

BOOK REVIEWS

Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard. By MAYO MORAN. [Oxford: Oxford University Press. 2003. 316, (Bibliography) 15 and (Index) 11 pp. Hardback £50.00. ISBN 0–19–924782–X.]

REFERENCE to the “reasonable man” is, as Moran points out, ubiquitous, particularly (but not only) in the law of tort. An enduring difficulty with this standard of liability is the definition of the characteristics of this hypothetical person, particularly where those characteristics diverge from the actual defendant. This interesting book undertakes the difficult task of examining the various attempts to distinguish the essential qualities of the “reasonable person” from those that can be disregarded.

Moran identifies two primary responses to this difficulty and demonstrates how each poses problems for an egalitarian understanding of the “reasonable person” standard. The first response equates, implicitly, “reasonableness” with what is ordinary or normal. This response runs counter to the common law’s affirmation that “normal” behaviour may, but not necessarily will, be regarded as reasonable. Moran goes on to demonstrate that it also risks perpetuating discriminatory stereotypes, and lending them the force of law. The other response to divergence between the “reasonable person” and the defendant is to seek to bring the characteristics of the reasonable person closer to those of the actual defendant. This approach, it is argued, threatens to undermine the objective standard of liability altogether.

Moran argues that both approaches threaten equality under the law: the first assumes that widely accepted but potentially culpable behaviour is necessarily “reasonable”; the second is potentially over-dependent on the personal characteristics of the defendant, and inclined therefore to hold that his or her behaviour is reasonable even where it illegitimately threatens the interests of the claimant. Both responses indicate the need to identify a normative content of the “reasonable person” standard which can be relied upon to condemn even widely accepted behaviour, and which cannot be displaced by the defendant’s personal characteristics.

In addition to the widely-accepted minimum requirement that the defendant should have the capacity to avoid the risk, Moran refers to work on criminal liability for inadvertence and suggests that the standard there developed based on indifference to the interests of others may provide the necessary normative core, and assist courts to decide which of the defendant’s individual characteristics can properly be taken into account in assessing whether or not his or her behaviour was “reasonable”. She closes by concluding that it may be better to do away with the hypothetical reasonable person altogether and to focus instead on the normative goals that he or she is supposed to personify. This is an illuminating and persuasive account of judicial interpretation of the reasonable person standard. It draws together work from a number of legal disciplines

(including, in particular, the criminal law) in a clear and convincing manner, and offers thought-provoking suggestions for the future.

Moran introduces her thesis by examining the treatment in negligence of children and the developmentally disabled, and argues that the courts' decisions reveal that what is viewed as "reasonable" is closely aligned to what is perceived to be "normal". Negligence does not adjust the picture of the reasonable man to reflect the shortcomings of the developmentally disabled (in contrast to its response to the physically incapacitated). Examination of cases relating to children reveals that widespread but discriminatory assumptions about the level of care which can be expected from boys as opposed to girls are reflected in decisions about what constitutes "reasonable" behaviour from each group. While conceding that it is "hardly ... surprising" that the "reasonable person" standard "often draws deeply on ideas about what is normal or natural", she goes on to demonstrate that this application of the standard "actually works to reinforce exactly the stereotypes that equality seekers are worried about—reasonableness gets read as normal or natural with all of the difficulties that this implies." Chapter 5 argues that there is reason to suppose that the bias identified goes beyond the groups to which Moran has paid particular attention in the preceding chapters and seems likely to extend to other groups against whom there has historically been discrimination. In chapter 4, she argues that this dependence on what is normal to determine what is reasonable is reinforced by frequent reliance on "common sense" as the basis for deciding what is "reasonable", which may suggest that widely-held discriminatory assumptions are in fact "reasonable".

Having demonstrated that the existing application of the "reasonable person" standard is prone to rely on whether the impugned behaviour is normal or ordinary, Moran then goes on to consider whether the standard should be retained; and, if so, whether it can be defended against the likelihood of collapse into an assessment of what is normal rather than what is reasonable.

Chapter 6 examines the argument that the "reasonable person" test is "so hopelessly and fundamentally flawed that it must be jettisoned" and replaced by a subjective approach to liability. Moran expresses concern that commonly held prejudices will still be reflected in a "subjective" understanding of litigants. Moreover, she concludes, with reference to the debate in criminal law regarding provocation and sexual assault, that an objective standard is important for equality. Without it, judges must rely on credibility: the more widely held a belief, the more credible it will seem, even where the fact that it is widely held indicates only that it is common, not that it is necessarily reasonable.

Given her conclusion that some objective standard is required, chapter 7 turns to the question of the minimum content of the "reasonable person" standard. Moran accepts that a necessary condition is the ability to avoid the harm but argues that this is not sufficient because it does not assist in identifying which personal characteristics of a litigant are relevant to his or her ability to avoid harm. If, for example, a defendant is unable to control her temper, does that mean that she is unable to avoid the harm caused by her losing her temper? If it does not, on what basis is this conclusion reached? Moran looks to the debates concerning inadvertence and criminal liability for assistance, and argues that the indifference accounts may assist in developing a core normative content for the reasonable person. The

indifference approach focuses attention on whether the defendant's failure to avoid the risk was attributable to his or her indifference to the claimant, rather than to some other justifiable reason. Moran acknowledges that she does not examine the different works on indifference individually but rather suggests that their common thread may shed light on the search for a minimum content for the reasonable person. The application of her proposed approach to well-known cases such as *Roberts v. Ramsbottom* [1980] 1 W.L.R. 823, *Mansfield v. Weetabix Ltd.* [1998] 1 W.L.R. 1263 and *McHale v. Watson* (1966) 115 C.L.R. 199 makes for interesting reading.

Chapter 8 acknowledges that adopting an "indifference" standard for reasonableness will not make hard cases easy; nor will it necessarily be sufficient to prevent judges from reverting to notions of the "normal" or "ordinary" in assessing what constitutes "reasonableness" or "indifference". Moran suggests a number of responses to this anticipated difficulty, including articulating what is or is not capable of constituting reasonableness in those areas where there is a particular danger of "normal" but discriminatory perceptions taking over. She goes on to suggest that the personification of the standard may itself be an incentive to turn to the "normal" and the "ordinary" and boldly concludes that the man on the Clapham omnibus may have outlived his usefulness, and that it may be preferable to drop our attachment to the personification of the standard altogether.

There are some minor criticisms that might be made about this book. There is somewhat uneven treatment of the sources to which the author refers or upon which she relies. For example, the reference to Rawls in chapter 5 is complemented by extracts from his work useful for a reader unfamiliar with the relevant ideas. In contrast, the references to, for example, Kant and the Bernard Goetz trial assume familiarity. This is a pity in a book that should have broad appeal. Similarly, the Introduction uses a number of terms (such as "shortcomer") that, for one new to the arguments, require clarification. Generally speaking, these terms were then clearly explained in the body of the work. However, the fact that their meaning was not explained at their first use made the argument in the Introduction difficult to follow at times. The argument was, however, developed clearly and succinctly throughout the remainder of the book. These criticisms may well be attributable to the admirable breadth of the work referred to and the jurisdictions encompassed. The reference to Dame Elizabeth Butler-Sloss P. in the Court of Appeal in *Mullin v. Richards* [1998] 1 W.L.R. 1304 as "he" and to "his" brief concurring judgment, in the context of judicial memory of boyhood, jarred somewhat. However, these are only minor points. Taken as a whole, this book is scholarly and challenging but also provides a succinct and, by and large, admirably clear account of a number of areas of interest—whether specifically the treatment of children under the law of negligence, the role of and possible responses to judicial discretion, the relationship between tort and criminal law, or an introduction to feminist and other egalitarian critiques of both tort and criminal law. There is much in this book to reward returning to it.

JILLAIN SEYMOUR

The Personal Employment Contract. By MARK R. FREEDLAND. [Oxford: Oxford University Press. 2003. xlii, 560 pp. Hardback £80.00. ISBN 0-19-924926-1.]

THIS IS the second edition of a book first written some thirty years ago. The subject is the most fundamental concept in labour law: the contract between the worker and the employer. Notwithstanding the significant development of statutory rights, this contract remains of central importance. This is partly because the common law continues to regulate many significant areas of employment, and partly because the scope, and in some cases the content, of statutory rights has been identified by reference to the employment contract and the common law principles which regulate it.

There are three aspects of the employment relationship in particular which have been transformed fundamentally in the period between these two editions. The first is reflected in the change of title. The original book was entitled *The Contract of Employment*; now it is *The Personal Employment Contract*. The book focuses not merely on the traditional contract of employment (that is, the relationship between employer and employee) but also on other work relationships described by Professor Freedland as “semi dependent” work relationships. The pattern of employment relationships has so changed that the traditional focus on the contract of employment would not only ignore the rights and duties of an increasing segment of the workforce falling outside its protection, but would also fail to grapple with one of the most pressing problems in labour law, namely how the law should categorise and define the different types of worker. The development of the tripartite relationship involving agency workers, the agency and its client, the rise of part-time and of casual or intermittent employment, and the increase in fixed term employment all provide a challenge to the traditional categorisation between employees and the rest.

The second significant change is that the courts have increasingly recognised that the contract is much more than merely an economic nexus; it also fulfils social and psychological needs. This is reflected in a number of ways, but most strikingly in the development of the duty of trust and confidence (perhaps the most important legal development of all since the first edition) which has been the source of such diverse obligations as requiring the employer to act courteously towards the employee, to handle grievances expeditiously and (overlapping with public law concepts) to exercise discretions fairly.

Finally, there has been a fascinating osmotic relationship between statute and the common law. It was ever thus, but the increasing degree of statutory regulation has led in certain areas, as Professor Freedland persuasively argues, to an aggregation of common law and statutory law so that “we are now talking about not so much the common law of employment contracts, as the common law based law of employment contracts” (p. 4).

All this has left the subject in a considerable state of flux and uncertainty. This book provides an excellent and thought-provoking analysis of the current trends and tensions. It begins with an analysis of the definition and structure of the personal employment contract, and thereafter there is a detailed consideration of all aspects of the contract,

from formation to variation, breach and termination. There is a particularly original chapter on implied terms in which Professor Freedland persuasively argues that the courts have been influenced by a series of underlying general principles in their approach to this topic, which may be synthesised under an overarching principle of fair management and performance.

The style is not always easy; the argument is sometimes dense and complex, but so are the ideas being elucidated. The effort to confront and grapple with the argument is well worthwhile. The range of scholarship is impressive, the mastery of the literature is plain, and the analysis is concerned not only with where the law is, but also where ideally it ought to be.

Some of the ideas are controversial but, as one would expect from this distinguished authority, they are carefully and thoughtfully reasoned. This reviewer would take issue with some of the conclusions, for example that all personal employment contracts ought ideally to be regulated by the same rights and obligations. The traditional distinction between independent contractors and employees surely reflects real social and economic differences, both in the degree of dependence and in economic risk, which may justify different treatment. There are undoubtedly real problems which result from employers seeking to cloak what is in truth a dependent employment relationship in the guise of an independent contract so as to avoid liabilities which would otherwise apply. In other cases, such as certain agency arrangements, the employers may have perfectly legitimate business objectives, but the rights of employees are nonetheless adversely affected. It is a moot point, particularly in the latter situation, whether the judges can legitimately mould the common law to meet the problems, particularly if—as I suspect may be the case—this involves a distortion of traditional contractual principles. Perhaps legislation has to be the answer. Again, this reviewer has reservations about the wisdom of adopting Professor Freedland's proposal that there should be a legislative codification of the personal employment contract. The obvious danger of any codification is that it tends to crystallise the law at a particular historical moment; the risks are exacerbated when there is still considerable uncertainty as to how the law should develop.

These, however, are differences of opinion. The strength of this book is that it engages in a series of important debates which will cause lawyers interested in the field to reconsider and reassess their own assumptions, and to ponder anew the significance of the set of contractual relationships which still lie at the heart of labour law.

SIR PATRICK ELIAS

The Competing Jurisdictions of International Courts and Tribunals. By YUVAL SHANY. [Oxford: Oxford University Press. lxix, 288, (Bibliography) 43 and (Index) 19 pp. 2003. Hardback £80.00 net. ISBN 0-521-82488-5.]

THE LAST FEW DECADES have witnessed an unprecedented proliferation of international courts and tribunals. New tribunals are established with specialised or regional profiles. This process naturally envisages that more

disputes are referred to adjudication, and in certain cases there may be disputes over which court or tribunal has jurisdiction, not least because more tribunals are established with compulsory jurisdiction activated by unilateral referral of cases by states. Yuval Shany's book is the first systematic attempt to examine this phenomenon.

The principal problems focused upon in the book are: *choice of forum*, the question whether an applicant has an unfettered discretion to bring proceedings before any of the two or more tribunals which may have jurisdiction over a dispute; *parallel proceedings*, the issue whether a party to a dispute pending before one tribunal can initiate proceedings before another tribunal also having jurisdiction over that dispute; and *successive proceedings*, the question whether a dispute decided by one tribunal can be brought subsequently before another tribunal. In examining these questions, the author addresses the phenomenon of overlapping jurisdiction between tribunals of general, universal, and specialised competence. It is suggested that unless a situation is regulated within a specific regime, parties to a given dispute may exercise their unfettered discretion and select any available forum for proceedings (p. 79). On the other hand, simultaneous proceedings before more than one court or tribunal could cause major inconvenience to the parties.

In view of the systemic nature of international courts and tribunals, a special focus is made on the issue of competing jurisdictions. This focus is even more required because, as the author recognises, the study of this subject proceeds on what is mostly uncharted territory. Shany concludes that the international judiciary should aim at reducing challenges to the coherence of international law, but, at the same time, full coordination at the institutional level cannot necessarily be expected.

The author performs a comparative analysis between competing jurisdictions in international law and the forum shopping and selection in national and transnational legal contexts (pp. 128–175). Special attention is paid to the nature and content of norms which regulate the standards of forum selection (chapters 5 and 6). The author suggests that treaty law does not always satisfactorily address the potential complications that may arise out of jurisdictional competition. Therefore, other sources of law such as custom and general legal principles should also be consulted. This conclusion reflects the hierarchy of sources in international law. At the same time, the author suggests that while treaty law does not contain comprehensive or imperative standards of forum selection, and there is no “common law” on this subject either, much is left to the will and discretion of the States who are parties to the litigation in question. This is accompanied by a (doubtless wise) suggestion that a strict rule on allocation of competences would restrict the autonomy of parties and also undercut cross-fertilisation between courts and tribunals. The author proposes that, under the current state of the law, limited choice of forum in some areas of adjudication (such as in the context of regional integration) and broader choice of forum in all other areas represent what the law should be. After this analysis, the author turns to the relevance of norms regulating jurisdictional competition which are derived from sources other than treaties.

The author examines the role of the *res judicata* principle and the exceptions to it, such as situations where a judicial decision is made in lack of competence, or by error, fraud or corruption, and tries to examine the

relevance of these limitations in the jurisprudence of various tribunals. The author also examines the relevance of the doctrine of abuse of rights in terms of competing jurisdictions of tribunals, and concludes that where the discretion of an applicant in selecting a forum is used in an arbitrary or malicious manner, such as with the sole purpose of causing undue hardship to the respondent, the doctrine of abuse of rights should entitle a tribunal to decline jurisdiction. This statement is supplemented by some examples of malicious behaviour in the process of forum selection.

It is an advantage of the monograph that it not only deals with specific issues and categories of competing jurisdictions, but also tries to give a conceptual idea of this phenomenon, for instance by examining the issue in terms of the systemic nature of the international legal order. Practical and comparative aspects are also abundantly represented. The monograph examines the jurisdictional framework and practice of a wide range of tribunals, including the International Court of Justice, the Law of the Sea Tribunal, the WTO dispute settlement bodies, ICSID arbitration, UN Human Rights Committee and the European Court of Human Rights.

Owing to all these factors, it should be concluded that Yuval Shany's book is an original, useful and timely response to the recent academic need to examine the phenomenon of competing jurisdictions in international law. It will undoubtedly retain its importance and significance in the foreseeable future. But the debate on forum choice in international law is likely to continue in both doctrine and judicial practice, testing the outcomes proposed by this monograph.

ALEXANDER ORAKHELASHVILI

A History of Water Rights at Common Law. By JOSHUA GETZLER. [Oxford: Oxford University Press. 2004. xl, 352 and (Bibliography and Index) 44 pp. Hardback £60.00. ISBN 0-19-826581-6.]

THIS IS A HISTORY of the English and Welsh case law on water rights, from the feudal period to the present. There is a great deal on the individual cases, though the focus is on general concepts, and the emergence of broad notions. Dr. Getzler is very much interested in theories informing the law, and is continually on the look out for them, whether they are purely legal theories, political theories of rights, or economic theories concerned with the promotion of growth. He is also acutely sensitive to the influence of foreign legal ideas, whether drawn from Roman law, from continental codes, or from foreign case law. Yet very far from trying to squeeze the law into particular theoretical moulds, Getzler is continually acknowledging the limits of these tools. This is a notoriously unstable area of law, perhaps inherently unsuited to development on a case-by-case basis, and resisting any neat characterisation or explanation. The overall picture is untidy, and Getzler does not pretend otherwise.

Getzler starts with feudal property law, and interference with a freeholder's use of water as leading to an action of disseisin or nuisance. Water rights then existed only as servitudes attached to real rights, with the distinction between natural rights and rights derived from grant only slowly becoming established. Increasing litigation threw various other theories into the mix, and the requirements for a successful action were loosened; by

1600, it was becoming established that the plaintiff claiming a right to an ancient watercourse only had to show that the water's flow was ancient, not that the use of it was. The following centuries saw the triumph of the "natural right" approach, though only by very slow stages: Getzler's attempt to tease a coherent theory out of Blackstone and Hale yields little solid; and his description of the mid-eighteenth century case law reveals four quite different theories, of which "natural right" is only one. Something very like the modern law, recognising a natural right to water use so long as the use is a reasonable one, eventually emerges in the US cases in the early 1800s. It is accepted in England by a string of cases starting with *Embery v. Owen* (1851) 6 Exch. 353, and culminating in the famous *Chasemore v. Richards* (1859) 7 H.L.C. 349.

A persistent theme is the role of water resources and water law in the Industrial Revolution; in its early stages at least, water power was critical to industry. Several writers have argued that the common law rules aided (or might have aided, or at least were meant by their judicial authors to aid) nascent industries at the expense of competing resource users. The supposed need of industry for particular legal regimes has been asserted again and again. Getzler considers various theories on the economic relevance of the law, whether on water law in particular, or as illustrating more general theories on the law as promoting economic growth. His conclusions here are distinctly cool, and would tell against any attempt to read particular economic or political theories into the cases. The law was, for most of its history, in a mess, a point which leans heavily against any theory ascribing a clear rationale to it. Finding individual statements of law with clear economic implications is hard enough; characterising the whole of the law by reference to any one theory is clearly impossible.

In any event, as he stresses, the importance of the law in the books should not be overstated. Many key issues, especially on the reasonableness of particular uses of water, were left to juries; in the early years at least, local courts may have been more important than the Royal courts on which Getzler concentrates; and, most important of all, the richer and more technically adept water users would very probably have pre-empted litigation by means of a private Act establishing their rights. Very far, then, from answering the difficult questions on the role of water law in the rise of modern industry, Getzler makes it clear why these questions are even harder than has been supposed, and strongly suggests that those arguing for an economic rationale to the law have been looking in the wrong place.

STEVE HEDLEY

The Home Office and the Dangerous Trades: Regulating Occupational Disease in Victorian and Edwardian Britain. By P. W. J. BARTRIP. [Amsterdam: Rodopi. 2002. iv, 344 pp. Paperback €35.00. ISBN 90-420-1218-8.]

THIS BOOK—part of *The Wellcome Series in the History of Medicine*—imparts Dr. Bartrip's most recent research into socio-legal aspects of occupational injury and illness in modern England. As with his previous scholarship, the volume is meticulously researched, clearly written, and makes a fine contribution to a relatively under-examined field.

Rather than providing an exegesis of what follows, chapter one ("Introduction") sets forth the central question of this study: namely, why did occupational diseases receive attention relatively "late" by comparison to other workplace hazards? A number of reasons, which reappear later in greater detail, are then provided. Occupational diseases differed from workplace accidents and other disasters in that they were insidious, their victims suffering "in silence and anonymity", and therefore did not induce much public attention, sympathy, or moral outrage. As well, "it was the poor, the unenfranchised, the unorganised, the politically impotent and the inarticulate who suffered" most, and who had the least wherewithal to change their condition. Moreover, even when recognised by individual medical researchers, the subject of occupational illness was itself considered as an undesirable vocational pursuit for medical practitioners. The Introduction also provides an overview historiography of British occupational health scholarship, with an emphasis on post-1982 developments. The seven chapters that follow each address a specific occupational disease, and their respective roads to recognition and regulation.

Chapter two ("Lead: The Road to Regulation") describes how lead poisoning, although "both statistically and politically, one of the most significant occupational diseases" of Victorian Britain, did not receive governmental attention until the last quarter of the nineteenth century. As an occupational illness, lead poisoning was especially prevalent among pottery workers. Nevertheless, appropriate regulatory response was delayed due to a combination of little empirical study in Britain, a *laissez faire* influenced official report, and limited enforcement of factory-related legislation. The lag in formal action is explained mainly as the result of employers and inspectors being ignorant of lead poisoning as a specific cause of illness, and workers acquiescing in its effect. Chapter three ("The White Lead Trade") recounts that, by the last quarter of the century, white lead poisoning was a comparatively well-recognised phenomenon, receiving the attention of both Charles Dickens and factory inspector Alexander Redgrave. Redgrave's proposals for workplace rules followed a typical pattern of advocating the exclusion of child workers (since adults could, according to notions of political economy, fend for themselves), and was reflected in the Factory and Workshop Act 1878, which banned their employment. Sponsored by Home Secretary Harcourt, Redgrave's further recommendations impelled 1883 legislation requiring employer safety certification, a significant event as the "first attempt to suppress" industrial illness through legislation. Subsequent acts increased the scope of certification as a means of controlling the workplace. By contrast, chapter four ("Pottery and Earthenware") tells of the much slower road taken in regulating the ill effects of lead on pottery workers. Recognised as early as 1842, the problem was "virtually untouched by regulation" until the 1890s, and dealt a critical blow by Home Secretary Asquith's 1892 declaration of pottery manufacture as a danger to health. That pronouncement was influenced by the path-breaking work of physician Thomas Arlidge's 1892 book *The Hygiene, Diseases and Mortality of Occupations*, empirical reports by a Labour Commission and by factory inspector William Dawkins Cramp on the harm engendered in factories, and a much publicised exposé in the *Daily Chronicle*. Following Asquith's declaration, the pottery and earthenware industry was subject to increasingly greater restriction. The

ability of these industries to avoid legislation far longer than the analogous white lead trade is attributed to the latter lacking equivalent "economic power and cohesion."

Chapter five ("A Kind of Dread: Arsenic and Occupational Health") utilises the case of arsenic toxicity to exemplify very different responses to illness. Long recognised as a lethal poison, arsenic's retail availability was proscribed in 1851, and thereafter caused periodic public unrest as an unwholesome consumer good. By comparison, despite the effect of arsenic on exposed workers being known as early as the 1830s, "no one who worked with arsenic enjoyed any legal protection" until 1892. Aiding the eventual conversion of the hazards of arsenic exposure into a workplace concern was feminism, which raised social consciousness about arsenic's toxicity by influencing women's choices as consumers of textile products, and in doing so afforded workers limited protection. Despite this positive development, while public distress at the dangers of certain colourings derived from arsenic curbed its use, *laissez faire* notions of *caveat operarius*, unchallenged expert evidence as to employee safety, and limited legislative intervention ensured a sluggish governmental response towards workers. Late century exposés in the *Star* of manufacturers having purposefully concealed the effects of arsenic on labourers provoked Home Office-sponsored legislation beginning in 1895, by which time "the worst was probably past". The contrast in responses to public versus occupational hazards is further illustrated in chapter six ("'The Poorest of the Poor and the Lowest of the Low': Lucifer Matches and 'Phossy Jaw'"), which relates the treatment of the perils caused by the presence of phosphorous in commonplace matches. While public danger in the form of arson incited provocative press coverage, the known and dangerous effects of contact with phosphorous vapours to workers in the form of phosphorous necrosis ("phossy jaw") were largely ignored. Despite both available medical evidence in the United Kingdom and strict regulation of the industry by continental countries, the Home Office took few steps to counter this occupational disease. Once again, press coverage of manufacturers having covered up the known deleterious effects of exposure to toxins goaded a complacent Home Office into regulation that eventually banned the manufacture of phosphorous matches. Chapter seven ("A Huge Bacterial Bubble: Anthrax in Industry") demonstrates how anthrax regulation was motivated more by widespread "scares" that these illnesses had invaded England from foreign shores to endanger an unwitting public, than by concerns about the workers who were exposed to this hazard on a daily basis. Chapter eight ("Conclusion") emphasizes the complexity of factors contributing to the diverse treatment of public and occupational illness, including the role played by women, responds to some recent treatments of this topic by other commentators, and puts forth some thoughts on the future study of occupational diseases.

M.A. STEIN

Regulating Cartels in Europe: A study of Legal Control of Corporate Delinquency. By CHRISTOPHER HARDING and JULIAN JOSHUA. [Oxford: Oxford University Press. 2003. xxv, 290 and (Bibliography) 7 and (Index) 3 pp. Hardback £50.00. ISBN 0-19-924244-5.]

Law of Cartels. By MARK JEPHCOTT and THOMAS LÜBBIG. [Bristol: Jordan Publishing. 2003. ix, 461 and (Index) 33 pp. Hardback £125.00. ISBN 0-85308-820-9.]

THE DECENTRALISED APPLICATION of EC competition law brought about by Regulation 1/2003, the criminalisation of “cartel” activity by the UK Enterprise Act 2002, and the increasing possibility of private suits for damages have created a new competition law environment in which “the likelihood of cartel activity being detected by the competition agencies at both the EU and the national level is now higher than ever, and the consequences of detection are potentially devastating” (*Jephcott and Lübbig*, para. 10.1). This new environment of intensified detection and enforcement effort has generated a number of books on the most serious competition law infringements.

Harding and Joshua offer an “instructive narrative of legal development” which charts the change in European conception from the view that cartels are beneficent to the view that they are malevolent. In the benign phase, “the cartel was seen as a useful phase of corporatist development which would facilitate the eventual take-over of the economy by the state ... in so far as cartels promoted stability, this could operate in the workers’ interests by ensuring employment, even if the workers paid more for the goods as consumers” (p. 72). The concentration of economic power was less of a cause for concern than was the social dislocation caused by rapid industrialisation. Cartels were thus given governmental encouragement and support, or even created by governments with a view to stabilising markets.

Once cartels ceased to be seen as universally benign, the value of the recognised advantages was so well entrenched that universal condemnation was impolitic. European enforcement regimes were never “designed to terminate cartelization, but merely to modify cartel programs by eliminating activities regarded as contrary to the public interest” (p. 68) by “balancing the pro- and anti-competitive features of cartels by means of a process of examination and market analysis” (p. 43). This mode of European control continued until the late 1980s. The beneficence with which cartels were viewed in the European context is contrasted with US hostility to cartels driven by the view that cartelisation is incompatible with democracy. In Europe “[t]he potential for political abuse of concentrated and collusive power” became clear with the “incorporation of the business cartel as a device of totalitarian governance in Germany, Italy, and Japan” (p. 85). It was the “political condemnation of collusive anti-competitive behaviour [that] pushed aside more ambiguous and complicated economic assessments and allowed for a relatively straightforward process of using evidence and imposing sanctions” (pp. 49–50).

Whether the narrative accurately reflects both the European and US conception of cartels may be contested. However, it is a cogently argued vision of events. Running alongside the narrative are a number of broad themes which stem from the claim that “the way the law deals with cartels

is no longer competition law" (p. 279). What exactly is cartel conduct? Jephcott and Lübbig see it as "co-operation whose anti-competitive effects are beyond question" (p. vii). Harding and Joshua concede that lawyers and regulators are still some way distant from a clear formulation of the "cartel offence". At the core the problem is an "overcharge" to consumers and business purchasers which is unfair, causes loss to others and hence an appropriate subject of regulation and sanctions. There is an additional requirement that the conduct be "deliberate and furtive collusion" (p. 8). What makes cartels furtive is the realisation on the part of the corporate actor that such conduct is prohibited. Since the cartel offence prohibits conduct rather than effect, the authors acknowledge that "it may be necessary to convince both courts and juries, and public opinion more generally, that planning and operating a cartel is conduct so morally offensive as to justify both criminal liability and punishment by imprisonment" (p. 257). This still remains to be done, as evidenced by the UK legislature considering that engaging in conduct with an anti-competitive effect is insufficiently morally problematic. European cartel law must thus identify the sense of delinquency.

Harding and Joshua argue that cartel law provides distinctive responses to the questions of what relevant evidence is, how it is obtained, and what its probative value is. Unlike competition law evidence—*economic* evidence, with natural "problems and pitfalls ... exacerbated by underlying theoretical uncertainties which bedevil such market analysis" (p. 144) and giving "defence advisers opportunities which have readily been exploited" (p. 151)—cartel law relies on *material* evidence, which is more familiar to lawyers.

There is a distinctive response to the practical difficulty of locating and retrieving such material evidence. The two principal techniques used are stealth ("the dawn raid"), and cunning ("leniency"). Harding and Joshua give some treatment to the first technique, but Jephcott and Lübbig set out comprehensively the ability of anti-cartel agencies to obtain evidence of illegal practices. Powers under both EC and UK enforcement regimes are discussed, whilst it is noted that the UK powers have yet to be tested in the courts. Harding and Joshua offer a most engaging discussion of the leniency technique, and how it exploits "a natural nervousness within the ranks of cartels by holding out a tempting offer of immunity or leniency for the first, but only the first, to provide evidence" (p. 209). European regulators for a large part of their history have lacked a serious sanction, though this is changing and chapter 5 of *Jephcott and Lübbig* explores the operation of leniency under EC and UK law. Both the old and current EC leniency policies and practices are discussed, as are the issues of confessions giving rise to private actions and problems caused by a patchwork of leniency programs.

Jephcott and Lübbig also details the sanctions imposed for infringements of cartel law, discussing the principles used to determine the level of fine and the courts' ability to reduce or increase the fine under EC law. In addition to fines, UK law allows for the disqualification of directors and imprisonment, with the added element that offenders can be extradited to and from other jurisdictions that have criminalised cartel conduct. Harding and Joshua consider the nature of the sanction imposed for cartel law infringements, which is important because it determines the type of safeguards necessary in order to ensure that the sanction is fairly imposed.

As the enforcement techniques change, more cartels are detected and more severe sanctions are imposed, the question of balance between effective enforcement and fair procedures arises. In the battle between the regulator and cartel participants, the Courts of Justice and First Instance act as referee in what has become “an increasingly complex battleground of due process argument” (p. 121). *Jephcott and Lübbig* sets out the safeguards that exist to ensure that cartel enforcement powers are not abused, but detailed consideration of this complicated and controversial area is beyond the scope of the work.

Whilst Harding and Joshua recognise that the punitive nature of the sanction gives rise to the need for procedural safeguards, there is complaint that the manner in which the courts have refereed the battle has enabled “powerful corporate actors participating in cartels ... to exploit legal procedures and complex economic argument in their resistance to legal surveillance” (p. 45). They chart the extension of Article 230 EU jurisdiction to allow an unfettered evaluation of the evidence, but are critical of the rigour of the analysis carried out under the extended jurisdiction and of the idea that such jurisdiction was ever necessary. The extension of review powers has enabled the Court of First Instance “to turn itself into a trial court ... without formally amending the Commission’s procedure under Regulation 17, there has nonetheless been a *de facto* separation of functions and an introduction of a distinct judicial trial authority” (p. 201). They thus question the balance between procedural protection and effective enforcement, lamenting the overreaction to the infringement of procedural requirements so that as a result the balance appears to lie in favour of the rights of the defence as opposed to the rights of the consumers that would be protected if competition law were effectively enforced. Cartel law, it is argued, has resulted in the creation of “a new sub-category of public law: not precisely an area of human rights, but the analogous topic of corporate rights” (p. 281).

Jephcott and Lübbig offers advice to competition law practitioners and company directors on how undertakings can avoid becoming involved in cartel conduct and on what to do when subject to a cartel investigation. Chapter 8 offers strategic advice to those who have engaged in cartel conduct when trying to strike a deal with an enforcement agency, particular emphasis being placed on how to prepare a leniency application. Chapter 9 offers similar advice to those subjected to dawn raids. Chapter 10 completes the substantive part of the book with a discussion of how firms can create a culture of compliance with cartel law. Although it will take time before there is enough case law to clarify the new UK legislative provisions, *Hansard* is used effectively by the authors to give expected interpretations. The book includes thirteen annexes containing useful material such as official guidelines on setting fines and on leniency notices.

Harding and Joshua offers a new way of looking at competition law (or cartel law) in a style that is highly readable. The extent to which cartel and competition law are distinct is clearly contestable. For example, Jephcott and Lübbig discuss: the relationship between the Court of Justice judgment in Case 309/99 *Wouters* and the Court of First Instance in Case T-112/99 *Métropole*; *de minimis*; interference with market integration; and whether creating market transparency has the effect of restricting competition. On the Harding and Joshua thesis, however, these are not *cartel* issues but *competition* issues. Conversely, *Jephcott and Lübbig* does not contain

information on market definition or economic analysis, which Harding and Joshua would regard as properly excluded. However, this makes the discussion on setting fines difficult because an element of the seriousness of the offence is the market effect that results. In any event, they document an important development in the history of competition law, without offering (or claiming to offer) the definitive view of how the law ought to develop. By questioning how things are viewed, and offering an alternative view of current practice, they provide a vantage point from which regulators, practitioners and academics can view the nature of cartel conduct and how it should best be controlled and also raise “[t]he pertinent question [of] the continuing location of the topic of cartels and their regulation in works and courses on competition law” (p. 279).

OKEOGHENE ODUDU

Insolvency Law: Corporate and Personal. By ANDREW KEAY and PETER WALTON. [Harlow: Pearson Education Ltd. 2003. xcv, 577 and (Index) 18 pp. Paperback £30.99. ISBN 0582-43719-9.]

INSOLVENCY LAW has emerged from the shadows of company and commercial law to become an academic subject in its own right. The reasons for this are not hard to fathom. Apart from the obvious social and economic need for a system of law that responds to financial distress, insolvency is a forcing ground for legal evolution (the current *locus classicus* being the debate as to the proper classification of security over book debts) and, *par excellence*, a forum in which the creative practitioner can be observed at work. However, as the study of insolvency law, at least in the United Kingdom, is still a relatively young academic discipline, the classic texts of the subject, such as Goode’s *Principles of Corporate Insolvency Law* and Fletcher’s *The Law of Insolvency*, tend to be oriented towards the profession and are marketed and priced accordingly. Whilst Finch’s *Corporate Insolvency Law: Perspectives and Principles* undoubtedly provides a valuable theoretical account that will be of particular interest to postgraduate students, the market for an introductory text designed and written with students in mind can hardly be said to have reached saturation point. Keay and Walton’s book seeks to exploit the relative dearth of introductory texts in this area.

The authors’ aims are modest and sensible. They seek to provide a “reasonably comprehensive and readable text” for use by law and business students studying insolvency law modules at undergraduate and postgraduate level and possibly also by practitioners who are new to the subject. The treatment is predominantly doctrinal, although theoretical issues are canvassed, with appropriate reference to the burgeoning literature, in chapter 3. As the title indicates, both corporate and personal insolvency law are covered. Indeed, after the initial discussion of the principal insolvency regimes in Parts II to V, the book is helpfully structured so that core issues such as the administration of the insolvent estate, the distribution of assets, the treatment of the various categories of creditor and transaction avoidance are considered holistically. This enables the student to see the overlaps and the differences between corporate and personal insolvency law and to evaluate the extent to which the Insolvency

Act 1986 has succeeded in harmonising these two bodies of law. In order to keep the text within manageable proportions, the authors have adopted a domestic focus, omitting such matters as cross-border insolvency. Teachers who wish to recommend the book but also to incorporate an international dimension in their course structure will therefore need to identify other materials covering, for example, the EC Regulation on Insolvency Proceedings and the UNCITRAL model law (to which effect can now be given in domestic law by virtue of Insolvency Act 2000, s. 14).

The structure of the book places fashionable emphasis on the rescue and rehabilitation of distressed debtors. Thus, the initial focus of the exposition in Part II is on the non-terminal statutory regimes: receivership, administration and voluntary arrangements. The authors cover this ground well and draw out the important aspects of the developing law in the post-Enterprise Act 2002 era. The picture is completed by some welcome discussion of non-Insolvency Act strategies such as schemes of arrangement and informal workouts. There then follows a comprehensive account of the law of company winding-up, which includes useful chapters on provisional liquidation (chapter 11) and dissolution (chapter 18), and the law of bankruptcy. Having discussed the available regimes, the authors consider in Parts VI to VIII (in the manner already described) various matters that overlap corporate and personal insolvency law before closing in Part IX with an account of the law's response to the misconduct of bankrupts and those most intimately connected with failed companies. This final part includes coverage of the directors' disqualification regime and the main criminal offences in the Insolvency Act. A minor point that may be worthy of consideration for a future edition is whether the material on bankruptcy restrictions orders and undertakings currently located in chapter 24 (bankruptcy discharge) would fit more logically in Part IX given that the imposition of post-discharge bankruptcy restrictions is premised on debtor misconduct. Inevitably, the book is the victim of the perennial occupational hazard in that its publication pre-dated the landmark decision in *Re Leyland Daf Ltd., Buchler v. Talbot* [2004] UKHL 9, [2004] 2 W.L.R. 582 which has radically reconfigured the law concerning the treatment of liquidation expenses.

The text is clear, concise, readable and uncluttered. The balance between breadth and depth of coverage has been well struck. No point is laboured, but at the same time there are excellent vignettes on a wide range of matters such as security, receivers' duties, the impact of default on voluntary arrangements and the funding of insolvency litigation, all of which serve to demonstrate the authors' grasp of the law and its practical context. In the opinion of this reviewer, the authors have achieved their stated objectives and, as such, the book should prove to be a popular foundational work.

ADRIAN WALTERS

Technology Transfer: Law, Practice and Precedents. By MARK ANDERSON.
[London: Butterworths. 2nd edition, 2003. lvii and 984 pp. Hardback
and CD-ROM £162.41. ISBN 0406913447.]

MARK ANDERSON has established a niche technology transfer practice and over the years this book and other related volumes have flowed from his work in this area. The book explains the context in which intellectual property is created, particularly within universities, the commercial issues which arise in dealing with that intellectual property, the types of agreement that are necessary and the various legal disciplines which need to be brought to bear. These include EC (particularly competition) law, personal property law (principally questions of ownership), patents, copyright law, the law of confidence, contract law and taxation. Along the way, regulatory requirements affecting the pharmaceutical and biotechnology industries, clinical trials and the valuation of technology are also addressed. It is a remarkable achievement to have brought together so many different strands and sought to provide a coherent guide through the maze. The book also comes with a CD-ROM filled with useful precedents arising from the author's long experience in the field. The precedents are a particular strength of the book and are accompanied by notes explaining their purpose and the underlying business issues. The book and the CD-ROM together form an important tool in the armoury of any lawyer practising in this area.

Inevitably, given the broad range of topics covered, other writers have contributed material. Mr. Anderson has tried to help his readers by providing overviews of various areas before plunging into the detail. Paradoxically, the weakness of the book flows from these two approaches. Repetition and cross-referencing become necessary, in the course of which the reader can become rather lost; and, whilst the index is fifteen pages long, it is hard to find the answer to a particular problem by using it. I look forward to the third edition, which the rapidly changing law in this area will shortly make necessary, and hope that the author will have time to streamline the contents and strengthen the index.

But ultimately the complexity and somewhat labyrinthine nature of the book is not the fault of the author. He has produced an authoritative and indeed essential tool for the practitioner in a profoundly unsatisfactory area. There are important academic and policy questions which plainly cannot be addressed in a user's guide, but which nonetheless urgently need attention.

Labour costs in the developing economies are a fraction of those in the industrialised nations. Manufacture and other labour intensive activities are gradually being outsourced and transferred to the developing economies. The pre-eminence of the developed economies in the global market therefore depends on their skills and on their intellectual property. The importance of technology development and expertise and its transfer from the university environment to the commercial world have been identified as national and European priorities for economic survival.

It is therefore of fundamental importance that the law and policy should facilitate rather than impede technology transfer. The process for transferring technology should be streamlined to maximise the volume of technology successfully commercialised. Those seeking to commercialise early stage technology are aware of a number of issues which currently

impede the process. Too often, finding a way through complex regulatory measures aimed at other sectors loads cost and risk on to the commercialisation of early stage technology. The recent debacle with the Finance Act 2003 is an example. This sought to close any loopholes which companies might use to avoid income tax by giving shares to their employees as a disguised employee benefit. This has resulted in a highly complicated and disincentivising framework for academic founders wishing to commercialise technology by means of a spinout company. The Inland Revenue has made four attempts to find a way through the maze it has created whilst maintaining that the rules simply provide a level playing field. Finally, prompted by the Treasury and DTI, on 23 September 2004 it acknowledged that special legislative treatment should be considered for technology transfer spinouts. Meanwhile academic founders face the risk of an income tax charge, before they have made any money, on shares in spinouts which may become valuable in the future (and, if so, then in large measure because of their involvement in the company) but which equally may end up being worth nothing. Similarly, the new Technology Transfer Block Exemption, in force from 1 May 2004, promised to make technology transfer easier since it covered patents and software. Provided the rules were met, licences would be deemed not to be anti-competitive. However, lest anyone should slip through a loophole, a market share threshold was introduced as a first test of eligibility for the safe harbour provisions. The Exemption thereby becomes useless for innovative technology because it may have 100 per cent. of the market and so be well above the prescribed threshold.

The increasing regulation of universities as charitable bodies is another factor. The government's *Lambert Review* encourages universities to engage more actively with the business world. However indications are that the Charities Bill will lead towards regulating more tightly the involvement of universities with businesses. When one adds to this the facts that 30 per cent. of new businesses fail, that 90 per cent. of new products also fail, and that there is an increased unwillingness on the part of established companies and venture capitalists to take on early stage technology, the picture becomes gloomy.

The government should apply its efforts to streamlining and reducing the different regulatory burdens which it is imposing. It could also reduce commercial risk by providing more matched funding for development of raw technology so that it is more attractive to commercial players. Taking a radical and academic approach, might it not be time to streamline the complex fragmentation of intellectual property law?

Although Mark Anderson's book does not address these issues, it is a timely publication. Academics and policymakers should pay more attention to ensuring the success of the technology transfer sector. If a technology is successfully spun out and makes money, the taxman will get plenty of revenue at that point and the economy will be stronger. It would be well worth looking at the taxation and regulatory environment that exists in the United States to see if lessons can be learned.

ROSEMARY BOYLE