

**BOOK REVIEW: "LAW OF TORTS" (THIRD EDITION)****BY BRYAN MCMAHON AND WILLIAM BINCHY****(BUTTERWORTHS, 2000)**

THE HON. MR. JUSTICE IARFLAITH O'NEILL\*

The late Mr. Justice Walsh in the foreword to the first edition of this work published in 1981 remarked:

One is moved to ask why the law of torts one of the main supports of the Irish Bar should have remained for so long neglected by writers.

That sorry state of affairs was brought to an end by the publication of the first edition of this work in 1981. As Mr. Justice Walsh put it,

[a] new generation of lawyers has appeared. It is better educated in the law and in the philosophy of law than were preceding generations. The authors of this work are brilliant examples of the academics who have emerged from the new generation of lawyers. Their presentation of the very considerable body of Irish tort law should give our practitioners and judges a new stimulus to explore their own legal heritage. It will certainly deprive them of any excuse for not being familiar with it.

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\* Judge of the High Court.

Mr. Justice Walsh was, as usual, right on all three counts. At this remove of time no one would disagree with his description of the authors. His dual prophecy of the impact of that first edition has been amply fulfilled both in it and the second edition. While that first edition, as Mr. Justice Walsh said, may have revealed “to a perhaps surprised common law world the existence of a significant body of Irish tort law”, in the twenty years that have ensued practitioners, judges and academics have become accustomed to the existence, quality and relevance of that body of Irish tort law to the point that the umbilical connection to the jurisprudence of our neighbouring jurisdiction in the sphere of tort law is now all but a distant memory. On a day to day basis in courts up and down the country it is Irish cases that are cited over the broad range of tort issues. What a change to twenty-five years ago! Indeed practitioners frequently forego opening the relevant authorities, being content to quote the relevant passages from McMahon and Binchy and judges have rarely if ever resisted. The virtual universal acceptance of this work notwithstanding that both its authors are thankfully still with us is the surest testimony to the great worth of this text book.

There is no doubt that this book has provided a stimulus both to practitioners and judges to “grow” the Irish law of tort. The third edition will undoubtedly continue that process. It goes beyond a mere updating in the sense of the inclusion of cases decided since the last edition. There are many praiseworthy improvements in the format and layout of the book.

Not least of these is the depth and detail of the contents pages. There are forty-six chapters and each chapter is divided into a number of headings with some of these headings being broken down into further sub headings. The great advantage of this detail is that it allows the reader to quickly locate the area he or she is interested in. The rushed student or practitioner need not wade through the entire section on the law of nuisance to locate the discussion in

relation to the premises adjoining the highway. The layout of the contents is, from the point of view of a busy practitioner, exemplary.

Interestingly, while the first two editions were entitled the *Irish Law of Torts*, the third edition is simply entitled the *Law of Torts*. The jettisoning of *Irish* from the title is probably indicative of a broader and entirely appropriate ambition in this edition. The purpose of this book is not merely to describe the principles of Irish tort law but to explore the broader nature of tort law generally and its fit with other areas of the law. While the second edition also developed these themes they reach a fuller maturity in the third edition. United Kingdom lawyers at present struggling with the question of the horizontal effects of the Human Rights Act, 1998 might do well to read the author's discussion in Chapter 1 entitled "Private individuals as well as the State may be liable for infringement of constitutional rights".

This edition, like its predecessor, treats of the subject in a comprehensive way starting in Chapter 1 entitled "Overview of the Law of Tort" with a general discussion of the function of the law of torts, ranging from such diverse topics as the relationship between tort law and infringements of constitutional rights, too predictably a definition of tort, comparisons with tort and crime and tort and breach of contract, moving on to a discussion of the role of insurance, winding up with a discussion of a report commissioned by the Minister for Commerce, Science and Technology done by Messrs Deloitte and Touche, a firm of management consultants. The ensuing chapters follow the more traditional format of a text book on the law of tort. Chapters two and three dealing respectively with causation and remoteness and chapter four dealing with concurrent wrong doers and joint and several tortfeasors. This then leads in to the topic of negligence, which as one would expect tends to dominate any text book on the law of tort. Chapters five through to twenty-one inclusive deal with various aspects of this topic,

e.g. professional negligence in Chapter 14, negligence on the road in Chapter 15 and negligent care of children in Chapter 16. Of particular interest is the authors' treatment of recent developments in the law relating to the recovery of negligently inflicted "pure economic loss" (Chapter 10). In dealing with this difficult area of the law, the authors continuously energise their analysis with everyday examples and scenarios. For example, the following from page 234:

Not every careless statement will engender liability in tort. Loose talk at a party about the prospects of 'dot.com' shares on the stock market will not render the speaker liable to one who invests with an unhappy outcome even if the speaker is a stockbroker. If I am in a railway station and I am asked the time by an agitated passenger who says that he or she is rushing to an important interview, I will not be exposed to a *Hedley Byrne* claim if my watch is slow and the passenger misses the interview and the prospects of new, better-paid employment. There has to be some assumption of responsibility on my part...

A striking aspect of the book is its anecdotal richness. The authors sometimes recount the political climate or background to a particular legal development breathing life into the development. A good example of this is the author's account of the background to the Occupiers Liability Act, 1995. At page 316 under the heading "The Lobby is Marshalled", the authors describe the concerns of the agricultural community in the years preceding the Act and conclude that "[t]hey kept up the pressure and the legislation that ultimately went onto the statute book represents a victory for those interests."

While the purist might find the inclusion of this kind of background material unusual in a legal text book, against the backdrop of universal rigorous academic analysis, the

overall effect of the inclusion of this kind of material is to enrich the overall text and to add to the readers overall understanding of the topic and indeed to make the work that much more readable and enjoyable, a wholly acceptable diversion from legal analysis, not a diminution or dilution of it.

Not content with merely describing what the law is the authors frequently suggest what the law ought to be. The best illustration of this is probably found in the authors' treatment of the rule in *Rylands v. Fletcher*.<sup>1</sup> The authors begin by identifying the strange place occupied by this Rule in the common law; next they examine the approaches in other jurisdictions and eventually they conclude "[t]he time has surely come to abandon [the concepts of the rule in *Rylands v. Fletcher*] in favour of the negligence principle". The authors in a number of instances also refer to Law Reform Commission Proposals, specifically on the subject of liability for animals, on the law relating to the enticement and harbouring of children, on defamation, on the liability of minors and mentally ill persons.

In the context of careful elucidation of the law as it is, a discussion of its reform based on sound scholarship as distinct from political or sociological aspiration, is always welcome and undoubtedly provides useful pointers to both practitioners and judges. The suggestions for change that crop up throughout this work have that kind of solid foundation and no doubt will be treated with respect in the future.

In conclusion the authors are to be congratulated on this work. The book is a welcome attempt to free the law from rigid compartmentalisation. It is underpinned by the philosophy that the law of tort cannot be understood in isolation but only through its interrelationship with other areas of the law such as the law of contract, constitutional law and European law. This new edition places emphasis on general principles and ideas rather than the rigid application

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<sup>1</sup> (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

of precedent, and there is no doubt in my mind that this work will continue for the foreseeable future to be an indispensable part of the libraries of judges, practitioners and academics alike. As with the first and second editions, the publishers can expect a demand for many reprints.

“Law of Torts” (Third Edition) by Bryan McMahon and William Binchy (Butterworths, 2000), 1295 pages.