REVIEW OF THE LAW REFORM RECONNAISSANCE PROGRAMME, PART II, PUBLISHED BY THE LEGAL RESEARCH INSTITUTE OF THE UNIVERSITY OF MANITOBA, APRIL, 1974

The recent publication of Part II of the Law Reform Reconnaissance Programme undertaken by the Legal Research Institute of the University of Manitoba will be of interest and assistance not only to professional law reformers, to whom it is primarily addressed, but also to the far wider audience of practitioners, professors and students.

As in the case of Part I of the Programme—which was published in February, 1973—Part II represents the result of a summer's research by five senior law students[1] of the University of Manitoba. The ten published articles extend over the law of contracts, torts, business, insurance and equity, with one excursion into criminal law[2] from the private law forum.

The thrust of the proposed reforms reflects the general movement this century away from the individualist " 'mind your own business' philosophy"[3] of the last century towards greater social protection. Thus, one finds Mr. Hill in two well researched articles[4] arguing for the amelioration of the present vulnerable position of insured persons, in particular ordinary laymen, in respect of misstatements (either by the insurance agents incorporated into the application form) of by the insured themselves. Whatever defeats may exist in certain provisions of Canadian provincial statues — and Mr. Hill concedes, in relation to the former problem, that "in all fairness . . . from this writer's experience, (it) is not one of the most pressing questions facing the insurance industry today,"[5] Canadian insurance legislation is light years ahead of England, where insured persons are virtually unprotected by statute in regard to these matters and must depend on the sentiment that "no reputable English insurer would normally (*sic*) rely on a purely technical defence to meet an honest claim".[6]

Obviously, a review of this size must be selective and will concentrate on only a few of the articles. However, the general comment may be made that the quality of research throughout the articles is high and the presentation mature[7],although there is strong evidence that a considerable time lag occurred between the submission of the articles and their actual appearance in print in April, 1974. One finds, for example, a very detailed investigation by Mr. Kirk[8] into the capacity of minors to consent to medical treatment failing to cite a recent English article[9] very much in point. An equally penetrating study, also by Mr. Kirk,[10] of the problem of whether non-user of safety belts constitutes contributory negligence did not consider a New Brunswick decision of last year.[11]

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1. D. Hill, L. McInnes, D. Melnyk, D. Primeau and T. Kirk.
2. D. Primeau, **Narcotics Drugs: How Many Elements to the Offence of Possession?**
3. **Per** Laskin, J. (as he then was), in **Horsley v. McLaren** [1972] S.C.R. 441, at 459.
4. **Omissions and misrepresentations caused by Insurance Agents** and **The Doctrine of 'Uberrima Fides' and its Application to Insurance Law in Canada.**
5. **Omissions and Misrepresentations caused by Insurance Agents**, at 2.
6. S. Preston and R. Colvinaux, **The Law of Insurance**, at 106 (2nd edition, by R. Colvinaux, 1961).
7. The language of youth does, on occasion, intrude. Mr. Hill, having demonstrated a capacity to write in accordance with the most conventional norms (e.g. "It is the respectful submission of this writer . . .", **op. cit.**, fn. 5, **supra**, at 13) refers (at 27) to a "hangup" of the English and Canadian courts (specifically, in time context of illiteracy!)
8. T. Kirk, **The Capacity of Minors to Consent to Medical Treatment.**
9. Skegg, **Consent to Medical Procedures on Minors**, 36 **Modern L. Rev.** 370 (1973).
10. T. Kirk, **The Seat-Belt Defence.**
11. **Heppell v. Irving Oil Co. Ltd.** 40 D.L.R. (3rd) 476 (N.B. Sup. Ct., App. Div., 1973). A recent article which refers to most of the Canadian authorities in the area is Hicks, **Seat Belts and Crash Helmets**, 37 **Modern L. Rev.** 308 (1974).

Mr. Kirk's recommendations in respect of the future of "the seat-belt defence" are substantially similar to those of Professor Linden.[12] One might be misled by the reference to "the retreat of (the) defence (of *volenti non fit injuria*)."[13] Whilst the defence has been abolished in the context of automobile accidents by a recent English statute,[14] in Canada the defence continues to thrive.[15] One must, however, agree with Mr. Kirk[16] that in relation to seat-belts the defence would be very difficult to sustain.

Mr. McInnes presents a logical analysis of the problem of unilateral contracts.[17] He surveys Canadian, American and English proposals for solving some of the inequities which the present law may occasion and elects to support the inverted *quantum meruit* solution suggested by Mr. Trietel of Oxford.[18] Perhaps Mr. McInnes goes too far in categorising as "folly"[19] Wormser's defence of the standard rule as being "logical in theory, simple in application and just in result".[20] The intrusion of equity into the sphere of contract, at all events as conceived and engineered by Lord Denning, M.R., has not been notably successful,[21] nor, for that matter, has it been conducive to more distributive justice than the rules forged in the stringently individualist days of the last century.[22] Perhaps that old remedy, the constructive trust, which English[23] and Canadian[24] courts have suddenly recognised as a malleable remedial device after a century of blandly ignoring American practice in this context, may provide a solution to the problems posed by unilateral contracts which will be sufficiently flexible to render justice to both parties to the abortive contract.[25]

Mr. Kirk's article on the capacity of minors to consent to medical treatment[26] is timely in regard to growth in the concept of children's liberation[27] in such fundamentally important areas which require the making of responsible individual decisions as birth control, abortion and medical operations in general. The range of legislative freforms adopted by so many

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12. **See Seat Belts and Contributory Negligence,** 49 **Can. B. Rev.** 479 (1971), **Canadian Negligence Law,** (1972).

13. **Op. cit.,** fn. 10, **supra,** at 7, fn. 21.

14. The Road Traffic Act, 1972, S. 148 (3); for a commentary thereon, **see** Raisbeck, **Injured Passengers — The Road to Compensation,** (1973) **J. Bus. L.** 322, at 326-7.

15. For citation of the dozen or so recent Canadian decisions in this area, **see** Binchy, **The Good Samaritan at the Crossroads: A Canadian Signpost,** 25 **N.Ir.L.Q.** 147, at 150 (1974).

16. **Op cit.,** fn. 10, **supra,** at 7.

17. L. McInnes, **Unilateral Contracts: The Questions and the Answers.**

18. **See The Law of Contract,** at 40 (3rd edition, 1970).

19. **Op. cit.,** fn. 17. **supra,** at 8.

20. Wormser, **The True Concept of Unilateral Contracts,** 26 **Yale C.J.** at (1916).

21. **See** the devastating criticism of the **High Trees** principle by Gordon in **Creditors' Promises to Forgo Rights,** (1963)-**Camb. L. J.** 222.

22. Coote, in a critical commentary on the "Denning approach" towards breach of contract, as evidenced by **Harbutt's Plasticine v. Wayne Tank Co.,** [1970] 1 All E.R. 225 (C.A., 1969), has observed that "one may be forgiven for suspecting that somehow, somewhere something has gone wrong": **The Effect of Discharge by Breach on Exception Clauses** (1970) **Cam. L.J.** 221, at 221. Professor Cuming has perceived "some striking similarities between legal and religious fundamentalism. With respect to both doctrines believers must reject evolution, and be satisfied with belief rather than reason. Further, the justification for the existence of both doctrines is the need to make men's hearts pure": **Contracts Survey,** 6 **Ottawa L. Rev.** 438, at 449, fn. 63 (1974).

23. **E.g. Cooke v. Head** [1972] 2 All E.R. 38 (C.A.), **Hussey** v. **Palmer** [1972] 3 All E.R. 744 (C.A.)

24. The lone dissent of Laskin J. (as he then was) in **Murdoch v. Murdoch,** 41 D.L.R. (3d) 367 (1973) may well not look so isolated as it does today within a very short time.

25. As a footnote, it may be mentioned that that Victorian extravaganza, **Carlill v. Carbolic Smoke Ball Co.** [1893] 1 Q.B. 256 (C.A.) may be challenged by an equally extravagant contemporary example of a legally binding unilateral contract. Mr. Christopher Mayhem, a former British Minister in the Labour Government, has received a writ for £5,000 damages for breach of contract from a Zionist law student who claims to have fulfilled the terms of an offer made publicly by Mr. Mayhem that he would pay that sum to any person who produced satisfactory evidence of any responsible Arab leader who had advocated genocide: see **The Sunday Times,** October 6, 1974 at p. 4 (London).

26. **Op. cit.,** fn. 9, **supra.**

27. For recent articles describing the decline of Parental authority, **see** Eekelaar, **What Are Parental Rights?** 89 **L.Q. Rev.** 210 (1973), Hall, **Waning of Parental Rights** (1972) **Camb. L. J.** 248.

of the states in America[28] indicates that this is indeed an area ripe for statutory reform in Canada.

Limitations of space prevent further individual consideration of the other articles in Part II of theprogramme. Let is suffice to record that they are all of high quality - in particular the analysis by Mr. McInnes of the legal problems presented by the increasing use of credit cards.[29] Dilatory law reformers will be heartened to learn that an increasingly sophisticated technology is likely to simplify many of the present legal difficulties which the indiscriminate transmission of credit cards presents.[30]

One major criticism of the publication relates not to the quality of the articles, but to its perverse pagination, each article beginning at page 1; the result is a frustrating delay in searching between competing pages to locate the article one requires. Apart from this blemish, however, the publication of Part II of the Law Reform Reconnaissance Programme is to be welcomed by all those concerned with the law in Canada and beyond.

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28 Set out in chart form by Mr Kirk, **op. cit.**, fn 9, **supra**, at 24-39a

29 L McInnes, **Credit Cards: A Canadian Overview**.

30. **Id.**, at 28