

Book Review: Special Lectures of the Law Society of Upper Canada, 1973: New Developments in the Law of Torts

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Book Reviews

Special Lectures of the Law Society of Upper Canada, 1973: New Developments in the Law of Torts (Richard DeBoo Limited, Toronto, with Index, 565 pages, 1973, \$25.00). Reviewed by William Binchy.

As practitioners and teachers in this country appreciate only too well, there has been until recently a dearth of Canadian textbooks dealing with the law of torts, a subject which must comprise part of the staple diet of the majority of the profession. The names of the late Dean Wright and of Professor Allen Linden dominate the authorship of what has been produced — Dean Wright in respect of his world-famous Casebook¹ and Professor Linden in respect of his recent text, "Canadian Negligence Law",² as well as a series of essays in honour of Dean Wright, published in 1968 and edited by Professor Linden.³

Now the Law Society of Upper Canada has greatly assisted the plight of practitioners, not only in Ontario but throughout Canada, with the recent publication of its Special Lectures treating as its theme "New Developments in the Law of Torts". The Lectures, which were delivered in March 1973, were published last October. In well over five hundred pages of clearly printed text, nineteen lectures and one panel decision are reproduced. The range of topics is immense and it would naturally be beyond the scope of a short review to consider more than a few critically. Suffice it to record that the judiciary, practitioners and academics are all represented among the lecturers, and that the themes of the lectures display a refreshing contemporaneity which lives up to the title of the Lecture Series.⁴

A notable absentee, however, is economic loss, which is considered in only a peripheral manner. One would have thought that the recent develop-

¹ *Cases on the Law of Torts*, now in its fifth edition, *sub nom.* A. Linden, ed., *The Law of Torts, Cases Notes and Materials* (Toronto: Butterworths, 1970).

² A. Linden, *Canadian Negligence Law* (Toronto: Butterworths, Canadian Legal Text Series, 1972).

³ A. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968).

⁴ *Viz.*, Dean McLaren's *The Law of Torts and Pollution*, p. 309; B.A. Percival's *Recent Trends in Occupiers' Liability*, p. 105; M. Rowan, Q.C.'s *Privacy and the Law*, p. 259; W. Maxwell's *Rescuer and Victim in Tort Law*, p. 89; and Prof. Fleming's *Damages for Non-Material Losses*, p. 1.

ments in English and Canadian jurisprudence in this area⁵ will have the greatest impact on the future function of tort law; yet, for some reason, one finds full lectures being devoted to the more esoteric torts of false arrest⁶ and civil conspiracy⁷, with economic loss relegated to a brief (albeit enlightened) treatment in the course of a lecture basically concerned with contractual aspects of products liability.⁸

Other developments, however, have been well treated. Mr. Percival's lecture on recent trends in occupiers' liability⁹ considers in some detail the scope of *British Railways Board v. Herrington*¹⁰, the House of Lords decision of 1972 which expanded the duty owed to trespassers by occupiers. The only pity is that the Canadian courts to date have adopted an ostrich-like approach to this decision, either ignoring it¹¹ or denying its relevance to the facts at issue.¹² Mr. Percival's prediction that the Ontario Government will enact legislation in the very near future similar to or identical with the liberal draft Act proposed by the Law Reform Commission has still to be borne out. It seems that Canadian legislators, save in Alberta where a liberal Occupiers' Liabilities Act has recently been passed, are as conservative in many areas of tort law as their judicial brethren.

The widespread belief current among academics that the "New Jerusalem" of strict liability in respect of deficient products is at hand is gently yet devastatingly mocked by Mr. Stradiotto in a scholarly lecture.¹³ His thesis is that "the tort of negligence affords adequate protection to the

⁵ See Harvey, *Economic Losses and Negligence: The Search for a Just Solution* (1972), 50 C.B.R. 580; Slutsky, *Case Comment* (1973), 36 Mod. L. R. 656 at 656-660; *supra*, note 2 at 322 *et seq.*. The recent decision of the Supreme Court of Canada in *Rivtow Marine Ltd. v. Washington Iron Works and Walkem Machinery & Equipment Ltd.*, [1973] 6 W.W.R. 642 would appear to constitute a most significant extension of the area of recovery in respect of economic loss.

⁶ W. Horkins, Q.C., *False Arrest Today*, p. 241.

⁷ J. Carthy, Q.C. and W. Millar, *Civil Conspiracy*, p. 495.

⁸ Prof. S. Waddams, *Implied Warranties and Products Liability*, p. 159, especially at 175-181.

⁹ B. A. Percival, *Recent Trends in Occupiers' Liability*, p. 105.

¹⁰ [1972] A.C. 877 (H.L.) (Eng.).

¹¹ In *Haynes v. C. P. R. and Boland*, [1972] 6 W.W.R. 296 the British Columbia Court of Appeal applied the "reckless" criterion of *Commissioner for Rlws. v. Quinlan*, [1964] A.C. 1054 (P.C.) (Aust.) with no reference to *Herrington*, either in the Court of Appeal (*sub nom. Herrington v. British Railways Board*, [1971] 2 Q.B. 107) or in the House of Lords.

¹² In *Veinot v. Kerr-Addison Mines Ltd.*, [1973] 1 O.R. 411, the Ontario Court of Appeal was far from enthusiastic to embrace the philosophy of *Herrington*. Holding that the plaintiff must lose his case, even applying the *Herrington* criterion, Arnup J.A., speaking for the Court, continued (at 417): "It is not easy to appreciate, this recently after the delivery of the five separate judgments of the House of Lords, what its precise effect will be (rather cautious commentaries have been made by Professor Goodhart in 88 L.Q.R. 305 (1972), and by C. J. Miller in 35 Mod. L.R. 409 (1972))." This decision has been appealed to the Supreme Court of Canada. A full Court reserved judgment on January 25, 1974.

¹³ R. Stradiotto, *Products Liability in Tort*, p. 189.

consumer. Its principles are flexible, capable of changing with the times, adapting to meet new conditions, and responding to the needs of our society."¹⁴ The recent Supreme Court decision of *Lambert v. Lastoplex Chemicals Co.*¹⁵ provides strong support for such a view, imposing liability on the defendant, but nevertheless showing no sympathy for the strict liability approach.

The respective duties to rescue and to rescuers have been analysed in a number of recent Canadian decisions¹⁶ with the result that the courts have humanised the "mind your own business" philosophy of the Nineteenth Century decisions. Regrettably, Mr. Maxwell's lecture¹⁷ on this area of the law is pedestrian; the best one can say of it is that it refers the reader to two articles which treat of the subject in satisfactory depth.¹⁸

Professor Linden's contribution on foreseeability¹⁹ is none the better for having been presented on a number of previous occasions in substantially similar form.²⁰ The more one rereads the professor's thesis that the foresight concept is "verbiage"²¹ and that it is less just than the discredited directness test, the more skeptical one becomes of the efficacy of the criterion with which he wishes to replace it. Surely, today's lawyers need hardly be astounded by the revelation that the foresight concept "can disguise value choices as much as causation did"²² or, more innocuous still, that "[f]oresight does not excuse courts from the onerous responsibility of making difficult decision."²³ The adoption of "policy" as a determinant of liability, which Professor Linden appears to suggest,²⁴ is surely no more certain and is

¹⁴ *Id.* at 194.

¹⁵ [1972] S.C.R. 569; 25 D.L.R. (3d) 121.

¹⁶ Principally *Horsley v. MacLaren*, [1972] S.C.R. 441; *Moddejonge v. Huron County Board of Education*, [1972] 2 O.R. 437 (H.C. Pennell, J.). See also *Schacht v. The Queen in Rt. of Ontario*, [1973] 1 O.R. 221 (C.A.) (at present on appeal to S.C.C., judgment reserved, February 7, 1974); *Jordan House Hotel Limited v. Menow and Honsberger* (1973), 38 D.L.R. (3d) 105, *aff'g sub nom. Menow v. Honsberger*, [1971] 1 O.R. 129, *aff'g*. [1970] 1 O.R. 54 (Haines, J.); *Corothers v. Slobodian* (1973), 36 D.L.R. (3d) 597 (C.A.) (Sask.).

¹⁷ W. Maxwell, *Rescuer and Victim in Tort Law*, p. 89.

¹⁸ Alexander, *One Rescuer's Obligation to Another: The 'Ogopogo' Lands in the Supreme Court of Canada* (1972), 22 U. of T. L.J. 98; Linden, *Rescuers and Good Samaritans* (1971), 34 Mod. L. R. 241; see also *supra*, note 2 at 216-252 and 287-297.

¹⁹ *Foreseeability in Negligence Law*, p. 55.

²⁰ See also, *Down With Foreseeability! Of Thin Skulls and Rescuers* (1969), 47 Can. B.R. 545; *supra*, note 2, ch. 7.

²¹ *Supra*, note 19 at 65.

²² *Id.* at 67.

²³ *Id.*

²⁴ *Id.* at 67-69. Lord Denning M.R.'s abandonment of the "pigeon-holes" of duty and remoteness in favour of naked policy considerations in *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] 1 Q.B. 27 has met with some criticism from academics: see Jolowicz, *Comment*, [1973] Camb. L.J. 19; Jacobs, *Comment* (1973), 36 Mod. L.R. 314.

potentially far more arbitrary a criterion than foresight, whatever its limitations may be in individual cases.

In all, however, these lectures represent an important contribution to contemporary Canadian scholarship in regard to tort law. The fact that they were presented to an audience of practitioners rather than professors ensures that what is lost in academic sophistication is more than compensated for by contemporaneity, practicality and relevance to the legal system in operation today.

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