BOOK REVIEWS

THE LAW OF TORTS IN NEW ZEALAND

(2ed, Wellington, 1997) (Todd (general editor), Hughes, Burrows, Chambers, Hawes, Bedggood, Beck) pp 1316 + xcviii, $144 (inclusive of GST).

Reviewed by Geoff McLay[*]

There is no doubt that students and practitioners alike will welcome the updated edition of Todd on Torts. The first already seems older than its six years. A quick read of the preface and the tables of both the first and second edition show just how much has happened in the intervening years. The common law has continued to be in ferment. The Accident Compensation system has remained in crisis. Parliament, for better or worse, has continued to interfere with legislation like the Consumer Guarantees Act 1993 that simplifies or destroys, depending on your point of view, the balances struck by the common law. The courts have confirmed their role in personal injury cases under the exemplary damages doctrine and continued to expand their empire by creating a new remedy under the New Zealand Bill of Rights Act 1990. All of this justifies a new edition of Todd on Torts , the additional 300 pages of text and indexes, and the addition of two new chapters.[1]

One suspects that General Editor Professor Stephen Todd is due most of the credit for the second edition. Not only is he the sole author of half of the book, he is co-author of many of the remaining chapters. While readers will not necessarily agree with particular interpretations of either cases or statutes, this book satisfies the first criterion by which a textbook should be judged - it is a fine starting point for research , a place where basics are discussed and where researchers or students are presented with lines of future inquiry. Todd II will succeed its predecessor as the first port of call for the anxious law clerk asked to research areas as seemingly disparate as malicious prosecution, conversion, New Zealand Bill of Rights actions, vicarious liability and fair trading law.

Negligence has continued to confound and confuse practitioners, courts and students alike. Few areas of the book have needed as much simple updating as Todd's own chapters

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1 Chapter 19 on "Misuse of Public Office" and Chapter 23 on "Parties".

on the "duty question". The "retreat from Anns"[2] was in full swing in 1991, with Stephen Todd saying in his preface, with relief, that the then recent *Murphy v Brentwood District Council*[3] case had not caused "any undue delay". *Murphy* now seems like an age ago, as do the pre-*Hamlin*[4] ruminations of whether New Zealand would follow *Murphy* or continue down its own path and retain council liability for negligent inspections.[5] More importantly, the dismissive tone of the House of Lords in *Murphy* and its predecessor, *Caparo* has now thankfully gone. Attempts to calm the waters so stirred up by Lord Wilberforce in *Anns* have been replaced by a much more open inquiry into the proper shape of the law of negligence in a unified law of obligations. [6]

Todd's chapters reflect this process in the thorough way that those used to the first edition or his other writings would expect. Particularly impressive are the references to cases decided in the last six months. This reviewer has found it extremely difficult to "catch out" Todd on recent cases, be they English, Australian or Canadian.

The growing importance of Australian and especially Canadian decisions[7] is emphasized in the text. Much of what the Supreme Court of Canada has done in the last few years should appeal to our courts. While the Supreme Court of Canada has been consistently to the fore in pushing liability forward, more recently it has become concerned with the proper limit of liability. In doing so it has moved beyond using "policy" as a way of justifying personal judicial preferences. Instead the justices appear to be moving towards balancing both economic and social concerns and explicitly articulating the choices made between various theories of liability. One advantage of Canadian material is that thanks to

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2 *Anns v Merton* London Borough Council [1978] AC 728.

3 *Murphy v Brentwood District Council* [1991] 1 AC 398.

4 *Hamlin v Invercargill City Council* [1994] 3 NZLR 513 (CA) and [1996] 1 NZLR 513 (PC).

5 One of the remaining oddities is that, although Todd, in his first edition was confident that the "conflict" between *Caparo Industries v Dickman* [1990] 2 AC 605 and *Scott Group v McFarlane* [1978] 1 NZLR 553 on the extent of auditors' liability would soon be resolved, it is yet to be decisively resolved. Todd usefully sets out overseas authorities that suggest that the more expansive auditor liability suggested by the *Scott Group* majority has not found favour. To the authorities discussed, of course, must now be added the Australian High Court's decision in *Esanada Finance Corp. Ltd v Peat Marwick* (1997) 142 ALR 750 and the Supreme Court of Canada in *Hercules Management Ltd v Ernst & Young* May 22 1997, File No 24882.

6 See for instance *White v Jones* [1995] 2 AC 207.

7 Nowhere was this importance more recognised in the last 6 years than in *Hamlin* where both the New Zealand Court of Appeal and the Privy Council referred to the approaches of superior courts in both Canada (*Winnipeg Condominium Corp No 36 v Bird Construction* ([1995] 1 SCR 85; (1995) 121 DLR (4th) 193) and Australia (*Bryan v Maloney* (1995) 128 ALR 163 to show the disparate solutions possible to the problem of negligent council inspection of defective premises).

the efforts of its academic community, and notably Professor Bruce Feldthusan of the University of Western Ontario,[8] Canadian courts are rapidly accepting that the rules relating to the recovery of one kind of economic loss should not necessarily be applied to other kinds of loss. Canadian courts seem to be leaving behind the vague judicial blandishments "of taking account of all the relevant circumstances" that so bedevil New Zealand negligence law. [9]

Todd wisely analyses, at length, the Supreme Court of Canada's monumental *Norsk*[10] decision on "relational economic loss". There, Canadian Railways sought to recover profits lost because damage to a bridge owned by the Canadian Government by one of Norsk's tugs had required that it reroute its trains. The judgments of La Forest and McLachlin JJ should become the classic starting points for economic loss cases. Both systematically reviewed the law of economic loss, and examined why building foundation or misstatement cases are different from the "relational" economic loss case at hand; Canadian railways had only a contractual right to use the bridge as opposed to a proprietary interest in the bridge. Both justices leave the reader with a sense that complex issues have been explored and framework developed to resolve them in the future. Todd prefers for La Forest J's more restrictive judgment. This preference might be debated, but the desirability of the kind of detailed reasoning exhibited by both justices cannot.

Similarly praiseworthy is Todd's discussion of how the Fair Trading Act 1986 and the Consumer Guarantees 1993 Act apply to misstatement and the law of defective chattels. In the rush to understand and use the complicated case law in either field, it is often easy to forget that much simpler statutory avenues might be available. He provides a number of flow diagrams that elucidate the "correct" path for lawyers taking action on behalf of consumers and those unlucky enough not to be consumers under the wonderfully generous Consumers Guarantee Act. While Todd seems to agree that it was appropriate to make things easier for consumers to bring actions he shares the scepticism of many that the vagueness of the Fair Trading Act 1986 has led to its becoming an all-purpose weapon in civil litigation without a similar all purpose justification or theory.

While there is much to be commended about Todd's discussion of negligence, inevitably there are parts which readers will argue over. One example is his discussion of *Trevor Ivory Ltd v Anderson*[11] in which the Court of Appeal denied that Mr Ivory, the director of a

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8 See Bruce Feldthusan "Economic Negligence" (2ed, Toronto, Carswell, 1989).

9 For an insightful summary, see B Feldthusan "The Recovery of Pure Economic Loss in Canada: Proximity, Justice, Rationality, and Chaos" (1996) 24 Manitoba LJ 1.

10 *Canadian Railways Co. v Norsk Pacific Steamship Co.*(1992) 91 DLR (4th) 289.

11 [1992] 2 NZLR 517.

one man spraying company, might be liable when it was shown that Mr Ivory had failed to ensure that proper precautions were taken to protect the plaintiff's crops. As well as "successfully recovering" against the limited liability company, the plaintiff tried to recover direct from Mr Ivory. Todd is very critical of the Court of Appeal, arguing that the Court, in denying Mr Ivory's personal liability, failed to follow fundamental principles of liability. While there is something to be said, of course, for not letting the negligent hide behind corporate veils, the criticism however is strained. Cooke P seems perfectly correct in arguing that the parties had chosen to order their affairs in a particular way and that courts should not reorder the transaction when things go wrong. Perhaps the potent question is not whether Trevor Ivory is correct but whether the decision has wider application. [12] Does it, for instance, confirm that in New Zealand tort law will not be used to supplement what the parties have bargained for, and how might this affect cases where parties attempt to jump over the contractual chain? David Goddard has gone so far as to suggest that Trevor Ivory threatens such well known New Zealand cases as *Bowen v Paramount Builders*[13] as do more specific statutes like the Contracts Privity Act 1982 which might make it not only unnecessary for negligence to jump over the contractual chain but undesirable for it to be allowed to short-circuit the defences contained in the Act . It may be that rather than being a case of general application, Trevor Ivory will seen as one of those "corporate veil"cases where the courts sometimes uphold the sanctity of the corporate structure but on other occasions do not.

This leads more generally to the point that the relationship between tort and contract is not developed in the book as much as it might have been. While there is considerable discussion of the existence of "concurrent liability", there is perhaps not enough discussion of what concurrent liability might both in a general theory of obligation law and more immediately in practice. Lord Goff's stated in *Merret*[14] that tort law is the general law out of which contractual parties can contract. New Zealand judges have, however, seemed more cautious than English judges. Earlier in *South Pacific*[15] Richardson J, in contrast, seemed to indicate that tort law should have very little say when faced by the silence of the contractual parties. Much of the concurrency debate has tended to focus on the possibility of different limitation periods, a relatively minor issue in the emerging law of obligations. Other questions like the use of tort to supplement existing contracts seem more interesting

12 See for instance Rickett and Goddard "The Law of Obligations" (New Zealand Law Society Seminar, November 1996) 107-120.

13 [1977] 1 NZLR 394.

14 *Henderson v Merret Syndicates* [1995] 2 AC 145, 193-4.

15 *South Pacific Manufacturing Co. Ltd v New Zealand Security Consultants & Investigations* [1992] 2 NZLR 282, 308-309.

and more controversial. Todd, somewhat surprisingly, spends little time discussing *Banque Bruxelles*[16] where the House of Lords held that valuers could not be liable for losses that resulted from a fall in the market value of properties bought in reliance of their valuations. In doing so Lord Hoffmann looked to reformulate the test for remoteness of damage in both tort and contract and in doing so raised a host of issues about the interaction of tort and contract. These are controversial areas and likely to be debated as plaintiffs and defendants seek to explore the significance rather that the mere existence of concurrence. Todd II will, I predict, have much to report in these areas.

Another area where Todd does not go as far as might have is the liability of government in negligence. Todd does a very good job analysing the key English authorities, *Bedfordshire County Council*[17] and *Stovin v Wise.*[18] which cast doubt on whether negligence is the appropriate tool for bringing public bodies to account for their public functions. There is a sense, however, that Todd cuts his discussion short by not pressing further. Lord Hoffmann in *Stovin v Wise* criticised the theory that citizens' expectations of government create private law obligations, the theory on which the New Zealand building cases that ended with *Hamlin* were based. A major theme of Lord Cooke's tort jurisprudence[19] was an analysis of the reliance that ordinary New Zealanders place on those in official capacities and that reliance might form the basis of making government liable. Much of the Cooke court's observations about the role of government seems to be in tension with the new government environment. It is ironic that while the role of the State seems to have been rolled back in many ways since 1984, New Zealand courts have seemed imposed increased responsibility. At some point New Zealand lawyers are going to have deal with these inconsistencies. Any such resolution of these inconsistencies will ultimately have less to do with classical legal analysis and more to do with political theory. [20]

The accident compensation chapter is inevitably going to be one such chapter - another chapter that needed substantial rewriting. This time Todd's Canterbury colleague John Hughes has taken responsibility for this distinctively New Zealand area of tort law . Hughes does well to present many of the technical problems caused by a mixture of bad

16 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1996] 3 WLR 87.

17 *X (minors) v Bedfordshire County Council* [1995] 2 AC 633.

18 [1996] 3 WLR 388.

19 Beginning with cases like *Rutherford v Ministry of Transport* [1976] 1 NZLR 403 and ending with *Hamlin and Fleming v Securities Commission* [1995] 2 NZLR 51.

20 These tensions are clearly evident in the differing conclusions of Cooke P and Richardson J in *Fleming* as to whether the Securities Commission indeed might owe a duty of care to disappointed security investments.

policy behind and bad drafting in the Act. The problem with the Accident Compensation and Rehabilitation Insurance Act 1992 is that you are never sure which provision reflects a bad policy choice and which reflects drafter's mistakes. In the haste to be explicit about what is not to be compensated under the Act, the drafters have made all kinds of common law actions possible. Given that the levels of compensation under the Act are felt to be well below that which a jury might award, there is a grave danger of plaintiffs exploiting the loopholes by pleading not the physical injury which is the real source of their loss but rather some legal theory of liability that has been unwisely left unbarred. Of course, most of us hope that Hughes will have to once again rewrite the chapter for the next edition.

Hughes' chapter title "Accident Compensation and the Common Law" reflects the way many tort lawyers think about the accident compensation scheme. Rather than being at the centre of the way we think about tort, accident compensation is somehow seen as an aberration or at least something best understood from the common law perspective. This is not necessarily so, but is curious that after 25 years the scheme merits only one chapter in a book on New Zealand tort law. An American tort lawyer might ask what is left after personal injury is taken from the system. A second, related, point is the continuing expansion of exemplary damages. The courts under the guise of exemplary damages seem increasingly to be giving us back the tort system we thought we had done away with. The *Donselaar*[21] idea of "pure" exemplary damages removed entirely from compensation may, of course, have been flawed from the beginning, and the low level of compensation under accident compensation has certainly meant that courts seem justified in reasserting their role even if they deny that low levels of compensation are relevant to awarding exemplary damages. [22] But I wonder whether in not surrendering their dominion the courts might have also have ultimately threatened the system's integrity. Popular misconceptions abound about the role of the courts and the place of common law actions. The Cave Creek[23] affair revealed the unsightly existence of a three track system : high levels of compensation for those involved in "national" tragedies; moderate levels of payments for those involved in purely "personal" tragedies where the behaviour merited special punishment; and low levels of statutory compensation for those who are unfortunate enough to be in an "ordinary accident" of the run-of-the-mill sort. All of which seems highly undesirable if one's focus is, as the original 1967 Woodhouse report was focused, on removing the forensic lottery and ensuring that all victims were properly rehabilitated.

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21 *Donselaar v Donselaar* [1982] 1 NZLR 97.

22 See *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 .

23 A group of polytechnic students were either killed or severely injured when a badly contructed Department of Conservation platform collapsed. After almost two years of public controversy, a judicial inquiry, the Government paid out large sums to the surviving victims or the families of the deceased victims.

Defamation law has, for the past decade, seemed on the point of major change but a quick read through Professor John Burrows' defamation chapter reveals that the Defamation Act 1992 was pretty much a non-event in changing the substance of the defamation law. As one would expect, Burrows comprehensively survives defamation law. One disappointing feature however is the way in which Burrows deals with the New Zealand Bill of Rights Act 1990. Rather than its protection of free speech being explicitly at the forefront of his discussion, free speech is presented almost as a postscript and its possible effect is only very loosely considered. As many New Zealand lawyers will not only start with Todd but will finish with it as well, Burrows might have taken the opportunity to suggest how the much touted "right to reputation" might be better balanced with free speech. While there is some discussion of the *Theophanous*[24] defence for media reporting on the public life of politicians, the discussion focuses on the lack of detail on what is "reasonable" or what is "public" as opposed to "private". He does not focus on the principles behind the decision. In contrast to Todd's strong discussion of Canadian negligence law, there is no mention of the Supreme Court of Canada's *Hill v Church of Scientology*[25] which bolstered the New Zealand Court of Appeal's view in *Quinn*[26] that New Zealand law was already doing very nicely in balancing reputation and free speech.[27]

Burrows' treatment of the Bill of Rights tends to reflect how the Bill of Rights is generally dealt with throughout the book. Authors, such as Hughes in his Accident Compensation chapter, tend to be aware that it is relevant to many issues under discussion, but are rather inconclusive about its likely impact. By creating a new chapter on "Abuse of Public Office", Todd has recognised that actions against the State are going to become an important part of the "tort scene". This removes the an anomaly in Todd I where misfeasance was dealt with under the "economic torts". His treatment of the subject is traditional and one gets the sense that he sees a limited role for a separate tort regulating government action. Todd's discussion of *Baigent's* case is similarly vague and uncertain. Of course, this may not be the authors' fault. The courts have been hazy about the actual effect that the Bill of Rights or the new *Baigent*[28] remedy may have on the private law, and doubt perhaps befits a remedy that has only been that is so novel for common lawyers to grasp. Todd III will have a lot more material with which to work.

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24 See *Theophanous v Herald & Weekly Times Ltd* (1993) 182 ALR 104.

25 [1995] 2 SCR 1130; 126 DLR (4th) 129.

26 *Television New Zealand v Quinn* [1996] 3 NZLR 24.

27 This will have to change as the New Zealand courts have to deal with the judgment of Elias J *Lange v Atkinson* (unreported, 24/2/97, Auckland, Cooke P 484/95) released just after the publication of "Todd II".

28 *Simpson v Attorney-General* [Baigent's case] [1994] 3 NZLR 667.

While tort's empire has expanded in most areas, its influence in others might actually be declining. Burrow's chapter on privacy emphasises the importance of the Privacy Commissioner and bodies like the Broadcasting Standards Authority. Privacy, much touted as the next tort to develop, has instead become a statutory creature and attention should be focused not on what the courts do but on refining the Privacy Act 1993 or the Broadcasting Standard Authority's jurisdiction, and in the practice of the various commissioners and administrative bodies. This might, of course, be a good thing. Great skill is needed to balance what are very sensitive issues of private dignity and the public right to know. A reading of New Zealand defamation law as it stands in Burrows' chapter reveals that New Zealand courts have often not exhibited such skill.

What does it mean to say that there is a New Zealand tort law. This is the question that is left open by Lord Cooke's statements and Lord Lloyd's acceptance in *Hamlin* that New Zealand should develop its own common law. There are two ways of interpreting the theme of judicial nationalism that runs though much of the Cooke court's tort jurisprudence. One is that by asserting judicial independence, the New Zealand courts were attempting to escape the formalistic style of Lords Keith, Oliver and Templeman. But now that the House of Lords itself, seems to have rejected this formalistic "retreat from Anns", can the New Zealand developments of the past few years really be seen as the first steps to a unique tort law or as simply New Zealand variations on an English theme? The authors of Todd II leave the impression that rather than having its own identity New Zealand common law still lives very much in an English shadow, the main discussion in many areas focuses on recent English developments first and then turns to consider how the wisdom has been or is likely to be received in New Zealand.

The other way of looking at *Hamlin* is that New Zealand law is really unique, that there are special local circumstances which mean that although we share a common starting place we will not share the same finishing place. The problem with this is that seldom do courts articulate why New Zealand is such a different place, what our expectations are and why our law should develop in different ways. Richardson J's judgment in *Hamlin* is a rare exception of a judge attempting to do this. It is something which is remarkably under-explored in either edition of Todd.

It may be perfectly reasonable to criticise our judges for trying to invent a national identity by themselves. It is, of course, also perfectly unreasonable to expect the courts to do a good job without others questioning the assumptions that courts make about New Zealand society and the role of law in it. The Cooke court asserted a great independence in tort law but academics and practicing lawyers have not risen to the challenge of telling the courts how to use it. For all of its strengths, Todd II does not try to do this. On very few occasions, do the authors move beyond saying what they think the law is, or at least what it is in other places, to saying what the law should be. There is still another book to be

written, one less concerned with stating the law and more concerned with asking directly what "New Zealand tort law" is and what it should become.

Tort theory is very much in second place throughout Todd II. Rather than being its strength as one might say it is of Justice Linden's Canadian Tort Law[29], theory often seems confined to a very broad introduction and to being something of almost a last resort when analysis of the cases does not produce a definite result. This is a pity. Whatever one thinks of the results of American tort scholarship, the emphasis on theory be it economic or otherwise has raised debate to a new level, not easily achieved if the focus is mainly, as it is in Todd II, on reconciling one case with another. If we are to go about constructing our own tort law, New Zealand students, lawyers and judges would greatly benefit from being introduced to the rich debates that wheel in academic circles. There is little of the economics of a Calabresi or a Posner, the ethical theory of a Weinrib, or the practical research of a Trebilcock in the way New Zealand lawyers talk about either accident compensation or negligence. The next book on New Zealand tort might be made even better by asking what it is that we are all so busily engaged in trying to achieve, suggesting a preferred destination and showing the way to get there.

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29 (4ed, Butterworths, Toronto, 1993).

COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND ITS RISE AND FALL BY IAN CAMPBELL

Auckland University Press, Auckland, 1996, 286 + x pages. Price $39.95

*Reviewed by WR Atkin**

The Woodhouse Report on accident injuries[1] was released in December 1967. I began studying law the following year and not surprisingly the Report was one of the features of the first year course. I recall reading the Report eagerly, being impressed by its clarity and vision. Perhaps nothing stimulated this tentative first year student more and whetted his appetite for what was to come. As we look back 30 years later, can there be any doubt that the Report stands as a giant beacon in the development of policy in this country. It is a classic document, nationally and internationally, little excelled by anything else written since.

The scope and radical nature of the Report took some by surprise, on both the left and right of the political spectrum, from trade unions to insurance companies and business. It proposed sweeping away the myriad of mechanisms for compensating injuries, including the right to sue at common law, and replacing them with a unified comprehensive scheme. Eventually, after further examination, the National Government of the day agreed to a new accident compensation law. The Labour Government which was elected shortly afterwards extended it to non-earners who were not included in the National legislation. Thus, it can be said that accident compensation was originally developed in a largely non-partisan way and was greeted positively. "In the early days of the ACC the morale of staff was very high, as they considered themselves privileged to be taking part in such an innovative experiment."[2]

Today, accident compensation has sadly become a political football. The Right urges competition and privatisation, though interestingly not a return to the common law, probably because of a realisation that Woodhouse was correct in assessing the old system as being costly and unfair. The Left urges higher benefits and extension of the scheme to

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1 Report of the Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, 1967) commonly referred to as the "Woodhouse Report" after the name of the chairperson.

2 P 48 of the book under review.

cover all forms of incapacity, with the occasional voice suggesting that workers ought to be able again to sue their employers for damages. In 1992, the Right won a partial victory when the new Accident Rehabilitation and Compensation Insurance Act cut benefits, narrowed the scope of the scheme and made the funding system more favourable to employers.

In this environment, it is timely that a new book should be produced on the history of accident compensation and the competing arguments for future change. Someone who has long been involved in the process from the workers compensation days is surely an ideal person to write such a book. Ian Campbell was secretary and chief executive of the Workers' Compensation Board for 22 years and Director of Safety of ACC until 1981. His book gives an overview of the approached to compensation from the earliest days, but concentrates on the more recent changes to ACC and the forces at work behind these changes. He does not pretend to be anything he is not. This is not for example a legal text and while discussions of case law and statute are found within its pages, lawyers will not find the detailed analysis they usually strive for. In many ways, this is one man's journey, a life tied so intimately to a major area of social policy. He is therefore passionate. He expresses his views without equivocation. Broadly speaking, he favours Woodhouse and has scant respect for the 1992 Act.

He no doubt considers that the pendulum has swung away from prevention of accidents, compensation and rehabilitation towards the interests of employers and business. Towards the end, he asks what he describes as "the principal question": "Whose interests should be paramount? Should it be the injured and the dependants of those killed, or the providers of the funds?"[3] While he says that "[t]his is not a black-and-white issue but rather a matter of the weighting given to respective views", the whole tenor of the book is that the injured have tended to be forgotten. He says of the 1992 Act that many of the changes "reflect a parsimonious attitude which clearly belies the basic premise upon which the whole accident compensation scheme was founded"[4] and "[i]t would be difficult to conceive a more savage attack on a compensation system which, though not perfect, was serving many well".[5] In fact he *can* conceive a more savage attack, namely privatisation,

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3 Pp 252-253.

4 P 253.

5 P 138.

which, although not indexed, is examined in several places. Referring to a ministerial working party which preceded the 1992 Act, he says that:[6]

> [the working party] put great effort into finding a solution so that the private insurers might again be permitted to undertake compensation insurance business. One thing is certain: such a move will bring no benefit to the claimant. Concentration on this aspect of the exercise left the working party no possibility of giving attention to the important subject of prevention.

And again:[7]

> The continuing pressure from employer organisations for accident compensation to be privatised needs to be viewed in the light of the probable developments that would accompany such a move. The multiplicity of operators would mean that administrative expenses would increase substantially, and here we have the past experience of the workers' compensation to guide us. This would lead either to an increase in premiums or a reduction in compensation, or probably both.

One of the 1992 changes which is of interest to lawyers is the removal of mental injury (unless the result of physical injury) from the scope of the Act. This is described as "[p]ossibly the most ominous feature of the legislation".[8] From a logical point of view, the justification for the change is hard to find, but it was no doubt a politically pragmatic way of cutting down the apparent broadening of the situations which the courts had held came within the ambit of the Act.[9] But from a policy point of view, Campbell queries the wisdom of the new law:[10]

> There can be no doubt that today's working environment is much more stressful than was ever the case since we left the very demanding workplaces of the previous two centuries behind us. Furthermore, some of this stress has been caused by government policies in the past decade, which have made jobs not only much less secure but often far more demanding.

Another matter of interest is what Campbell refers to as "the re-emergence of common law actions".[11] This comes about partly through the Act's reduced cover and partly from the sense that the benefits under the Act are now often inadequate. In referring to the

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6 P 86. See also p 83.

7 P 138.

8 P 137.

9 EG *ACC v E* [1992] 2 NZLR 426 (nervous breakdown as a consequence of a management training course).

10 P 111.

11 P 133.

exemplary damages, Campbell probably makes an understatement when he says that the extent of such damages "remains to be determined but if unlikely to be great"[12] and is also perhaps less sanguine than he might be about the effect of the Health and Safety in Employment Act 1992, which, in terms of accident prevention, ought to be seen as a significant companion piece to the 1992 accident compensation legislation.

The book is marred by one or two presentation errors. For example, on p 23 there is a cross-reference to comments of "H Poland MP referred to on p 23" when they in fact appear on p 20. On p 70 reference is made to "1994-1887 Strategic Directions" which if correct casts a new light f strategising. In some places statements are made without full explanation, citation or referencing. An example is at p 61 where a judgement of Barker J is left uncited. Again an article by Peterson is referred to on pp 63 and 64 but the footnotes bear little relation to the article. At the top of p 98, two cases are cited without explanation and to the uninitiated may appear a complete mystery. Similarly on p 104 a provision in the definition of "accident" is mentioned as having "caused considerable concern" but we are not introduced to what this concern is. These are matters which should have been remedied by a diligent publisher. It is likewise normally the publisher's responsibility to prepare the Table of Cases (the book surprisingly has no Table of Statutes) and it is disappointing that the Table contains so many mistakes which are not apparent in the text itself. One example will suffice. *Charles Burrell & Sons Ltd v Selvage* is cited at [1921] 50 LIKB 1340 at p 107 of the text. It should be (1921) 90 LJKB 1340 at p 106 of the text. Two other complaints often made by reviewers can be repeated: the table of contents contains chapter headings only, whereas in a book like this the inclusion of the many subheadings would have been helpful; and the collection of all the footnotes at the end of the book (rather than on each page or at the end of each chapter) simply makes the reader's life a misery. Finally, a book like this merits a bibliography: Appendix 5 contains "Recent Articles on Various Aspects of the Accident Rehabilitation and Compensation Insurance Act" but this is inadequate and in any event omits one of the most trenchant articles, Ison's "Changes to the Accident Compensation Scheme: An International Perspective".[13]

The subtitle of the book refers to accident compensation's rise and fall. This may be too pessimistic a picture. For many new Zealanders the system works well. However the book adds weight to the concern that accident compensation is under attack. With its grounding in the history of compensation mechanisms, the book represents a valuable addition to the debate about future directions.

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12 P 135.

13 (1993) 23 VUWLR 26 in footnote 41.

FUNDAMENTALS OF EUROPEAN CIVIL LAW BY MARTIN VRANKEN

Pp xiv + 290 including Appendix, Bibliography and Index. Published by the Federation Press, Sydney, 1997, soft cover, NZ$45

Reviewed by AH Angelo[*]

The purpose of this book is "to take account of the ever-increasing penetration of national law by the legal order of the European Community by incorporating the relevant materials on European Community Law within each chapter, in preference to having a separate chapter at the end of the book. This desire to demonstrate the impact of the European Community on the national law of a growing number of member states has affected the selection of the substantive topics for discussion. Thus, there is no discussion of family law or criminal law, for example, as these areas of the law largely remain untouched (so far) by European Community law" (page iii).

"In this book, the emphasis has been on expounding the essential characteristics of the European civil law from a common law perspective. The writing of the book was premised upon an assumption that civil law and common law constitute the two main (though not the only) legal families in the Western World to date, hence the need to understand both if only to break the barriers of insularity in legal education. By and large however, the making of any direct comparisons has been avoided throughout the book. Rather, the reader has been expected — and, ideally, encouraged — to reflect upon the civil law offerings from his or her own national, common law perspective" (page 212).

The above set out both the objects of the book and the purposes which it has achieved. This is a compendious and easily read book. Its size is deceptive relative to its content. It is very tightly and clearly presented and provides a good introductory text for a number of purposes. It discusses the central topics of comparative law and provides a basic introduction to the courts, profession, the codes and the methods of interpretation of the main systems of continental Europe. In addition, it provides a basic introduction to the law of contract, the law of tort, labour law, and commercial and company law in the French and German legal systems, as well as within the context of the European Union. It could therefore be the undergraduate text for a programme on comparative law, or on French or German law, and could also be the text for an introductory programme on European Union

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law. The bibliographical references at the end of each text and the more substantial bibliography which runs from page 252 to 284 provide a most useful listing of relevant modern English language materials.

The Appendix with documentation (pages 227-251) is appropriate and helpful but would be likely, in the standard undergraduate context, to be supplemented by additional materials which support the course emphasis of the individual teacher. The value of the book is that it presents the standard material very clearly and in a contemporary form, and particularly that it uses the comparative study of European legal systems as the basis for an introduction to the law of the European Union. This is a very valuable contribution, and perhaps a salutary reminder to the common lawyers of the Commonwealth to understand the ingredients and impetus for the European lawmaking which is more and more frequently and significantly affecting the development of the law of the United Kingdom.

Much of what the book tells us is encapsulated in the recent case of the European Court of Justice of *Webb v Webb*,[1] which dealt with article 16 of the Brussels Convention of 1968, and which concerned in particular the nature of the common law trust. That case deals with an institution dear to the heart of common lawyers. It also shows the role and the significance of the role of the Advocate General in the European legal system (discussed on pages 72 and 73 of the book) and the respect given to academic commentary. Equally interesting is the reaction of Professor Birks in the Trust Law International journal.[2]

The teacher of the traditional comparative law course might miss the substantive topics of family and succession, but will be well satisfied with the treatment of contract and tort and the inclusion of the consumer protection and labour law material.

This book clearly explains the development of European law in significant areas and the role of the civil law heritage in that development. This development is both a natural and predictable result of the Treaty of Rome of 1956 and the accession of the United Kingdom to that treaty. It is with a degree of amusement and bemusement that one remembers the reactions in the United Kingdom on the likely impact of the common market on the common law. Whether ingenuous naive or optimistic, the government of the United Kingdom in the 1960s said that there would be no impact on the private law of England. The present book provides a reasoned and correct view of the impact of the European Union on aspects of the private law of the member states.

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1 [1994] QB 699. A common lawyer might be interested to have a case reference on the role of the European Court of Justice. Lord Denning put it in his way in the *Bulmer v Bollinger* [1974] 3 WLR 202 (esp 210-211), *Schorsch Meier v Hennin* [1974] 3 WLR 823 (830), and *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 line of cases.

2 *"In rem* or *in personam? Webb v Webb"* (1994) 8 Trust Law International 99.