REDISCOVERING THE LAW OF NEGLIGENCE, ALLAN BEEVER (OXFORD: HART, 2007)

For several decades preceding the 1990s, Anglo-American negligence law scholarship was characterized by, *inter alia*, proposals for "law reform," which "reform" G. Edward White defined as "the reorganization of doctrine to conform to particular policy imperatives."[1] The work of William L. Prosser[2] and Robert Keeton[3] in the United States, Patrick Atiyah[4] in the United Kingdom, John Fleming[5] in Australia, and Allen M. Linden[6] in Canada conspicuously instantiated that form of scholarship. While not always finding common ground on specific issues in negligence law, or even on the proper place or function of negligence law in contemporary Western society, these scholars shared a common methodological standpoint. Specifically, they confined themselves to describing law's positive expression and espousing changes which, based upon their respective subjective understanding(s) of "good" public policy, they viewed as desirable. And, in espousing systemic public policy norms which they saw as governing (or which they felt ought to govern) negligence law's development, they also implicitly rejected the possibility of systemic *legal* norms.[7]

Moving from the academy to the judiciary, one sees that public policy has similarly been privileged in negligence cases, first in the U.S.[8] and later in the Commonwealth, an early example being the pronouncement of the House of Lords in *Home Office v. Dorset Yacht Co. Ltd*.[9] From that point, negligence law began to be conceptualized as "an ocean of liability for carelessly causing foreseeable harm, dotted with islands of non-liability."[10] According to this thinking, the defendant's liability is no longer made out on the evidence, but is presupposed unless and until the defendant demonstrates, on the basis of public policy arguments, that liability ought not to be imposed.

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1 G. Edward White, "The Unexpected Persistence of Negligence, 1980-2000" (2001) 54 Vand. L. Rev. 1337 at 1342.

2 William L. Prosser, *Handbook of the Law of Torts* (St. Paul, Minn.: West, 1941); William L. Prosser & John W. Wade, *Cases and Materials on Torts*, 5th ed. (Mineola, N.Y.: Foundation Press, 1971).

3 Page Keeton & Robert E. Keeton, *Compensation Systems: The Search for a Viable Alternative to Negligence Law* (St. Paul, Minn.: West, 1971).

4 P.S. Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld and Nicolson, 1970).

5 John G. Fleming, *The Law of Torts* (Sydney: Law Book, 1957).

6 Allen M. Linden, *Canadian Tort Law* (Toronto: Butterworths, 1977). Lewis Klar's work also falls within this tradition, although he has been more wary of the confluence of tort law and public policy. See Lewis N. Klar, "Judicial Activism in Private Law" (2001) 80 Can. Bar Rev. 215.

7 Sometimes such rejection was explicit. In the most recent edition to Linden J.'s book (now co-authored with Bruce Feldthusen), the authors argued that a non-pluralist approach to tort law "undervalues" tort law. See Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Butterworths, 2006) at 3.

8 See generally Alan Calnan, *A Revisionist History of Tort Law: From Holmesian Realism to Neoclassical Rationalism* (Durham, N.C.: Carolina Academic Press, 2005).

9 [1970] UKHL 2, [1970] A.C. 1004. There, Lord Reid articulated a conception of tort law in which a case for the defendant's liability no longer falls to the plaintiff to demonstrate on the facts and law. Instead, he said, "I think that the time has come when we can and should say that [a duty of care in tort law] ought to apply unless there is some justification or valid explanation for its exclusion" (at 1027).

10 D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999) at 192-93.

In response to this "policyization"[11] of negligence law, a revived legal formalism has emerged in negligence law discourse, eclipsing to some degree instrumentalist references to public policy imperatives. Seeking to tame the "unruly horse" of public policy,[12] formalism's proponents have argued that jurists ought to acknowledge, and confine their negligence law discourse to, negligence law's own terms. Those terms, moreover, are said to be embodied in the collection of concepts, doctrines, and institutions through which it is seen as maintaining coherent legal expression, all within the parameters of corrective justice.[13] It is from this tradition that Allan Beever draws in his important new book *Rediscovering the Law of Negligence*.[14]

In fact, Beever does not merely draw from this tradition, but strengthens it by expanding its doctrinal reach. *Rediscovering* takes us further than the works of most corrective justice scholars, whose attentions to date have been directed to various discrete components of the tort of negligence, such as the duty of care,[15] the standard of care,[16] factual causation,[17] or to particular types of claims, such as those for pure economic loss.[18] *Rediscovering* is what it purports to be: a systematic and theoretical exploration of *all* the law of negligence.[19] And, it is driven, as Beever explains, by the need to find "an understanding of the law that is capable of providing an alternative to the modern mess"[20] that most observers would agree fairly describes the current state of the law of negligence. That exploration leads us through five great cases — central, canonical pronouncements of "utmost importance to the law"[21] — whose reasons, Beever argues, all reflect a common understanding of a core aspect of negligence law which coheres to corrective justice: *Donoghue (or M'Alister) v. Stevenson*,[22]

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11 Vaughan Black, "The Transformation of Causation in the Supreme Court: Dilution and 'Policyization,'" in Todd Archibald & Michael Cochrane, eds., *Annual Review of Civil Litigation 2002* (Toronto: Carswell, 2003) 187.

12 Per Burrough J. in *Richardson v. Mellish* (1824), 2 Bing. 229, 130 E.R. 294 (C.P.) at 303: "public policy" is "a very unruly horse, and when once you get astride it you never know where it will carry you."

13 Jules L. Coleman, "Moral Theories of Torts: Their Scope and Limits: Part I" (1982) 1 Law & Phil. 371; Ernest J. Weinrib, "Toward a Moral Theory of Negligence Law" (1983) 2 Law & Phil. 37.

14 Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007) [Beever, *Rediscovering*].

15 Ernest J. Weinrib, "The Disintegration of Duty" (2006) 31 Advocates' Q. 212; Ernest J. Weinrib, "The Passing of *Palsgraf*?" (2001) 54 Vand. L. Rev. 803; Arthur Ripstein, "Three Duties to Rescue: Moral, Civil, and Criminal" (2000) 19 Law & Phil. 751.

16 Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003).

17 Here, Beever's own prior contribution is noteworthy. See Allan Beever, "Cause-in-Fact: Two Steps Out of the Mire" (2001) 51 U.T.L.J. 327.

18 Stephen R. Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 U.T.L.J. 247; Peter Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law" in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 427.

19 Here, however, I have one quibble. I was disappointed that Beever chose to avoid accounting for vicarious liability on the basis that it is "parasitic" to the law of negligence, and to leave it at that. There are some arguments for viewing vicarious liability as cohering to a corrective justice-inspired account of tort law that I thought would be worthy of his attention. See e.g. Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 260 (which draws from Glanville Williams, "Vicarious Liability and the Master's Indemnity" (1957) 20 Mod. L. Rev. 220; J.W. Neyers, "A Theory of Vicarious Liability" (2005) 43 Alta. L. Rev. 287).

20 Beever, *Rediscovering*, *supra* note 14 at 19.

21 *Ibid.* at 30.

22 [1932] A.C. 562 (H.L.).

Palsgraf v. Long Island Railroad,[23] *Bolton v. Stone*,[24] *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2))*,[25] and *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound (No. 1))*.[26]

In seeking to illustrate negligence law's systemic norm of corrective justice through select cases, Beever is attempting to reconcile the requirement for any serious interpretive legal theory (that it account for actual legal expression) with the fact that not every case "fits" with any single legal theory. This means blocking out the background noise of cases that do not enjoy wide acceptance — for example, controversial cases applying the thin skull rule or cases involving claims brought by disappointed wills beneficiaries — and focusing instead on those which are generally seen to be fundamental to negligence law. To the extent, then, that he can discern a single way of thinking about negligence law in the central cases, the outlier cases can be seen as such and thus can be dismissed.

This invites, however, the criticism of tautology, and so the difficulty for some readers will be in accepting that other cases are not central. For them, this will be no mere quibble. Negligence law, like any other common law device, evolves, and its future positive direction is not predetermined by any single theoretical reference point like corrective justice. On one hand, future cases might affirm an understanding of negligence law as an instance of corrective justice. As Ernest J. Weinrib observed, "subsequent occurrences or the thinking of subsequent jurists may lead to fresh nuances in doctrine or to a reevaluation of the coherence or plausibility of previously settled law."[27] What, however, when the thinking of subsequent jurists does not conform to the reasoning of cases that have previously been regarded as central and instead embraces instrumental goals such as loss-shifting, risk-spreading, or sociologically inspired schemes of wealth redistribution?

Negligence law's dynamism is thus inherently challenging to the interpretive legal theorist who seeks to advance the case for a single legitimate reference point. Not every development will be consistent with a single reference point, even one that supposedly gives negligence law its internal coherence. Obviously, one can attempt to rationalize and accommodate shifts in negligence law, either by "smooth[ing] out"[28] or outright rejecting such developments as unsound, but again this risks tautology. Not only is legal theory being used to explain negligence law in negligence law's own terms, but it is also being used to define those purported terms. The essential criticism is that negligence law's pluralistic judicial expression means that one cannot simply privilege normatively one small bit of that expression while claiming that the bulk of it is a mistake because it does not "fit."

Anticipating this, Beever points out that "fit" is hardly determinative in evaluating interpretive theories of law. Other salient axes include the theory's transparency (does the theory cohere to the general reasoning used by courts?) and morality (does the theory reveal

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23 (1928), 162 N.E. 99 (N.Y. C.A.).
24 [1951] A.C. 850 (H.L.).
25 [1967] A.C. 617 (P.C.).
26 [1961] A.C. 388 (H.L.).
27 Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995) at 15.
28 *Ibid.* at 12.

how the law might be thought to be justified, even if it is not justified?).[29] Obviously any legal theory is dependent to some degree upon our intuitions, and these axes (and particularly that of morality) are unavoidably subjective. Still, at its root, negligence law is an intuitive device, basing its normative strength on widely accepted apolitical norms as to the content of our rights that are worthy of protection. Furthermore, intuition, when informed by legal training, is more than some mere intestinal wisdom, and Beever's approach presumes that it also leads us to some level of general agreement as to starting points. While then, not everyone might agree on the cases that Beever *excludes*, no one could seriously challenge the centrality to negligence law of any of the five cases that he *includes*. (Indeed, I cover all five of them within the first three months of my first-year course in tort law.)

Not content to advance his own legal theory, Beever also advances a powerful critique of the alternative account of negligence law, being the policy-based orthodoxy that has prevailed in all but the most recent negligence law discourse. This part of his book should be mandatory reading for all Canadian judges who still believe in — and formally perpetuate (in, for example, the second step of the test in *Cooper v. Hobart*[30] governing the imposition of a duty of care) — their competence to implement what they view as desirable public policy considerations in adjudicating negligence law claims. Consider this passage from *Rediscovering the Law of Negligence*:

> [J]udges are not in a position to make these decisions, both because they lack the necessary information and because they usually lack the training to deal in an informed matter with the information if they had it.
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> …
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> Why … spend considerable effort and taxpayers' money setting up ministries containing expert policy analysts in order to ensure that ministers get the best advice possible, and yet be prepared to allow judges with little or no social policy training, advised by lawyers with little or no social policy training, to make social policy choices in the absence of the data necessary to make those choices informed ones? Judges may be entitled to rely on reports prepared by ministries, etc. But there are three problems with this strategy. First, policy advice is often conflicting and judges are generally not in a position to decide on the merits of such advice. Secondly, the accurate interpretation and application of policy advice often calls for expertise in the subject matter of the advice. Thirdly, if it is argued that judges may rely on ministry reports because those reports were prepared by persons with significantly greater expertise than the judges themselves in a subject matter relevant to judging, then we should replace those currently on the bench with the experts who write the reports.[31]

Such arguments for constrained judicial power have tended to be dismissed in this country as simplistic,[32] although as recently as 1989, the Supreme Court of Canada, pronouncing *per curiam*, acknowledged that its task "is a legal one," adding:

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29 Beever, *Rediscovering*, *supra* note 14 at 21. Here Beever is drawing from Stephen Smith's general account of interpretive legal theory in Stephen A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 7-32.

30 2001 SCC 79, [2001] 3 S.C.R. 537.

31 Beever, *Rediscovering*, *supra* note 14 at 172-73.

32 See e.g. The Right Honourable Beverley McLachlin, "The Supreme Court and the Public Interest" (2001) 64 Sask. L. Rev. 309 at 312.

> Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.[33]

The underpinning normative idea behind Beever's practical point here is that there is a jurisdictional divide between legislators and judges, such that judges conceive and effect justice differently than legislators. We expect those "decisions based upon broad social, political, moral and economic choices"[34] to be made based on germane distributive and other political considerations. Once, however, those public policy questions begin to influence outcomes in the adjudication of claims in negligence cases, negligence law also becomes "political" in the sense that such results entail subjective choices among different possible methodologies of reaching a result.

Beever makes this point clearly in discussing the relevance of the availability of insurance as a factor informing whether a duty of care ought to be imposed on a given set of facts.[35] What makes insurance relevant? If the answer is that it is more economically efficient to spread the risk among policy holders, then why is economic efficiency important? If the answer is that economic efficiency is socially beneficial, then why — and here is the point — do not all other concerns of social benefit apply? Why, for example, do we not consider the social benefit that is derived from the work being done by the defendant who negligently runs down the plaintiff pedestrian while delivering a load of donations to the food bank, or the social benefit conferred by the hospital whose nurse accidentally administers the wrong medication to the plaintiff? If social benefit matters, why does it not always matter? The answer, of course, is that this would be going "too far," and also that it would be expecting "too much" of judges to have the time, incentive, or expertise to engage in such depth and breadth of analysis. But that, as Beever points out, is no answer at all. "If it is right to appeal to moral consideration *x* in determining liability in case *y*, then all *x*-type considerations are relevant in all *y*-type cases."[36] In other words, either all of it is relevant or none of it is relevant. The only alternative is to view judging as a simple matter of cherry-picking, on some idiosyncratic basis, one's preferred public policy imperative and applying it.

That Beever is surely correct here is demonstrated by considering an alternative argument that was advanced in this law review by Dale Gibson[37] which would turn Beever's practical argument on its head. It is in fact, Gibson argued, the legislators who lack the time,[38] the incentive,[39] and the access to expertise[40] necessary to carry out the sophisticated task of developing the law. Courts, therefore, "should feel no compunction about being *creative*."[41] And, if the courts get it wrong, legislators (being supreme) retain the power to "correct" judicial decisions where they disagree with the court's choice of policy imperatives or with the outcome.

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33 *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 at 553.
34 *Ibid.*
35 Beever, *Rediscovering*, *supra* note 14 at 17, 190-91, 199-200.
36 *Ibid.* at 17.
37 Dale Gibson, "Judges as Legislators: Not Whether But How" (1987) 25 Alta. L. Rev. 249.
38 *Ibid.* at 250.
39 *Ibid.* at 250-51.
40 *Ibid.* at 251.
41 *Ibid.* at 256 [emphasis added].

There are, of course, obvious normative objections to Gibson's idea. For example, taken to its logical conclusion, it would indulge institutional conduct that is ultra vires based on the presupposition that the institution can always be corrected — no harm done — by another institution acting intra vires. As a justification of judicial action, it smacks of a flouting of the rule of law and of the idea — which the Supreme Court has itself affirmed — of modest legitimate space for judicial decision-making. There is also, however, a more practical difficulty. If legislators have insufficient time, incentive, or expertise to develop the law, how will they have the time, incentive, or expertise to consider and reverse judicial pronouncements that intrude into their exclusive institutional competence (or are just otherwise "wrong")? And, finally, there is an empirical problem with Gibson's idea, inasmuch as it runs counter to the evidence as revealed by general historical trends which suggest that legislatures *have* managed to assume an increased burden of responsibility for the public welfare in matters implicated by negligence law. In the twentieth century alone, restrictions have been legislatively imposed on rights or burdens derived from the Canadian law of negligence with a multitude of distributive consequences ranging from substantive law (for example, occupiers' liability, products liability, and maritime liability) to procedural law (for example, Crown liability, class actions, and limitations of actions). Legislators typically set out to pursue "the public interest," generally driven by majoritarian policy impulses, and measure their currency as legislators by the reforms they have introduced and the benefits they have procured for their constituents.[42] Indeed, given this sustained activity in the legislative branch, the contemporary argument for a more robust employment by judges of public policy considerations is incongruous, as such concerns have been more saturated with legislative activity in the last century than they have been since the inception of English law.

Rediscovering the Law of Negligence is not justly canvassed in a brief review. It is an elegant and persuasive account of a theoretical understanding of the entire scope of negligence law which, as such, goes further than past efforts to advance that understanding. The pay off from such an ambitious scope is an exploration of the interrelationship of negligence law's various components (Beever's ability to connect twentieth-century developments in remoteness with contemporary developments in the duty of care[43] is something of a tour de force). The book will provoke argument, and it will occasionally raise eyebrows even among sympathetic readers. For example, Beever's explanation of the law of negligent misrepresentation as being based upon the assumption of responsibility — an explanation I generally accept (and in fact would take further than he does)[44] — also asserts that a plaintiff's reliance on an assumption of responsibility is generally irrelevant in the law of negligence.[45] While Beever is not alone in making this argument,[46] other corrective justice scholars have seen reliance as central to the duty of care in those cases.[47] This, of course, simply makes Beever's contribution all the more vital, since he forces the rest of us to re-examine our old arguments afresh in light of his insights.

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42 Roger Pilon, "Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty" (1985) 4 Cato Journal 813 at 813-16.

43 Beever, *Rediscovering*, *supra* note 14 at 162.

44 *Ibid.* at 254, n. 104.

45 *Ibid.* at 276.

46 This is also the position taken by Stevens, *supra* note 19 at 14-15.

47 Perry, *supra* note 18; Benson, *supra* note 18.

It was a rare treat to read a book that every few pages had me not only thinking about why the author is right or wrong, but also about how I might revise my class lectures. In its scope and its nuanced account of the cases, *Rediscovering the Law of Negligence* illuminates negligence law's doctrinal components in surprising ways, shedding new light on old conundrums, and making observations that should inform discussions about negligence law that occur amongst ourselves and with our students.

Russell Brown
Assistant Professor
Faculty of Law
University of Alberta