

Book Reviews — Revue des Livres

CANADIAN NEGLIGENCE LAW

By Allen M. Linden (Butterworths, Toronto), 1972; IX, 575 pp.

In "Canadian Negligence Law", Dr. Linden has placed in the hands of Canadian legal practitioners, teachers of law and students (or at least those of the foregoing who can amass the requisite and rather daunting number of shekels demanded by the publishers for this work) a most valuable tool.

We now have, for the first time, a detailed and coherent analysis of the state of negligence law in Canada today. The volume makes a timely appearance upon the forensic scene. In the words of the author himself,

"The Canadian courts have finally begun to travel along paths of their own choosing. Indeed, there are areas of tort law where the Canadian courts and legislatures have been in the vanguard . . . In the last few years particularly, the pages of the Canadian law reports have begun to vibrate with a new life as our judiciary becomes bolder, more independent, and more creative. It is a story that deserves to be told."

Dr. Linden tells the story clearly and in eminently readable prose, and provides the reader with a wealth of further information in the forms of both case citations and bibliography in the footnotes.

Particular value may be found in Chapters 5 and 7, which deal respectively with the topics of "Proof of Negligence" and "Remoteness of Damage and Proximate Cause". Onus-shifting devices and the foreseeability-causation debate are matters which have vexed and perplexed successive generations of law students (and — may it be admitted — not infrequently others occupying more exalted positions in the legal hierarchy). At least one law teacher is grateful for the excellent degree of clarity and orderly exposition in the discussion of these and other topics; the benefit to Canadian students of having such concepts dissected in Canadian terms and against an environment of Canadian judgments has been most marked and apparent during the first year of the availability of this work.

If one major criticism is to be levelled at the book, it is that at some points the collection and exposition of decided cases gives the impression, almost, of a "laundry list" to the exclusion of the following-through of an argument to its fully logical conclusion.

An example is the consideration given to the topic of the "Good Samaritan" (pp. 228-30). After posing the problem of how to encourage potential rescuers by reducing the risk of liability to them if their effort is unsuccessful, the author comments that,

"A preferable approach might be the one pioneered in the United States. Over 30 American jurisdictions have enacted legislation relieving doctors

and nurses and, on some occasions, ordinary citizens from tort liability for their conduct at the scene of an accident, except if they are guilty of gross negligence."

He proceeds to welcome the importation into Canada of this approach as exemplified by The Emergency Medical Aid Act of Alberta.¹ His view is that "such an approach retains some control over the conduct of rescuers while at the same time it does not frighten them away."

With due respect, this seems most peculiar reasoning. The "control over the conduct of rescuers" which is stated to be retained, is, in fact retained in such diminished form as to be almost non-existent. This result stems from the fact that the legislation imposes liability, in the designated situations only where *gross negligence* can be proven by the plaintiff. The ordinary negligence law already gives good protection to the doctor or nurse who stops at the scene of an accident to give emergency treatment; the facts that it is dark, that it is pouring with rain and that no adequate medical equipment is at hand will all be taken into account by the court in deciding whether there has, in fact and in law, been a breach of the duty of care owed by the Good Samaritan to the injured person once the emergency treatment was begun.

The fact that it is almost impossible to discover, in the law reports of North American jurisdictions, judgments in which a medical person has been successfully sued in respect of treatment rendered in such circumstances,² does itself stand as mute evidence that no further, extended protection for them is necessary. The only effect of such legislation will be to deprive a deserving plaintiff, who *has* actually suffered through the negligence of a Good-but-negligent Samaritan, of any compensation; for if recovery in such circumstances is nigh-impossible, as it seems, under the existing common law of negligence, how much even further will hope of recompense be removed when the statutory element of "gross negligence" is stirred into the juridical recipe.³

Furthermore, while it is true that the legislation will not, in Dr. Linden's words "frighten them (the rescuers) away", there is equally no cogent evidence to suggest that it will induce greater willingness on the part of medical personnel to stop at the scene of accidents and attempt emergency treatment.

In 1963, the Journal of the American Medical Association conducted a survey right across the U.S.A. in an attempt to assess the impact of such legislation. Doctors were questioned both in jurisdictions which

1. Stats. Alta. 1969, c. 28.

2. Interestingly, see Linden's own footnote no. 115 on p. 229.

3. Compare Linden's remarks on Good Samaritan legislation (pp. 228-230) with his remarks on gross negligence (pp. 51-53). Presumably, we may now add to his two categories of legislative provision invoking the concept of "gross negligence" (see p. 52), that of the Good Samaritan legislation.

had enacted Good Samaritan legislation, and in those which had not. The results published in the Journal⁴ indicated that the legislation really had little effect on the doctors' decisions to stop or not; of 20,000 doctors canvassed, about 50 per cent indicated that they would stop. But as between those living and practising in jurisdictions having Good Samaritan legislations and those who did not, it was the latter group, by a small percentage majority, who indicated more frequently that they would stop and offer treatment.

So what does this evidence do to the Good Samaritan legislation? It is suggested that the logical conclusion to be drawn is that the legislation in no way benefits potential plaintiffs, and in fact makes their position the more hopeless than it was before. In a real sense, the law in its "reformed" state is throwing both ends of a lifeline to a drowning man. Is this truly a "preferable approach"?

In other areas, further examples of similar shortfalls in pursuit of logical conclusions may be observed. In the section relating to "Mental Disability" in the law of negligence (pp. 34 -37) the author, after reviewing the existing case law, arrived at the conclusion that

"The puzzle of tort liability of the mentally disabled is not yet satisfactorily resolved. Perhaps the best solution would be to treat the insane in the same way as everyone else. At least in the automobile cases they should not be allowed to escape liability. Since the highway traffic legislation denies them the privilege of having a licence, they might be precluded from pleading their own evasion of the law on a theory akin to estoppel."

Again it is a little difficult to understand the appeal to the evidentially exclusionary effect of the doctrine of estoppel in this context. Indeed, this reference turns the whole paragraph into a completely circular argument, which ultimately begs the question posed. For the essence of the rule of estoppel lies in the fact that the person whose defence is now being excluded has engaged in a course of action, or made some representation of fact to the contrary, and on which others have usually acted upon to their detriment. At the very least he will at least have failed to speak up and correct a mistaken impression of *which he was aware* and was under a duty to rectify. (Consider, for example, the closing words of section 49(1) of the Bills of Exchange Act). How often has a course of action engaged in by a mentally-disabled person been accepted as the basis upon which to invoke the operation of the rule of estoppel? And can an insane person really be estopped from pleading a state of affairs of which, in many cases, in the very nature of the state of affairs, he could not truly have been aware?

In other words, it is suggested by this reviewer that to adopt the rule of estoppel as an analogy by means of which to justify the imposition

4. J.A.M.A. (1964) 189: 859.

of liability in circumstances such as these is unhelpful. For there lies in the seeds of the purported analogy (which itself depends upon a previous pattern of behaviour or omission) the very conundrum which lies at the heart of the problem to be solved — namely the effect of insanity upon the previous conduct of the defendant.

The foregoing are but two examples of what is described above as the major fault of the work. There are others, but they are not adduced for two reasons: first, in order not to submerge in minutiae the one really substantial criticism of the work which is stated above; second, not to obscure the true worth of the book as a whole.

For whatever criticism is made, issue taken or debate started over the details of this book it remains indisputably the most significant single work on Canadian negligence law in narrative form to date. In many ways it is, understandably, the ideal companion volume to the great casebook forged originally by the late Dean Cecil A. Wright; there are many areas of Canadian law where academic and practitioner may justly complain over having to depend primarily upon the textbooks of other jurisdictions for guidance, but in the field of negligence law such a cry will, henceforth, ring rather hollowly.

The author conceives, at the penultimate page of his book, that,

“Eventually, tort law may become very much like a Gothic cathedral — a rather elaborate structure, but one that continues both to function and to uplift the human spirit.”

Clearly, tort law has not yet even approached such levels of spiritual refinement. But if (to mix the figures of speech) the corpus juris needs, as it struggles through this vale of tears, an ethical brassiere providing uplift to the sagging moral bosom of the world on the way, sturdy support is now available.

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STUDIES IN CANADIAN FAMILY LAW

Edited by D. Mendes Da Costa; Butterworth & Co. (Canada) Ltd. 1972, pp. vii, 1104 (2 Volumes — \$79.50)

The wilderness and the dry land shall be glad,
the desert shall rejoice and blossom¹

At last a Canadian textbook has emerged which comprehensively deals with the subject of family law. Its birth is long overdue. In 1964, Julian Payne edited the second edition of *Power on Divorce*,² a work

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1. Isaiah 35, Verse 1.

2. First edition published in 1947.