STUDIES IN CANADIAN TORT LAW, edited by Lewis Klar. Butterworths, Toronto, Canada, 1977, pp. xxiii and 461, $50.00

The publication of a second *Studies in Canadian Tort Law* approximately ten years after its predecessor is welcome. The intervening years have been marked by significant developments in both the Law of Torts and in the more general area of Compensation Law. This momentum is a reflection of increasing demands upon both Courts and legislatures to refashion the law to accommodate the adverse consequences of new forms of social friction, and to deal more effectively with those types of injuries which seem endemic in a complex industrial society.

The years between 1968 and 1977 saw the expansion of negligence liability to embrace the defective construction of real property, the careless oversight of public authorities, and to some degree, fault in failing to protect others from their own negligence or that of third parties. The principles set down in the case of *Hedley Byrne* v. *Heller*[1] relating to negligent misstatement were clarified and honed. The Law of Damages as it applies to personal injury underwent increasing analysis and rationalization by the Courts. Tort actions, some of great antiquity, were used to vindicate newer social interests such as privacy. One Commonwealth jurisdiction, New Zealand, introduced a comprehensive scheme of social insurance benefits for personal injury which totally replaced the preexisting tort system. All Canadian jurisdictions introduced some degree of no-fault recovery in the context of automobile accidents, and Quebec moved towards a comprehensive no-fault system for highway accidents. Collectively these developments more than justify the publication of a new set of essays.

To a significant extent the content of the new *Studies* reflects the movement and turmoil of the past ten or twelve years. Like its predecessor it does not purport to follow a common theme. Professor Klar has chosen to let the various contributors select their own topics and the objectives which they have in exploring them. Clearly some attention was paid to opening up and examining areas of concern which were not covered in the first *Studies*. Beyond that, however, there is little hint of overall planning. This means that the book has a smorgasbord quality to it, with pieces varying significantly in purpose and somewhat in quality.

One hopes that in a collection of this sort the pieces will be profound, if not seminal. In particular, it should provide an opportunity for scholars to examine the social, economic and philosophical underpinnings of the law, to stress the creative potential in both judge-made law and statute, and to provide a more rational and sensible conceptual shape to the law. These objectives are only partially realized in the new work. The pieces range from the reflective and profound on the one hand, to the analytical and largely descriptive on the other.

Professor Joe Smith has demonstrated in his writing elsewhere that he has a very clear perception of what Courts actually do in deciding negligence cases, notwithstanding the conceptual facade which they have erected. His chapter on "The Mystery of Duty" continues in this vein and

1. [1964] A.C. 465; [1963] 2 All E.R. 575.

provides an excellent functional analysis of the contemporary law of negligence and its faltering attempts to accommodate unforeseeable categories of plaintiffs and suspect forms of damage, such as nervous shock and economic loss. No one reading Professor Smith's piece, be he judge, lawyer, teacher, or student should be in any doubt as to the confusion which has been worked in the law by the indiscriminate use of the duty concept to resolve totally different functional issues in negligence and of the need for Courts to identify clearly what they are doing in both a functional and policy sense. Of particular value is the clear distinction which he draws between risk and remoteness, a dichotomy which has for too long been submerged by the overworking of the duty concept and the erection of "reasonable foreseeability" as the universal solvent of most of the issues in a negligence case. If, as he suggests, Courts began to recognize this distinction and the value of dealing with specific questions of the scope of liability in the context of remoteness, much confusion would be avoided and the important policy factors addressed.

A number of other pieces address broader philosophical problems, in particular those presented by compensating personal injury. In a pungent and stimulating chapter on "Fault—The Great Hoax" two unabashed foes of the fault system and its application to personal injury, Professors Glasbeek and Hasson, endeavour to demonstrate the social and moral bankruptcy of the fault doctrine. This they do by analyzing a series of well-known negligence decisions in the light of Glanville Williams' classic categorization of the functions of tort law.[2] Their finding is that these objectives are not applied by the Courts in any rational or systematic way, and that different objectives may be stressed in very similar cases, with the most capricious results. They conclude that, notwithstanding their good intentions, the Courts are not well equipped either conceptually or evidentially to balance these objectives. As a result we are left with a system of indefensible contradictions. It must be said that this approach to the analysis of negligence cases is extremely refreshing and one which warrants serious attention by torts teachers. Nevertheless it does betray weaknesses. In the first place one has some doubts as to whether most Courts would recognize that they are working within the objectives erected by Glanville Williams. The perceptions of the academic and judge may diverge significantly. Second, the form of analysis adopted seems to the reviewer to ignore other reasons which induce Courts to come to particular decisions in individual cases. There is, for example, a very heavy element of homespun pragmatism in the cautious way in which the Courts have dealt with nervous shock cases, which reflects reservations about extending liability to an indeterminate group of people and situations. This often blots out any serious consideration of the desirable objectives to be achieved by imposing liability. This criticism is not to deny the validity of the criticisms made by Glasbeek and Hasson. It is merely to point out that by adopting the Williams model they may have oversimplified the problems inherent in the administration of the fault system.

The latter chapter does not attempt to suggest a substitute for the fault system and its application to personal injury. This challenge is taken up in the chapter on "Human Disability and Personal Income" penned by

2. G. Williams, "The Aims of Tort Law", (1951), 4 *Curr. Leg. Probs.* 137.

Professor Ison. For many years now Professor Ison has played a seminal role in directing attention to fundamental weaknesses in the tort system as a means of compensating for personal injury and to the need to develop a comprehensive, income-related social insurance scheme which would be activated without the impediments of a fault-based litigation system. Drawing on his recent experience as Chairman of the Workers' Compensation Board of British Columbia, Professor Ison sets out the general features of his model plan and the benefits which are likely to flow from it. The scheme is more far reaching than that in New Zealend in the sense that it is designed to respond to disability, however caused. This reflects Professor Ison's belief that as long as disability caused by trauma and by disease is differentiated, some of the problems of categorization which plague the torts system will be imported into the substitute system. The unfortunate results of differentiation are also evident in the administration of workers' compensation schemes. Having described the general features of the scheme, Professor Ison then goes on to relate it to a number of desirable social goals which he feels have been traditionally ignored in our structures for granting compensation. In particular, he adroitly relates compensation to the need for realistic and sensitive attempts at rehabilitation of the injured person. "Rehabilitation" is a term which until recently has been almost totally absent from the lawyers' glossary and it is to Professor Ison's credit that he has embarked on the arduous task of demonstrating to lawyers the vital place of the rehabilitation concept in the system of reparation which places a significant emphasis on attempting to restore the individual who is injured or falls sick to a productive role in society. Professor Ison is to be applauded for his continuing and convincing advocacy of a more rational and socially responsive approach to compensation.

Also compelling from a policy standpoint is Professor Pritchard's study of "Professional Civil Liability and Continuing Competence". The application of economic analysis to tort law is in its infancy in Canada. In a short and comprehensible piece Professor Pritchard uses this form of analysis to test the relative viability of civil liability as a vehicle for encouraging competence in the professions, as compared with the alternatives of disciplinary proceedings and continuing education programs. Happily he avoids the temptation of considering the issue solely in the context of an ideal economic model. Rather, he tries to balance certain pragmatic realities which work against or in favour of the application of civil liability in professional negligence cases and the operation of economic influences, particularly market forces, which may or may not strengthen the role of civil liability in underlining competency and which should be considered when choices are made between regulatory mechanisms. In this context he is particularly concerned to demonstrate how freer competition for services accentuates the role of civil liability in encouraging acceptable standards of competency. He concludes that the efficacy of civil liability as a regulator of competency is more significant in professions such as engineering and architecture in which there is widespread competition for services, and less in a profession such as medicine in which the financial underpinnings of the service are provided by the state. While the reviewer confesses to some skepticism about the results achieved by narrowly applying economic analysis to a form of social ordering which is clearly subject to other important social influences, it is clear that economic analysis has a role to

play in clarifying both what the Courts do in deciding tort cases and in suggesting policy considerations which they might consider in reaching conclusions. Professor Pritchard has ably demonstrated its value in this piece.

Several chapters in the *Studies* are valuable in showing the creative potential in the existing law of torts. Professor Gibson's piece on the "Common Law and Privacy" is a classic example of the advantages of reminding ourselves regularly of the potential for growth which exists in the common law, notwithstanding its unevenness and inadequacies. Professor Gibson, having identified clearly the major forms of privacy invasion in our society, tests the ability of the common law to cope. Of particular interest are his comments on the recent decision of the Appellate Division in Alberta, *Motherwell* v. *Motherwell*[3] in which nuisance theory was used creatively by the Court to enjoin harassing telephone calls, and the rather expansive developments, especially in England, in the area of protecting confidential information. While Professor Gibson is quite convinced that legislative intervention is necessary in this field to provide more ample protection for privacy, he demonstrates that there is a *corpus* of common law authority which can be used in a wide range of situations to achieve a significant measure of protection. This chapter, which is both well conceived and written, should prove a useful source of ideas and information for both practitioners and academics interested in the interaction between tort law and privacy.

Of similar quality is the chapter on actions by corporations for the tortious disablement of shareholder/employees. The authors, Professors Hanson and Mullan, expose very ably the strands of authority in the law which might be utilized to assist the small corporation where the major shareholder is also the most valued and vital employee, in recovering for the loss caused by injury to the latter. The authors argue plausibly that a number of theories can be advanced to assist the corporation in this type of case. They are extremely adept at analyzing and criticizing the viability of each, and weaving into their analysis consideration of policy factors which in their minds militate in favour of preservation of these actions to protect this type of interest. Parts of their analysis, too, have more general value in an understanding of tort law. This is particularly true of the discussion of the impact of taxation of damage awards.

The remaining chapters are more analytical in content. A number of them are helpful in the sense that they expose areas of the law of torts which have previously received scant attention by Canadian legal scolars and because they provide some useful suggestions as to ways in which the law may develop in the future. One area of the law relating to torts which has been traditionally ignored by scholars has been the law of damages, particularly as it relates to personal injury. Professor Charles' article on this topic is a useful contribution in filling that gap. He analyzes for us the various heads of damage in personal injury cases, the factors which Courts take into account in assessing damage under those heads, and how the factors are balanced. He spends time investigating the role of actuarial and other expert evidence which has become such a feature of personal litigation in the past few years. Unfortunately, the *Studies* were published prior to the rendering by the Supreme Court of Canada of its judgements in the trio of cases involving accidents causing total

3. (1976), 6 W.W.R. 550 (Alta.).

disability.[4] Thus Professor Charles was not able to comment on the ultimate legal wisdom in this area; however, that does not detract from the analytical framework which Professor Charles has developed, which accords with that utilized by the Supreme Court, nor to any great extent from the discussion of issues because those had been identified clearly by the lower Courts. The one problem in the reviewer's mind is that in an essay of this length it is very difficult to do justice to all of the issues, some of which are very complex. The piece has a general survey quality about it. It is hoped that Professor Charles and others will use this general survey as a take-off point for a more extensive examination of law and policy relating to the sub-issues.

Professors Solomon and Feldthusen have capably analyzed the halting attempts of the Courts in dealing with the problem of whether pure economic loss should be within the ambit of negligence law. Somewhat more doubtful is their attempt to develop a test which can be used to determine whether pure economic loss is recoverable in the individual case. Having correctly suggested that there are groups of situations in which the Courts have accepted as a matter of principle that recovery should be granted, they attempt to construct a test for the residual cases, especially those involving the interruption of utilities. Their position is that the test which should be applied is a combination of the reasonable foreseeability and direct consequence tests. Moreover, it is suggested that the definition of Mr. Justice Lawton in *British Celanese Ltd.* v. *A. H. Hunt Capacitators Ltd.*[5], that a direct injury is one which occurs by the operation of the law of nature without any further human intervention, should be adopted. In the absence of any clear pointers as to how this hybrid test would apply in practice one wonders whether the authors have not merely redefined the problem. While the reviewer agrees with the contention that the application of this test using Mr. Justice Lawton's definition would produce the same result in a case like *Weller and Company* v. *Foot and Mouth Disease Research Institute*[6] as that reached by Mr. Justice Widgery, it is not so clear that the test is helpful in the cases in which an interruption of utility service affects production in a plant. If electricity is cut off to a factory preventing the operation of the machines, do the consequences flow from the operation of the law of nature, or from the intervention of human judgment in the sense that somebody will have to make the decision that the plant is to close down and production cease? The authors give no guidance on this. It is also disappointing that the authors have not addressed the important question of risk allocation in these types of cases. Surely, factors such as the ready availability of insurance for business interruption are relevant to the issue of how far we should go in embracing consequential economic loss within the ambit of negligence law.

Contributory Negligence and Contribution are two topics which legal scholars in Canada have avoided in the past. Professor Klar's chapter which deals with these two topics is a helpful contribution in the sense that it analyzes the application of existing legislation and the problems which it has generated. Given the reviewer's biases in terms of the

4. *Andrews* v. *Grand & Toy (Alberta) Ltd.* (1978), 19 N.R. 50 (S.C.C.); *Thornton* v. *Board of School Trustees of School District No. 57* (1978), 19 N.R. 552 (S.C.C.); *Teno* v. *Arnold* (1978), 19 N.R. 1 (S.C.C.).

5. [1969] 2 All E.R. 1252; [1969] 1 W.L.R. 959 (Q.B.).

6. [1966] 1 Q.B. 569; [1965] 3 All E.R. 560.

objectives of such a collection of *Studies* it is a little disappointing that Professor Klar did not go the further step of including some of the excellent work which he and others have done in making proposals for reform in legislation relating to these two areas of tort law, particularly in relation to the appropriate scope of the two notions. For instance some comments would have been valuable on whether contract as well as tort actions should be embraced and why.

As with contributory negligence, the general notion of consent as a defence to tort actions has excited little comment among Canadian legal scholars. Professor Hertz remedies this deficiency in an able, if somewhat elliptical, analysis of the various manifestations of consent in the law of torts. His essay demonstrates clearly the need to relate the operation of the defence of consent closely to the type of activity and contact involved, as well as to the conflicting interests of the parties. He puts forward some useful ideas on how to resolve some of the thorny problems of the application of consent to the intentional torts; in particular, in the context of the dichotomy between a mistake as to the nature of the act and a mistake as to collateral matters. Furthermore, he supplies a useful framework for analysis of the *Volenti* defence in negligence actions by distinguishing between bilateral and unilateral agreement situations. Professor Hertz spends some time rationalizing the application of consent in medical malpractice cases. He concludes that recent decisions which have attempted to lay a clearer basis for distinguishing between the applicability of battery and negligence constitute a step in the right direction in that they lay a greater emphasis on the standard of the reasonable practitioner. To Professor Hertz's way of thinking, battery is only appropriate where the physician has been particularly blatant in not imparting necessary information to the patient. Recent developments in Canadian case law with regard to medical consent form the focus of Professor Picard's chapter entitled "The Tempest of Informed Consent". This piece is a useful complement to Professor Hertz's chapter in the sense that Professor Picard endeavours to expose more fully the two important interests which are at stake in medical consent cases. She feels very strongly that Canadian courts should eschew the rather confused thinking on the matter which has emanated from U.S. courts. She suggests that this may be achieved by establishing a fair balance between the objective test of what the reasonable practitioner would consider appropriate in the circumstances and the subjective condition of the patient. She adds that the importance of the two elements is accepted in Canadian jurisprudence and forms the basis of the recent decision of Mr. Justice Haines in the Ontario case of *Reibl* v. *Hughes*.[7] The reviewer finds it difficult to share the optimism of the two writers. I am not convinced that the balancing of factors which is suggested will be successfully struck in the future. Indeed, the earlier Ontario case of *Kelly* v. *Hazlett*[8] and the subsequent Ontario Court of Appeal decision[9] in the *Reibl* case suggest that, like it or not, we are in for a period of confused and confusing thinking on this issue. The conscious intrusion of negligence into this whole field seems destined to water down the notion of informed consent, which traditionally has been something of a bulwark against the doctor substituting his judgment for that of the patient.

7. (1977), 78 D.L.R. (3d) 35 (Ont. H.C.).
8. (1976), 75 D.L.R. (3rd) 536 (Ont. H.C.).
9. (1978), 6 C.C.L.T. 227 (Ont. C.A.).

Moreover, one cannot help thinking that the distinction between information as to the basic nature of the operation or medical procedure and information as to collateral matters will be as difficult of application as the similar distinction elsewhere in the law of consent.

The so-called "rule" in *Rylands* v. *Fletcher* has rarely prompted scholarly analysis in Canada. The chapter by Professor, now Mr. Justice, Linden is helpful in providing a focus on the extent to which the rule has had appeal to Canadian courts. While one would have appreciated closer scrutiny of whether the cases applying the rule can all be reconciled within accepted corollaries to the rule, the author is to be commended for drawing out the underlying premise of "ultra hazardous activity" which can be found in a number of cases. The articulation of this functional premise may help the courts to clarify more satisfactorily the situations in which it is desirable to apply strict liability.

Professor Magnet's chapter on "Intentional Interference with Land" takes us through the substantive features and procedural peculiarities of the modern law of trespass to land. While the author tends to concentrate on an analysis of the existing law, he does pay some attention to the potential for the application of trespass doctrine to a variety of contemporary social problems, including the invasion of privacy, pollution, picketing, and squatting. In each instance he makes useful suggestions on ways in which the trespass action may be used creatively, while at the same time recognizing its limitations in reconciling conflicting social interests when both have some claim to legitimacy or at least understanding. In the context of pollution, Professor Magnet rightly challenges the reviewer's contention that trespass is an inappropriate action by which to vindicate environmental interests.[10] On a more theoretical plane, Professor Magnet makes a convincing argument that the old characterization of trespass as requiring direct intrusion should now be replaced by characterization in terms of intention to interfere. This latter characterization, if adopted, would help in commending a trespass action as a means of dealing with problems such as pollution. Moreover, it would obviate the strange dichotomy between negligence and unintentional trespass, which enjoys currency in Canada. Having said that, one wonders whether trespass will ever be shorn of its early historical connotations while the burden of proof is different from that in negligence. By placing the burden of proof on the defendant, the law seems to ensure that the characterization of the tort is made in largely causal terms.

For lawyers interested in the important area of the tortious liability of school authorities, and for academics interested in demonstrating the increased sensitivity of negligence law to affirmative duties to protect others, Professor Barnes' chapter on "Tort Liability of School Boards to Pupils" is a useful contribution. The author does a capable job of relating the statutory and common law responsibilities which school boards have towards their pupils and opens up an interesting discussion on the possibility of torts claims relating to the quality of education. Given the judicial activity in this field already in the United States and growing criticism of educational standards in Canada it may not be too long, as Professor Barnes suggests, before Canadian Courts are faced with the

10. *See* J. McLaren, "The Law of Torts and Pollution" (1973) *L.S.U.C. Special Lectures* 309 and 310 for a more pessimistic view of the viability of trespass in pollution suits.

thorny issue of whether negligence theory can accommodate such complaints. We do well to ponder!

As this review should have demonstrated, the new *Studies in Canadian Tort Law* covers a wide range of issues in Compensation Law, includes a number of profound and stimulating chapters and fills in a number of annoying gaps in Canadian writing on the Law of Torts. For these reasons it is a useful addition to legal literature. The variations in objectives and substance mean that it is unlikely to be read from cover to cover by anyone other than the ever voracious academic; however, in the sense that it has something for everyone, judge, practitioner, teacher and student, it should be a welcome addition to a significant number of bookshelves.

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