TORT LAW AND ECONOMIC INTERESTS by Peter Cane, Oxford University Press, 1991, xxxix+530pp, ISBN 019 8252366, $190HC.

Book reviews sometimes tell one more about the reviewer than about the book under review. Despite this risk, I shall be consciously self-analytical in relation to my reaction to this book. When I was asked to review it, I was keen to do so. I knew that Peter Cane is an Australian currently teaching in Oxford; and that he is a prolific author. Further, I had already seen a copy of *Tort Law and Economic Interests*, had noted its innovative organisation, and had wanted to read it in full and to own it, but was deterred by the price. Agreeing to review the book seemed like an easy way to acquire it.

Although I had other commitments at the time, I started to read the book quite soon after receiving it in mid-September 1991. I quickly confirmed that Cane writes extremely well; that the depth of his scholarship is admirable; that his familiarity with case-law, statutes, academic literature (especially that emanating from the stimulating environment of Oxford) and reports of law reform and ad hoc inquiries is amazing, not only in the field usually allocated to tort law, but also in contract, property, equity, administrative law and even more esoteric areas such as intellectual property and maritime law. Oxford University Press had done an immaculate job in presentation and typographical errors were few indeed. However, as time passed I found that I was giving priority to other commitments, while Cane's book languished in a drawer at home. After my promised deadline of April 1992, I received a polite reminder from the book review editor, which caused me to take the book into my office, where it lay on my desk, pricking my conscience every time I caught sight of it, but not provoking me to read more than a desultory few pages at a time. In an attempt to provide myself with a stimulus, I told several people that I had undertaken to review the book; I would not want these people to think that I did not honour my undertakings.

Meanwhile, reviews of the book by such luminaries as Tony Weir, Anthony Ogus and John Fleming appeared. They mainly confirmed the positive qualities I had recognised in the work, though doubts were cast on the overall structure which the author had adopted. What more could I say? Perhaps I could relate the usefulness of the book to the Australian reader. While reading the book, I had noted many pages dealing with English statutes that would probably be of limited relevance in Australia. I had also made some notes of references to English cases possibly inconsistent with their Australian counterparts and a few statements which did not seem to me to set out the present law even in England with exact accuracy. Some of my detailed notes referred to Australian developments which the author had apparently overlooked, despite his great readiness to cite Australian, New Zealand and Canadian authorities when English law is silent or uncertain. But I felt that to include such matters would give a misleading impression of the high quality of the work as a whole and should not be allowed to detract from my assessment of the author's diligence. Nevertheless, my enthusiasm for the book had clearly waned and another long vacation elapsed, leaving still about 200 pages of the book to be read. Another review, which referred to the last 200 pages as being the most fascinating, failed to revive my flagging interest. Although this ob-

servation ultimately proved to be true, those pages still did not dispel my sense of dissatisfaction.

What was it about the book that turned me off? When a non-lawyer asks me what I teach and looks mystified in response to my answer of "torts", and even "civil wrongs" does not appear to elucidate sufficiently, I usually add illustrations from the fields of compensation for personal injury and defamation, which probably reflect the understanding of most lawyers as well as the lay public as to what constitutes the pith and substance of the subject. Was it because the present book takes the view that personal injury is generally outside its scope (and consequently excludes discussion of even economic loss to a person who suffers such injury) and that, though it recognises somewhat illogically that injury to reputation does sometimes have economic consequences which allow for its partial inclusion (see, for instance, pp270-4), the treatment of defamation is fragmentary and cannot be said to fall within the core of the discussion? Most Anglo-Australian torts academics have long concluded that compensation for personal injury is better provided by some form of social insurance and that the role of torts in fulfilling that object ought to be limited at most, in the words of the Pearson Royal Commission on Civil Liability and Compensation for Personal Injury (1978), Vol 1 par 1732, to that of "junior partner" (see the Preface to Furmston, M P (ed), *The Law of Tort: Policies and Trends in Liability for Damage to Property and Economic Loss* (1986), to which Cane contributed one of the essays). In my own law school, defamation has been removed from the torts curricula (and my jurisdiction) and shifted to the newer course of Media Law. The most absorbing developments in tort law in recent years have been the contrasting struggles of the highest courts in Australia, England, the United States and Canada to cope with the problem of drawing limits precisely in the area of pure economic loss resulting from negligence (cf the Australian High Court cases of *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 and *Hawkins v Clayton* (1988) 164 CLR 539 with, in the House of Lords, *Caparo Industries Plc v Dickman* [1990] 2 AC 605 and *Murphy v Brentwood District Council* [1991] 1 AC 398; in the United States Supreme Court, *East River Steamship Corp v Transamerica de Laval Inc*, 476 US 858 (1986); and, in the Supreme Court of Canada, *Norsk Pacific Steamship Co Ltd v Canadian National Railway Co* [1992] 1 SCR 1021). While *Murphy's Case* was decided too late to be dealt with otherwise than very briefly in the main text, it was still early enough to enable the author to provide a trenchantly critical analysis of the speeches in an appendix. Thus I do not think that the omission of much of personal injury and defamation law provides the answer to the question at the beginning of this paragraph.

In concluding his discussion of the limits of liability at common law for negligent misrepresentation, Cane says (pp186-7): "At the end of the day, courts have to choose to favour one party or the other: to be 'pro-plaintiff' or 'pro-defendant' ... " Almost unrelentingly throughout the book, he himself is pro-plaintiff and in favour of the achievement of this pro-plaintiff goal through the law of torts. In the final two parts, called "The Wider Context of Tort Law" and "Theory", he makes explicit his faith in corrective, as opposed to distributive, justice. It is because I cannot share that faith that ultimately I must part company with so much of his analysis. "Justice" is a concept whose content is not universally shared, at least at its margins; and it is at the margins that Cane is constantly pushing for expansion of tort liability. Many tort

disputes in the area of economic loss are really concerned with the allocation of the loss between two innocent parties, one or the other of whom must suffer for the fraud or other less reprehensible conduct of a third. Where justice lies in such cases is not readily apparent. Even if the defendant can be said to be "at fault" in some sense, it is not obvious that this should entail liability to any innocent person who suffers a loss in consequence. Since in this book he does not deal with personal injury, we do not know whether, like many other eminent torts scholars, Cane prefers the dissent of Andrews J in *Palsgraf v Long Island R R Co*, 248 NY 339; 162 NE 99 (1928) to the decision of the majority, but he seems certainly to have disregarded the warning of Cardozo CJ in that case that arguments of this nature are:

> built upon the shifting meanings of such words as "wrong" and "wrongful", and [share] their instability. What the plaintiff must show is "a wrong" to herself, ie a violation of her own right, and not merely a wrong to someone else, nor conduct "wrongful" because unsocial, but not 'a wrong' to anyone.

Nor is he greatly concerned here by another of Cardozo CJ's famous dicta, that "[i]f liability for negligence exists, a thoughtless slip or blunder ... may expose [defendants] to a liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corp v Touche, Niven & Co*, 255 NY 170, 174 NE 441, 444 (1931)). Yet in editing the fourth edition of the path-breaking work by Atiyah, P, *Accidents, Compensation and the Law* (1987), he accepted Count 1 of that author's "Indictment of the Fault Principle", namely that "[t]he compensation payable bears no relation to the degree of fault" (pp415-16). It is there said that:

> Even as between the plaintiff and the defendant, doubts are often felt about the justice of imposing liability on a defendant for the most catastrophic consequences of a negligent act ... [I]f justice between plaintiff and defendant demands that liability be imposed on defendants however extreme the consequences, and however trifling the negligence, then it may be felt unjust that the defendant be left to bear this bill as between himself and society.

There is no reason why these doubts should be confined to personal injury and they must be all the stronger in instances where the tort liability of the defendant is strict and not based on fault of any sort or is purely vicarious liability for the fault of another.

Finally, even if I could become a true believer in a greatly expanded torts law as the embodiment of corrective justice, I cannot accept that the path to heaven lies through litigation, especially in economic times when funds for legal aid are severely limited. Calling on his expertise as a writer on Administrative Law, Cane in this book has a splendid chapter (ch 8) on "Administrative Methods of Protecting Economic Interests", which follows an equally impressive chapter on alternative "Methods of Resolving Tort Disputes". Yet ultimately the author's vision of tort law serving to right the world's wrongs is premised on access to the courts (and sometimes necessarily to the highest court in the land) by those whose interests are invaded, but who would often lack the means and resources to embark on such a venture.

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