THE LIABILITY OF STRIKERS IN THE LAW OF TORT: A COMPARATIVE STUDY OF THE LAW IN ENGLAND AND CANADA. By I. M. Christie. Industrial Relations Centre, Queen's University, Research Series Number Five. 1967. Pp. xxii and 198 $6.00 and $8.00 (hard cover).

In recent years public tolerance of strikes, particularly those in public or essential services, has been severely tested. The legislative task of designing a policy that will protect not only the interests of the public but the interests of those involved in a free collective bargaining procedure as well, has become increasingly difficult. In the light of these developments Professor Christie's examination and appraisal of the present legal liability of strikers and the role the Courts have played in the development of laws in relation to strikes is extremely timely and significant.

In a well-written and scholarly work Professor Christie, comparing the historical development of the law in Canada and England, has shown how the judiciary, manifesting a consistently anti-labor attitude, has developed new heads of tort liability and extended the legal liability of strikers. The main value of the comparative study for Canadians is, in the words of the author, that it "points up the unhappy state of the Canadian law of industrial disputes," brought about in large measure by the Canadian courts insistent attempts to impose outmoded English tort concepts upon a statutory framework of American origin. The result, declares the author, has been to create a basic disharmony between the statutory provisions and common law tort principles as applied to Canadian labour disputes.

In his book, Professor Christie strongly contends that Canadian courts have consciously adopted an unsympathetic attitude towards trade unions and their interests and have not accepted the premise that unions do have a legitimate role to play in our Canadian society, a role that has not only been recognized but encouraged by Canadian legislatures in labour relations statutes. He suggests that a satisfactory body of tort law to regulate labour disputes will only be developed if the judiciary recognizes and accepts the role of trade unions as a necessary and useful one in modern society.

Professor Christie also argues that in addition to the basically unsympathetic attitude of the courts, trade unions have suffered from the Canadian courts' determination to apply and develop the traditional court concepts of conspiracy, inducing breach of contract, and interference with the right to trade, as tools with which to restrict the legitimate aims of trade unions. Professor Christie contends that these two factors have greatly affected the present liability of strikers in the law of tort in Canada.

These general observations and conclusions are arrived at by the author only after a most exhaustive analysis of English and Canadian cases and statutes, in which Professor Christie traces the judicial development of tort law in relation to labour disputes. The introductory chapter describes in general terms similarities and differences in judicial attitudes and statutory provisions in England and Canada, and serves as a prelude to a more detailed examination of the specific heads of tort liability and their development to which the following chapters of the

book are devoted. The introductory material provides the reader with general background information and explains that although the statutory framework in the two countries differs considerably, with Canada adopting a system of statutory regulation administered by administrative tribunals and England adopting a *laissez faire* attitude, the judicial attitudes have been quite similar and consistently adverse to union interests. Professor Christie suggests that the judicial attitude of the 19th and 20th century in both England and Canada is the result of a natural and perhaps unconscious desire to protect the interests of the social class from which the judges came. Whether or not this can still be accepted as the explanation for current judicial attitudes is another question.

Chapter Two deals with the law relating to picketing, and in this chapter the author explains how the courts have extended the doctrine of nuisance to protect the right to carry on business, but without according at the same time equal recognition to the equally legitimate claims of workmen to the right to peacefully persuade others. The author concludes that with the exception of the decision of the Supreme Court of Canada in *Williams* v. *Aristocratic Restaurant Ltd.*,[1] in which "the law of nuisance was considered in terms of the social efficacy of picketing and the attitude of the modern law to the place of the working men in society," the law of picketing is still very much subject to the attitude of the individual judge. This has been possible because the flexible law of nuisance is the key to liability and in spite of the *Aristocratic* decision of the Supreme Court of Canada, which in the author's view reflects an enlightened approach, the Courts have continued to rely on nuisance as the basis for issuing injunctions to restrain picketing.

Chapter Three is devoted to an examination of the historical development of the complex law of civil conspiracy and the manner in which Canadian courts have, by treating breach of a statute as giving a cause of action, created a new type of actionable conspiracy with which to control union activities. Professor Christie describes this new type of actionable conspiracy as involving acts not actionable in themselves but being in some sense lawful.

An examination of how Canadian courts have extended the legal liability of trade unions by a liberal interpretation of what constitutes inducing breach of contract is covered in Chapter Four of the book. Professor Christie endeavours to show how Canadian courts have extended the legal liability of trade unions for inducing breach of contract by finding a breach in situations where there have not been actual breaches of contract proved. He also explains that the extension of liability has not been offset by an equally liberal extension of the doctrine of justification as would be the case under English Law, with the result that he can only conclude that liability has been imposed for interference with advantageous trade relations rather than for inducing breach of contract. The author also points out that the doctrine of inducing breach of contract has also been extended by the Courts knowingly or unknowingly failing to recognize the distinction between a direct and indirect inducement.

1 [1951] S.C.R. 762.

The last area in which the courts, by the exercise of judicial creativity, have extended legal liability of trade unions is examined in Chapter Five of the book and involves interference with trade rights. In this chapter, Professor Christie points to the Court decisions which declare that activities contravening labour relations legislation constitute actionable intereference with rights to economic advantage and secondary picketing to be unlawful as further illustrations of unwarranted extensions of union liability.

The final chapter of the book is devoted to conclusions, observations and suggestions, some of which might be noted here. Professor Christie concludes generally that when Courts are faced with the task of balancing interests they have been more concerned with the interests of the employer than those of the union and that union interests have been largely ignored. He observes that England seems at the point of deciding whether or not the abstensionist stance of the law will be abandoned in favour of a more positive regulatory role. Professor Christie cautions against giving the courts any role at all in labour disputes and observes that Canadian experience shows that even given a regulatory system in which they will have no role the Courts will attempt to attach common law heads of liability to the statutory system, but in a way that will not satisfactorily balance the rights of the union against those of the entrepreneur. He suggests that the Canadian tort law of strikes and picketing should be developed along the lines of the British Columbia 1959 Trade Union Act and that the legality of the methods used to exert pressure be tied to the legality of the strike, subject to certain limitations. He also strongly suggests that any legislative solution should be drafted so as to exclude common law heads of tort liability.

The reader will find that Chapters Two, Three, Four and Five involve considerable case analysis which will require the utmost concentration if the author's thesis is to be appreciated. For this reason, the reader will find the conclusions at the end of each chapter most helpful.

In the course of illustrating the judicial development of tort law in relation to labour disputes, Professor Christie raises several interesting problems of tort law and his entire book is an excellent example of the interaction and relationship of the legislature and the judiciary in the legal process. For this reason, persons other than those primarily interested in labour law as such will find the book of considerable interest and value. For example, in the chapter dealing with restrictions on picketing Professor Christie clearly shows how the lack of a clear theoretical concept of nuisance has enabled the attitude of the individual judge to control the decisions and, apart from the *Aristocratic* case, how this has never worked in favour of trade unions. Another general tort problem, that of whether a breach of a statutory provision confers a civil cause of action also arises in labour law cases and is cited by Professor Christie in his discussion of conspiracy as the means by which a new kind of actionable conspiracy has been developed by Canadian courts. The question normally arises in negligence actions with the plaintiff, in an attempt to add another string to his bow, claiming a cause of action based on a violation of a statute. Canadian courts have

intoned the usual formula about seeking the intention of the legislature for the answer to this question. In most cases the decision has been against an action based on the statute but the courts have considered evidence of the breach in an alternative claim based on common law negligence. The effect of a statutory breach has been referred to a variety of ways by the courts. Some courts consider it to constitute negligence *per se,* others as *prima facie* evidence of negligence, and others as just some evidence of negligence. In many cases the statute violated has been one establishing safety standards and the courts have apparently endeavoured to encourage public compliance with the statutory provisions by finding a civil cause of action implied in the statute. The latest decision of the Supreme Court of Canada on this point is found in the case of *Sterling Trusts Corporation* v. *Postma and Little,* [1965] S.C.R. 324; 48 D.L.R. (2d) 425 (S.C.C.). Although the Supreme Court avoided the theoretical question of whether a statutory cause of action arises or whether it is an action in negligence, they decided that breach of the statute amounts to *prima facie* evidence of negligence.

Professor Christie has argued that by making breach of labour relations legislation the basis for an action in damages for conspiracy to commit a wrongful act the courts have defeated legislative policy by giving a private right of action when none was intended. Professor Christie finds the intention not to confer a private right of action clearly evidenced in provincial labour relations acts which require permission of the labour relations board before a prosecution can be commenced. The problem of discovering legislative intention is a problem that itself has been the subject of learned articles. But, assuming that this obstacle is overcome and the intention is as clear as he suggests, a court could still declare that, although no civil cause of action could be based on a violation of the statute, the violation could be used to found an action based on conspiracy in the same way that it can and is used in a negligence action where breach of a safety statute is involved. Perhaps the courts are in labour cases, by finding in the violation of the statute the unlawful element needed to support a conspiracy action, going further than the courts in negligence cases where they merely treat a breach of a safety statute as some evidence of negligence rather than negligence *per se,* but the general approach seems to be the same. Professor Christie would, no doubt, argue that whereas the primary purpose of the safety statute provisions is to protect citizens from careless acts on the part of others, whether they be drivers of automobiles or owners of factories, the labour statutes are not passed primarily to protect innocent individuals from the activities of unions although incidentally, they will include regulatory provisions designed to control the means by which the strike is carried out. Professor Christie contends, however, that to use a breach of a minor technical provision as the basis for a civil action is unwarranted and can only be explained as the result of a hostile judicial attitude towards unions, an attitude which is not consistent with the legislatively recognized and encouraged freedom to bargain collectively. His main objection seems to be not so much the fact that breach of the labour statute is used to found a civil action but that the discretion to confer it or not is left in the hands of a court rather than some other body.

In the process of comparing the development of statutory judicial

rules to govern labour strikes, Professor Christie has presented a fascinating, if somewhat disheartening, study of the legal process at work in one area of society. His examination of the way courts handle labour disputes and their development of the torts of nuisance, conspiracy, inducing breach of contract and interference with rights to trade and livelihood, has led him to the conclusion that Canadian courts have not proven themselves able to assess and balance with objectivity the conflicting interests in the trade dispute and have in fact seemed only concerned with the interest of the employer. He also suggests that not only should the courts be removed as much as possible from the task of balancing the conflicting interests involved in a trade dispute but that legislation should be enacted which would (1) outline the law applicable to strikes, (2) exclude the traditional common law heads of liability, (3) define the acceptable limits of picketing, (4) free the law from the common law complexities of inducing breach of contract, and (5) define what constitutes a secondary relationship and declare whether or not secondary picketing is to be permitted or prohibited.

Professor Christie admits that these suggestions are only directed to problems concerning the civil liability of strikers and will not solve all the problems inherent in industrial conflicts, such as the law relating to the labour injunction or the special problem of strikes in public utilities. His book clearly indicates the need for reform in the area of strikes and picketing and, although the reader may not agree with Professor Christie as to the degree of judicial indifference to labour interests, he has certainly provided a provoking citique of the situation. The recommendations he makes, which would tie the methods used in the strike to the legality of the strike itself, but subject to the limitations of the general criminal law to prevent violence and damage to persons and property, and the civil law of trespass to persons and land, seem reasonable. It is doubtful, however, whether even these suggestions can completely eliminate the courts from some participation in the settlement of labour disputes. It would still be the courts who have to interpret the Criminal Code and possibly the statutes relating to secondary picketing and boycotting though the latter statutory provisions Professor Christie would probably want to see administered or dealt with by an administrative board. Given this problem, the suggestions that he makes are certainly worth serious consideration, as is his whole book.

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STUDIES IN CANADIAN COMPANY LAW—ETUDES SUR LE DROIT CANADIEN DES COMPANIES. Edited by Jacob S. Ziegel. Toronto: Butterworths, 1967. Pp. xlii and 760. $22.50.

Those teaching company law in Canadian law schools have always been hampered to a certain extent by the lack of an adequate Canadian textbook which could be used to supplement cases and other materials used in the course. Professor Gower's *Modern Company Law,* although a scholarly work on English company law, contains noteable deficiencies especially in dealing with Canadian constitutional problems and with