by the profession or are professional standards merely evidence, along with other evidence, to assist the court? Where there is no informed consent, is the appropriate cause of action in battery or in negligence? The latter question is a highly significant one, for battery is actionable per se, the burden of proving consent is on the defendant and aggravated and exemplary damages may be awarded, whereas in negligence, the plaintiff must prove that the consent was induced by the failure to provide proper information and that loss followed, and is limited to claiming damages for foreseeable losses. On the one hand, it could be argued that consent which is not informed is not real consent at all (hence, the appropriate action is battery). On the other hand, it can be said that consent has in fact been given despite the lack of information and the doctor or nurse has simply failed in the professional duty of care owed to the plaintiff. The distinction may be even more critical for New Zealanders because of accident compensation. Actions seeking damages for personal injury may no longer be brought where the injury was the result of an accident.[4] Medical malpractice has been regarded as often falling within this category[5] but where does this leave the doctrine of informed consent? If informed consent relates to negligence, it is less likely that proceedings can ensue since the loss suffered will almost certainly be personal injury and may in some cases be the result of an accident or medical misadventure.[6] If it relates to battery, the patient may sue for the infringement of personal rights quite independently of injury — indeed, no injury need have been suffered at all. O'Sullivan examines informed consent well but is, of course, not concerned to explore the implications of the Accident Compensation Act 1982. This may yet need his attention, in the event of Australia legislating its own compensation scheme.

There is one main criticism to be offered of this book. The opening chapter is simply entitled "Law" and endeavours to introduce some basic jurisprudential concepts. It is doubtful whether there is any point in this exercise in a book of this kind but the doubts are compounded when it is discovered that the first page

1 Two of the leading recent cases are *Chatterton* v. *Gerson* [1981] Q.B. 432 and *Reibl* v. *Hughes* (1980) 114 D.L.R. (3d) 1.

2 [1965] N.Z.L.R. 191 (The patient was misled after asking specific questions but the doctrine requires disclosure even where the patient asks no direct questions).

3 *Hedley Byrne* v. *Heller* [1964] A.C. 465.

4 Section 27 (1), Accident Compensation Act 1982.

5 Cf. *Accident Compensation Commission* v. *Auckland Hospital Board* [1981] N.Z.A.C.R. 9.

6 Arguably, there will still be cases where the personal injury has been caused not by accident but by negligent misstatement or the negligent failure to inform a patient of the risks involved, in which case the Common Law and not the Act would apply. For a fuller discussion, see M. Vennell "The Effect of the Accident Compensation Scheme on Claims for Damages Against Doctors and Nurses" (1983) 11 N.Z. Nursing Forum. 4.

tries to summarise positivism, realism, natural law and more, virtually in one breath. The second sentence on page 2 then tells us that "[i]n a sense the debate is not particularly important . . . " and we are left wondering why we were troubled with references to Austin, Hobbes and the like in the first place. What the average nurse would make of all this is anyone's guess. But then on page 3 there is a sub-heading "Some Differences between Law and Ethics", a topic which possibly merits some careful treatment for nurses (especially as it appears that they receive the principal part of their education on law in the context of "ethics" courses). Unfortunately, what follows is merely a two-columned list of four such differences, at best rather misleading because of its summary form but, more significantly, highly debatable in its content. For instance, law is said to be "concerned with what is convenient for this time and place" while ethics is "concerned with how to live in a way that is good in itself", yet the lawyer would want to say that law embraces higher values than mere convenience and the ethicist would want to examine carefully what is meant by "good in itself". Again, we are told that with law there is an "emphasis on relationships between individuals" whereas in ethics the "emphasis is on the individual". Precisely what this distinction is is unclear but surely few ethicists would say that ethics places little emphasis on social relationships and few lawyers would deny the law's emphatic concern for the individual. It is respectfully suggested that in a future edition of the book the few lines on law and ethics be scrapped and replaced by a more understandable but carefully reasoned section.

Overall, this book achieves its purpose well and deserves recommendation.

SENTENCING THE FEDERAL DRUG OFFENDER: AN EXPERIMENT IN COMPUTER AIDED SENTENCING by Ivan Potas and John Walker. Australian Institute of Criminology, Canberra, 1983, iv and 113 pp. (including references and 2 Appendices). Noted by Warren Young.*

This book describes an attempt to analyse, with the aid of a computer, the factors relating to the circumstances of the offence and the background of the offender which appeared to influence the courts in determining the appropriate sentence in federal drug cases in Australia. Essentially, therefore, it selects the range and combination of factors which best predicted the sentences passed in the cases studied.

The study is an interesting illustration of the use to which computers might be put in providing information to the courts about the characteristics of offenders and the sentences passed in previous similar cases. It is less useful as a predictive device, since it does not validate the tables by reference to any subsequent cases. More importantly, since it makes no effort to examine the extent to which coherent principles underlie the sentences passed, it might well be merely turning nonsense into systematised nonsense.

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THE LAW OF TORTS by John G. Fleming. Law Book Company Ltd., Sydney, 6 ed. 1983, 1ii + 702 pp. (including index). Price A$42 (cloth), A$32 (limp). Reviewed by W. R. Atkin.*

At the time of the publication of the fifth edition of Fleming's book on torts (1977) the question was being asked by at least some academics in New Zealand whether there was much future for the law of torts. The accident compensation scheme had been in force a couple of years by that stage and had swept away tortious liability for personal injury. Speaking from a wider context in his latest edition, Fleming echoes the questioning at an even more profound level when he talks of "a serious crisis in contemporary tort law".[1] This crisis is brought on by the increasing examination of "more wide-ranging social and economic policies of how to allocate given losses" (something which is "more germane to the legislative than the judicial function") and by "the very challenge of tort law as a suitable method of compensating victims in the modern welfare state". ("This challenge represents a logical extension of the contemporary movement from individualism to collectivism as the basic philosophy of compensation").

Tort law has survived however as a mainline subject for legal education, and new editions of the leading textbooks keep appearing. What is more, judicial enterprise has reflected a resilience in tort law, which only a few years ago some would have doubted the existence of. In the short period between the fifth and sixth editions of Fleming there have been many developments, some of them monumental. *Anns* v. *Merton London Borough Council*[2] is perhaps the most significant, as it both redefines the basic test for duty of care in negligence and opens up to liability a very wide range of administrative actions. The expansion of the law is seen in other areas such as economic loss[3], nervous shock[4], negligent misstatement[5], nuisance[6] and exemplary damages. (*Taylor* v. *Beere*[7], the recently decided leading New Zealand Court of Appeal decision on such damages in a defamation action, merits citation in the new edition as early as the first two pages).

Fleming has had to find space for these changes, along with the smaller number of examples where the courts have denied expansion, notably in the area of novus actus interveniens[8], unwanted birth[9], and economic relations[10]. This has meant

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1 Page 11. The quotes which follow are from the same page.

2 [1978] A.C. 728.

3 E.g. *Caltex Oil* v. *"Willemstad"* (1976) 136 C.L.R. 529, *Junior Books* v. *Veitchi Co.* [1982] 3 W.L.R. 477 and *Bowen* v. *Paramount Builders* [1977] 1 N.Z.L.R. 394.

4 *McLoughlin* v. *O'Brian* [1982] 2 W.L.R. 982.

5 *Shaddock* v. *Parramatta City Council* (1981) 36 A.L.R. 385 and *Scott Group* v. *McFarlane* [1978] 1 N.Z.L.R. 553.

6 *Clearlite Holdings Ltd.* v. *Auckland City Corporation* [1976] 2 N.Z.L.R. 729. Cf *Kennaway* v. *Thompson* [1981] Q.B. 88 and *Miller* v. *Jackson* [1977] Q.B. 966.

7 [1982] 1 N.Z.L.R. 81.

8 *Lamb* v. *Camden London Borough Council* [1981] Q.B. 625 and *Knightley* v. *Johns* [1982] 1 W.L.R. 349.

9 *McKay* v. *Essex Area Health Authority* [1982] Q.B. 1166.

10 *Lonrho Ltd.* v. *Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173.

considerable revision of the text in many places, a task accomplished with the admirable ease we have come to expect of the author. At the same time, Fleming has taken account of the greater jurisprudence in the tort area, both from academics and from official reports such as the Pearson Commission[11]. This leads, for instance, to more discussion in the chapter entitled "Private and Social Insurance", although events in Australia and New Zealand have already overtaken the author. The accident compensation scheme has been reviewed by the New Zealand Parliament and now appears in a modified form in the Accident Compensation Act 1982. At the end of the Australian section, the sentence "For the time being, however, the prospect for such a fundamental reform is dim" has been added but is immediately looking questionable following the election of the new Labour Government.

Fleming is undoubtedly a superb book and the new edition reinforces its well won reputation. It is not without its blemishes, however, some minor matters of substance and some irritating ones of presentation. The New Zealand reader will pick up some mistakes. For instance, the accident compensation section wrongly states that "holders of driving licenses" (sic)[12] are levied instead of car owners, and that the Commission (now of course the "Corporation") has exclusive jurisdiction to determine coverage, whereas in practice the courts have spoken on this question after an initial determination by the Corporation. Actions for enticement of a spouse have been abolished in New Zealand by section 190 of the Family Proceedings Act 1980, as have per quod actions by the accident compensation legislation. In both cases, the text implies the contrary[13]. The Married Women's Property Act 1952 should no longer be described as a "current" Act as the relevant law is now found in the Matrimonial Property Act 1976[14]. There are a number of spelling and other mistakes, some of which are inherited from the previous edition. Examples affecting New Zealand references are as follows: *McCleod* v. *Jones* for *McLeod* v. *Jones*[15], *Capitol Motors* v. *Beecham* for *Capital Motors* v. *Beecham*[16], *Gordon Mock* for *Gordon Moen*[17], and Domestic Proceedings Act 1975 for Domestic Actions Act 1975[18]. *French* v. *Auckland City Corporation*[19] and *Rutherford* v. *Attorney-General*[20] are mis-cited and page 610 proves to be something of a disaster area, with at least five errors in the footnotes. The somewhat arbitrary use of abbreviations in the footnotes is both unnecessary and distracting. To cite the Woodhouse Report at page 11 as "Comp. for Personal Injury in N.Z." may leave the uninitiated guessing what "comp." is short for, although page 374

11 *Royal Commission on Civil Liability and Compensation for Personal Injury* (H.M.S.O. London, 1978) Cmnd. 7054 — I, II, III.
12 Page 375. At p. 376, the reference to "Supreme Court" should be changed to "High Court".
13 Chapters 28 and 29.
14 Page 640, n.11.
15 Pages 559 and xxxiii.
16 Pages 607, 608 and xviii.
17 Pages 610 and xxv (the Table of Cases lists the case both correctly and incorrectly).
18 Page 616 (footnotes 31 and 32 have been wrongly transposed).
19 Page 399 (volume number missing).
20 Page 610 (should read "[1976]").

uses the better formula "Compensation for Personal Injury in New Zealand". One more example of infelicitous abbreviating will suffice: Page 304 refers to "Miller, *Liab. in Intern'l Air Travel*".

Fleming remains a leading text on the law of torts. It has a lively discussion of the issues, it cites widely from Commonwealth jurisdictions and it explores the more fundamental questions of social and legal policy lying behind the cases. It may not be going too far to say that it is the best torts book for New Zealand students and practitioners.

THE LAW OF PARTNERSHIP IN AUSTRALIA AND NEW ZEALAND by P. F. P. Higgins and K. L. Fletcher, The Law Book Co. Ltd., Australia, 1981, 4th ed., lxiii + 383 pp. (including Appendices and Index). New Zealand price $35 (cloth), $25 (paperback). Reviewed by K. K. Puri.*

The law of partnership concerns itself with a variety of business decisions. For a commercial lawyer the most obvious context for consideration of partnership law is the choice of form of business organisation. Business associations of a wide range of sizes and activities employ the partnership form. Accordingly, the question of whether to choose the partnership form is one which recurs each time a solicitor assists in drawing up the deed of partnership. On the other hand, the question whether or not a partnership relationship exists is usually faced by a barrister, generally in the context of a creditor's quest for a solvent defendant. Indeed, partnership problems intersect almost all other areas of the private law including agency (the power of a partner to bind other partners and the firm); real property (whether a firm can hold title to real property, among numerous other problems); decedents' estates (rights of the heirs of a deceased partner in partnership property); civil procedure (whether a partnership can sue and be sued in its own name, and a whole series of additional issues); insolvency (distribution of bankrupt partner's property amongst joint and separate creditors, among various other problems); and taxation (whether the income of the individual partners derived from the partnership activities, stands on a different footing from the income derived by individuals from other sources).

Surprisingly, a branch of the law that deals with such a full range of problems has not attracted a large body of legal literature in Australasia. Several factors seem to have contributed to this. For one thing, the law of partnership, unlike other business laws, has not been subject to rapid change, so writings originating in the United Kingdom are considered useful and sufficient. For example, perhaps the best commentary on partnership law is still *Lindley on the Law of Partnership*.[1] Yet a practitioner researching a problem under his local jurisdiction's version of the United Kingdom's Partnership Act 1890 would probably not find solutions most

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1 E. H. Scamell and R. C. I'anson Banks (eds.) *Lindley on the Law of Partnership* (14

suitable to the indigenous business conditions. Furthermore, some people have come to believe, mistakenly though, it is submitted, that out of the two main types of business organisations viz., partnerships and incorporated companies, companies are a more common and most suitable framework for doing business in the modern environment. Undeniably, incorporation opens up new avenues and confers greater advantages, yet the function and utility of partnerships as the vehicle for carrying on small and medium-sized businesses cannot be overlooked. A partnership affords a suitable framework for an association of a small body of persons (who are sometimes members of a family) having trust and confidence in each other. As Gower has put it: "The distinction between partnerships and companies is often merely one of machinery and not of function."[2] There are indeed a large number of partnerships being established even today, notwithstanding the recent boom in company registrations.

Finally, partnership law is often found discussed in books which do not deal exclusively with matters relating to this field of law. These are works on mercantile or business law. Because of the variety of subjects which are often covered in such books, coupled with a desire to keep them within reasonable bounds, the analysis contained in such publications does not always fully assist the practitioner, or for that matter the law teacher.

It is most gratifying to note that the fourth edition of *The Law of Partnership in Australia and New Zealand* by Professor Higgins and Mr Fletcher fills the gap in the analytical and practical literature in partnership problems in Australasia.[3] The bulk of this excellent book is concerned with the developments of partnership law in Australia, but as the learned authors point out in the preface, the book also contains a good reference to New Zealand partnership law. In the five years since the last edition of this well-established text, significant judicial decisions have been handed down in the partnership law in Australia to cause the fourth edition of the book to be partly reset and expanded to many more pages. This is hardly surprising, since the ambit of the book is very wide and encompasses some of the most vital areas of current legal practice, including taxation of partnership income. Like its predecessors, this new edition is remarkable in its breadth, factual accuracy and the lucidity of authors' style.

Obviously in such a work there will be some omissions which seem not entirely to be explained by the need to confine the subject within reasonable bounds. The discussion of undisclosed principal's liability in the partnership context, for example, is hardly complete without at least a reference to the limitations under which the Common Law doctrine of undisclosed principal operates.[4] Similarly, it seems strange that the doctrine of ratification has not been fully explained. In particular, it is essential to draw the attention of the readers to the fact that one of the pre-

ed., Sweet and Maxwell, London, 1979).

2 L. C. B. Gower *The Principles of Modern Company Law* (4 ed., Stevens, London, 1979) 5.

3 Mention must be made here of an excellent New Zealand book: Webb and Webb *Principles of the Law of Partnership* (2 ed., Butterworths, Wellington, 1976).

4 See pp. 94-97.

requisites of the doctrine is that contracts must be professedly made on behalf of the principal — "obligations are not to be created by, or founded upon, undisclosed intentions."[5] Not surprisingly, no reference is to be found in the book to the New Zealand case of *Riley and Co. Ltd.* v. *Tosswill and Ellis*.[6] It seems unfortunate that a book aimed at a student and practitioner market in New Zealand also, does not deal with some of the leading partnership cases decided by New Zealand courts. The reviewer is particularly disappointed that the authors have not referred to (not even in footnotes) significant New Zealand cases such as *Wilkie* v. *Wilkie (No. 2)*[7] (dealing with expulsion of a partner) and *Castle and Others* v. *Castle and the Public Trustee*[8] (dealing, inter alia, with accountability of partners for private profits). Even otherwise, one would have expected a detailed commentary on these topics in a book of this stature, but the authors make only fleeting mention of these issues.[9] The other major disappointment to this reviewer is that, although the authors have done considerable research and contributed original thought to topics dealing with the nature of a partnership,[10] rules for determining existence of partnership,[11] authority of an individual partner to bind the firm[12] partnership by estoppel,[13] partnership property,[14] accountability for goodwill on dissolution of partnership,[15] and partnership taxation,[16] the discussion of some other partnership issues is not quite exhaustive. For example, the authors' commentary on topics like relevant considerations on the choice of business form (proprietorships, partnerships or companies), use of partnership form in particular kinds of businesses (e.g. medical partnerships, farming partnerships, etc.) and special problems in limited partnerships, is less flamboyant. Also, the authors appear to have overlooked the implications of section 8 of the Partnership Act 1908 (New Zealand) disallowing partnership agreements operating retrospectively.

Despite these criticisms, the book under review can be a very useful concise reference book to have on one's shelf, being quite comprehensive, well indexed and clearly written. As well as being useful to New Zealand practitioners, this will be invaluable to those people caught up in partnership litigation. Business people intending to enter into partnership relationship will find Appendix II particularly useful since it contains specimen clauses in "Partnership Articles" supplemented with very helpful footnotes. The reviewer has personally used the book in teaching a course in partnership law at the Victoria University and has found it to be a most useful teaching aid. To sum up, the book provides a classic exposition upon the subject of partnership law and is therefore strongly recommended.

5 Ratification is discussed at pp. 97-98.
6 [1927] G.L.R. 281.
7 (1900) 18 N.Z.L.R. 734.
8 [1951] G.L.R. 541.
9 See pp. 164-165 and 168-169.
10 Pages 53-64.
11 Pages 65-83.
12 Pages 87-94 and 112-114.
13 Pages 118-119 and 124-126.
14 See p. 136 et seq.
15 See p. 208 et seq.
16 See chapter 9.

PROTECTING THE PROTECTORS by Bruce Swanton. Australian Institute of Criminology, Phillip, A.C.T., 1983, xviii + 331 pp. including index. Noted by Neil Cameron.*

In this book Swanton provides a general, and essentially uncritical, survey of police unionism in Australia. Starting with an overall assessment of the impact of police unions in terms both of their own hierarchy and state politics over the last decade, he goes on to discuss police morale and militancy in general, dispute settlement and grievance mechanisms, the aims and structure of Australian police unions, the role of unionism in police professionalization and the future of police unionism and of the Police Federation of Australia and New Zealand. While the book contains much useful information its discussion of most of these topics is disappointing. Swanton has a clumsy and convoluted writing style and a penchant for uphelpful graphs and diagrams, but his main problem is a marked reluctance to view his topic in anything like its full social and political context. In particular his discussion of the political and media battles waged by police unions in Victoria, South Australia and Queensland in the mid-1970's is sadly defective in its failure to analyse the various conflicts in anything other than standard trade union terms. To describe police union militancy as showing simply that the police are now "actively and effectively participating in the struggle for power and economic reward which typifies modern industrial society"[1] is surely to seriously misrepresent the significance of such union involvement in the politics of policing, police policymaking and police accountability.

THE SOLOMON ISLANDS LAW REPORTS 1980/81. Published by authority of the High Court of Solomon Islands, 1983, xi and 269 pp. including tables and index.

The appearance of this the first volume in the Solomon Islands Law Reports series is noteworthy. In a region where the availability of reported decisions is unfortunately rare it is good to see this series take its place in the law library along with the small collection of Pacific Island legal materials. This 1980/81 volume reports 56 cases decided in the High Court of Solomon Islands and in the Court of Appeal for Solomon Islands. The range of cases is a good one and the volume is generally well and clearly presented. Besides its obvious importance to those within Solomon Islands the series is of especial interest to many outside Solomon Islands. The volume has a clear place on law library shelves in New Zealand and will also doubtless be acquired by other law libraries as a significant first in a series that will be followed with much interest. The inauguration of the series is a compliment to the international assistance that facilitated its production and to the initiative of the High Court.

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1 Page 15.