

THE FAMILY AND THE LAW OF TORTS

By E.R. Alexander

Toronto: Butterworths, 1979

58 pp. \$13.50

DEAN I. SCALETTA*

My initial impression of *The Family and The Law of Torts* was that it was grossly overpriced for a paperback with only 54 pages of text. Although the work itself is well-researched, well-written and extremely informative, this initial impression has remained with me.

E.R. Alexander states in the Preface that he reluctantly agreed to have the book, originally intended as a chapter in a larger, more comprehensive book on family law, published as an independent item. While his trepidations were likely well-founded, it is still fortunate that he was able to be convinced of the independent worth of his work.

The book is divided into three broad areas; namely, (1) torts related to third party interference with the family; (2) torts within the family; and (3) family tort liability to third parties.

The author begins with a very brief outline of tort law in general, and correctly points out that torts in a family situation generally involve interference, whether intentional or otherwise, by a third party with "relational" interests. In dealing with the husband-wife relationship, Alexander deals with the old common law intentional torts of criminal conversation, enticement and harbouring. There is a good discussion of common law and historical anomalies and anachronisms as compared to modern legislation in the area. Although these common law actions still exist in many jurisdictions, including Manitoba, the author argues, with some merit, that their lack of any useful function and their abolition in some jurisdictions are good evidence that these common law actions should be abolished altogether. With respect to unintentional torts affecting the marital relationship, the whole question of pecuniary damages payable to the spouse of an injured person for the loss of that spouse's consortium is adequately canvassed. Several problems of evidence, procedure and policy are also discussed.

The second part of the first Chapter deals with third party interference with the parent-child relationship. After discussing the common law in the area — in general, and in particular such torts as seduction, enticement and harbouring — the author comments that the abolition of these torts has already taken place in many jurisdictions and is imminent in most others. Further, the Chapter deals extensively with the history and development of the common law with regards to allowing pecuniary damages for nervous shock suffered as a result of the injury or death of a family member. This area is particularly well-researched and Alexander makes good use of both long-standing and recent authorities to make his points. He concludes by stating that although the Courts may extend liability to include nervous shock on the grounds of reasonable foreseeability, the preferable approach would be to apply broad policy considerations to the facts of each case.

* Student, Faculty of Law, University of Manitoba

There is also an interesting discussion of the relatively new area of common law liability for pre-natal injuries (which is described as being "in an embryonic state" in Canada!), including many of the inherent factual problems involved.

The Chapter dealing with torts within the family is necessarily brief because, as Alexander points out, this type of case rarely arises unless the relationship has deteriorated as a result of the tort, or it appears that insurance money may be available. There have never been any common law bars to a child's right to sue his or her parent, and the bar preventing one spouse from suing the other has been largely abrogated by statute. In short, the actions for intra-family torts are available, but rarely exercised.

The final Chapter, dealing with family tort liability to third parties, begins by posing two questions: (a) When are children liable for their own torts? and (b) When are parents liable for the torts of their children? The first question is discussed with respect to both negligence and intentional torts. The effects of such factors as age, capacity and the complexity of the tort involved is mentioned in each of these different contexts. These factors are also relevant when a child has been named as either a plaintiff or as a defendant. The issue of contributory negligence is particularly relevant in the former situation.

There is also a brief discussion of the liability of children engaging in "adult" activities — particularly "dangerous" ones such as golfing, snowmobiling and automobile driving — and the standard of care which they owe to others. The Chapter closes with several pages devoted to the tort liability of parents, in general, with respect to very young children and with respect to adolescents. Alexander notes that the situations where parental liability is assessed become fewer as the child gets older and virtually disappear when the child reaches majority.

From a technical standpoint, the book is well-footnoted and includes a good, albeit brief, case list and index. My only criticism with respect to the footnote style would be that when the designation "supra" is used, no page number or footnote number is specified (in many instances). The book would prove to be somewhat more helpful as a reference source with this minor amendment.

In short, *The Family and The Law of Torts* is sufficiently broad to give the casual reader a good overview of the areas in which family and tort law merge. It is also sufficiently detailed and documented to aid both the student and the practitioner of law in these areas.