

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.

JOHN M. SHARP*

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

* Associate Professor, Faculty of Law, University of Manitoba.

1. Isaiah 35, Verse 1.

2. First edition published in 1947.

still used by many lawyers and judges in Canada today. However, passing of the 1968 Dominion Divorce Act³ made revision of that text a necessity. Julian Payne responded in 1970 with a continuing series of Digests on the Divorce Act.⁴ In 1969 there emerged a series of case reports devoted entirely to areas of family law.⁵ But for any comprehensive discussion of family law, Canadian Law Schools have been forced to rely upon an English text⁶ and various American textbooks.⁷ These, though well-written, are becoming more and more inapplicable to the peculiar Canadian legislation.⁸

Mendes da Costa, professor at the University of Toronto, has accomplished the difficult task of collecting and co-ordinating a series of articles produced by eminent legal minds across the country into this two volume work. Overnight, it has already become the standard reference text on family law. I must set out a list of topics to give some idea of its breadth.

VOLUME 1:

1. Family Courts in Canada H. A. Allard
2. Family Organization and the Illegitimate Child A. L. Foote
3. Children in Need of Protection F. M. Fraser
4. Adoption in Canada Margaret E. Hughes
5. Property Rights During the Subsistence of Marriage M. C. Cullity
6. Alimony and Maintenance D. J. MacDougall
7. Divorce D. Mendes da Costa

VOLUME 2:

8. Custody and Access L. R. Robinson
9. Evidence and Proof in Proceedings for Divorce A. W. Mewett
10. Nullity of Marriage H. R. Hahlo
11. Res Judicata in Matrimonial Causes H. A. Hubbard

3. R.S.C., 1970, c.D-8.

4. Digest of Cases and Materials on the Divorce Act, 1968.

1. March 19, 1970.

2. Supplement 1, October 1, 1970.

5. Reports of Family Law, editor Judge David M. Steinberg, 7 Volumes to date. (Carswell).

6. Bromley, Family Law, 3rd edition, 1966 (Butterworth).

7. e.g. Foote, Levy, Sander, Cases and Materials on Family Law 1966, (Little Brown & Co.); Goldstein and Katz, The Family and the Law, 1965 (Collier - MacMillan Canada Ltd.).

8. e.g. The fourth edition of Bromley (1971), deals with new English legislation which has no counterpart as yet in Canada.

Matrimonial Homes Act 1967,

Family Law Reform Act 1969.

Divorce Reform Act 1969,

Matrimonial Proceedings and Property Act 1970.

12. The Family and Welfare Assistance
Legislation in Canada S. Fodden
13. Husband and Wife in the Law of Quebec:
A 1970 Conspectus J. E. C. Brierley
14. Tort Liability of Children and
Their Parents E. R. Alexander
15. Reciprocal Enforcement of Maintenance
Orders in Canada J. Swan
16. Divorce and the Conflict of Laws D. Mendes da Costa

"Family law" is a label capable of covering a multitude of topics. Obviously this work can be criticized for omissions.⁹ But no text on such an undefined area could ever be complete. Moreover, the inclusions here cover areas untouched in previous Canadian and English texts.¹⁰ The structure of the book conservatively reflects the recent trend of family law writers to break away from the traditional (and allegedly artificial) categories into which family law courses are divided.¹¹ The older law school graduate might be startled, or pleasantly surprised, to now find casebooks with chapter headings such as "The Family or the State: The Obligation to Support"; "For Whom, to What Extent and Why, is Providing or Obtaining Procreative Gratification Relevant"; and "When, Why and How should the State Intervene? — Four Studies in Child Custody" instead of the more traditional Judicial Separation, Divorce, Custody, Condonation, Connivance, Collusion, etc. This change in emphasis undoubtedly results from such factors as the welfare state, the growing involvement of the social sciences in dealing with family breakdown, the movement towards divorce by consent and a frustration with simplistic traditional legal categories as a means of looking at a complex real life situation.

All of the writers here have attempted to set out the current legal position in each of their respective areas. Most have included two other discussions. Firstly, criticism of the present legal position. Secondly, analysis of trends and underlying philosophies. The obsolescence of this text is thereby forestalled as we catch a helpful glimpse of where the law came from and where it may be going. At least two predictions have seen fulfillment since the publication of this work. In Professor MacDougall's chapter on Maintenance, he criticizes the restrictive definition previously given by the courts the meaning of "children of the marriage" in s.2 of

9. For example such areas as abortion, commitment under Mental Health Acts and juvenile delinquency have sometimes been included under the heading of "Family Law".

10. e.g. Chapter 2 — Family Organization and the Illegitimate Child.
Chapter 11 — Res Judicata in Matrimonial Causes.
Chapter 12 — The Family and Welfare Assistance Legislation in Canada.

11. See for example, Goldstein & Katz *supra* footnote 7, and Cases and Materials on Family Law, 1972 Edition, Osgoode Hall Law School by Barber, Fodden and Grant.

the Divorce Act.¹² He argues that a child of the marriage should include a person over the age of sixteen who is still a charge of the parent for reasons other than "illness". On 18th October 1972, the Supreme Court of Canada in the case of *Jackson v. Jackson* decided that "children of the marriage" can include a person over the age of sixteen who is still a charge of a parent for certain educational reasons.¹³ Likewise in Professor Cullity's chapter on Matrimonial Property, he notes that few westernised legal systems have been able to wholeheartedly embrace either community of property ideas or, at the other extreme, strict separation of property within a marriage.¹⁴ He suggests various compromises; and we have recently seen Lord Denning in the English Court of Appeal trying to nurture one of those compromises.¹⁵ Lord Denning suggested that judicial discretion under the English Matrimonial Proceedings and Property Act should begin with a presumption that a wife is entitled to one-third of both the spouses' joint income and capital assets. Fault should only be relevant where it is "both obvious and gross".

However, no textbook can be perfect prophecy — especially in an area such as family law which is so dependent upon fickle social mores, *Volksgeist*, or the will of the people.¹⁶ Accordingly, my criticism is that these two volumes, a massive investment, have no publicised system for updating, such as a pocket supplement. A yearly disposable pocket publication with brief notes or references to recent outstanding cases would in my opinion be an admirable addition.

Most of the chapters refer expressly or by footnote to relevant provincial legislation thereby giving the book a multiprovincial perspective. It contains both a table of cases and a subject index.

Apart from its sale price, this book is indeed a welcome addition to Canadian legal literature on family law.

JOHN WADE*

STUDIES IN CANADIAN CRIMINAL EVIDENCE

Edited by Roger E. Salhany and Robert J. Carter (Butterworths: Toronto), 1972; 393 pp.

Traditionally, there has been something of a dearth of Canadian legal writing in the area of the law of Evidence. Hence, this "oasis" in a virtual

12. See MacDougall's discussion pp. 347 to 352.

13. [1973] 29 D.L.R. (3d) 641.

14. pp. 271 to 281.

15. The Times Law Report 8th February 1973, *Wachtel v. Wachtel* on appeal from the order of Mr. Justice Ormrod [1973] 2 W.L.R. 84.

16. And complex constitutional issues. The difficult question of whether a court, acting under the Divorce Act, can make a maintenance order at a time other than "upon granting a decree nisi of divorce" is presently before the Supreme Court of Canada. *Zacks v. Zacks* on appeal from British Columbia Court of Appeal [1972] 6 R.F.L. 364 (B.C.C.A.). This case will substantially effect the discussion on pp. 354-356.

* Assistant Professor, University of Manitoba.