

## TORT LIABILITY OF PUBLIC AUTHORITIES

SUSAN KNEEBONE, LBC INFORMATION SERVICES, 1998

A commentator in an Australian newspaper once questioned the logic of having liability imposed for ‘an act of God - a bus skidding on an icy road with no one at fault’,<sup>1</sup> illustrating an increasing concern over the impression of a ‘denial that any accident can be purely chance’.<sup>2</sup> The writer points to a common misapprehension, perhaps fuelled by recent medical negligence cases, that tort liability is imposed upon some party notionally at fault in most cases. This valuable book by Dr Susan Kneebone illustrates that the truth is far more complex and that in the case of public authority liability in particular, there is in fact a culture of protecting those authorities against tort liability.

With a foreword written by Sir Anthony Mason, this book offers a comprehensive, scholarly and articulate contribution to tort literature. The tort liability of public authorities has never been more important. For there is a need for articulation of the relevant principles and a need to assess their very identity which has been under question due to the increasing onslaught of privatisation and deregulation. This book recognises the complex mix of bodies that make up public authorities, as well as recognising the complex mix of public and private law principles and the legacy of Crown and other immunities that underpin their tort liability.

The book proceeds from a straightforward acknowledgment of the basic rule of tort recovery, articulating from the start that this rule governs liability of public authorities just as surely as it governs liability of individuals. From that starting point the book proceeds to demonstrate that this basic rule has however been applied by the courts to public authorities in an overly protective way; a way which also reflects a falsely strict dichotomy between public and private law and the official culture of protection that forms much of the theme of the book. The thesis is illustrated through the adoption of a convenient framework for discussion: looking to the three main methods used by the court to categorise the cases. Those three methods are ‘core’ (looking for a private analogy), ‘administrative’ (excusing liability on the basis that public law remedies are more appropriate), and ‘control-reliance’.

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<sup>1</sup> P McGuiness, ‘Beware your heroic friend in court’ *The Sydney Morning Herald*, 11 June 1998, 17.

<sup>2</sup> Ibid.

It is significant (and cause for reflection) that in pointing to the neglected issue of notions of constitutionalism of common law principles in this area, Dr Kneebone asserts that this means that the courts are responsible for determining where the balance of power between an individual and a public authority lies. From this, a persuasive argument is made for an empowerment of the judiciary so they may modify the basic rule and take steps to nudge the official culture away from its protective philosophy. For this reviewer, this is reflective, but the author considers such a thesis 'reformative but not radical'. No argument is made here for a new theory of entitlements or no-fault risk liability, as has sometimes been proposed for liability in this area. Rather what the author proposes is that the basic rule, rather than any notion of statutory or other protection, must for purposes of clarity, provide the starting point for a principled approach to this body of law.

The book is extremely detailed, canvassing the law as it has developed in major common law jurisdictions, with special emphasis on Australia, the United Kingdom, Canada and New Zealand. This overview shows that the basic rule has led to different approaches or cultures in the four common law jurisdictions but also illustrates the overlapping use of the three methods of categorisation. There is a tendency in the English and Australian jurisdictions to use the core and administrative categorisations to protect public authorities from liability while the Canadian and New Zealand courts, by way of contrast, tend to apply the control-reliance categorisation in appropriate circumstances to impose liability. The law is covered in detail throughout, with the concisely named chapters covering the intersection of tort and administrative law, the background to the development of the law, the liability in negligence for exercise of statutory functions, actions for breach of duty, statutory authority as a defence in nuisance, special protections, liability of the Crown (vicarious and direct) and claims against the Commonwealth and States and their instrumentalities in the Federal jurisdiction. The comprehensive first chapter looking at the intersection of tort and administrative law sets out the dynamics to the law that follows.

Here major theoretical explanations for the law are included, making the book of value not only to practitioners, but also to teachers of law seeking to guide students in the complexities of (for example) economic theory, as it is sometimes used to explain and justify the objectives of tort law. The fear of claims on the public purse is canvassed in the context of the explanations advanced for the official attitude of protection towards public authority liability and a significant effort is made to counter assumptions about the cost of tort liability of public authorities, which the author claims, lack a firm empirical basis. In Dr Kneebone's view, the distribution of costs amongst the public will be balanced by the benefit in terms of awareness of responsibilities on the part of public authorities and increased efficiency. This would make it clear that in many situations, the public authority is in the best position to avoid the loss. Pointing to the dearth of bodies likely to press for change, Dr Kneebone argues strongly that it is the judiciary that is best placed to introduce a change of culture in this area. Identifying the dynamics which operate at the

intersection of tort and administrative law from the outset enables Dr Kneebone to assert that the basic rule has been too dependent on a distinction between legality (public law) and merits (private law) which has marginalised public law ideas and embodied the overstated protective attitude. This area of law lies at the intersection of administrative and tort law and judicial separation of these two routes detracts from the major contribution that one may make to the other.

While the author maintains that the thesis is not radical, the book certainly contains brave and thought-provoking ideas for the reader to reflect upon in the future. Are we happy with the protective culture? Or do we support the author's contention that it reflects a false dichotomy between the public and the private? As we increasingly witness suits against medical practitioners, can we realistically accept that public authorities are public in any more than name and yet remain subject to a more overtly protective judicial culture? If there is false distinction made between administrative principles of merit and tort principles of legality how does this affect lesser decision-making bodies and enable them to be shielded from accountability? Do our courts pay any attention in their decisions to the 'trickle-down' effect where there is to be no liability for questionable decisions made by public authorities? These are just some of the vital legal questions of the future to which this scholarly book lends itself. Besides this, it provides a comprehensive, detailed and analytical overview of a complex body of law, and will be of interest and benefit to practitioners and academics alike.

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