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Book Review: Manual of Motor Vehicle Law, by David B. Horsley

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courts do. This *imprimatur* is intended to give his proposals respectability and wide acceptance.

The treatise is replete with references to foreign cases and writings that may lead to useful analyses of problems similar to those arising in the United States. It also contains an excellent bibliography of modern domestic and foreign treatises as well as monographs in the field of conflict of laws.

To sum up the treatise is an excellent piece of work and Professor Ehrenzweig will certainly rank among the great conflict of laws scholars of all times. One may not agree with all the views expressed by the author but one must admire his erudition and the depth of his reasoning. The publication of the book is timely and lawyers will, I am sure, be curious to see to what extent the drafters of the *Restatement Second of Conflict of Laws* will give heed to his ideas. Will he have the influence that Beale had on the first *Restatement*? Certainly no other English or American treatise can compare with this one.² Any Canadian lawyer faced with a conflict of laws problem will read this book with interest and profit; any person deeply interested in re-examining fundamental principles in a new light will be grateful to Professor Ehrenzweig for having transfused a fresh life into this time worn subject. His ideas, his destruction of old dogmas, will certainly contribute greatly to the further development of one of the most fascinating areas of the law. As Cardorzo once remarked "law never is, but is always about to be".

J.-G. C.

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This small book will no doubt be of some use to lawyers who conduct motor vehicle litigation in Ontario as its merits are numerous. It is certainly an improvement over the books written by Phelan¹ and O'Connor.² Phelan does little in the way of analysis. He primarily strings together a group of headnotes and quotations

¹ In Canada textbooks on the conflict of laws are not numerous and none of them combine theory and practice. Laffleur, *The Conflict of Laws* (1898), gives a short summary of Quebec conflict of laws; Johnson, *Conflict of Laws* (2nd ed., 1962), also devotes most of his book to Quebec and is for the primary use of practitioners. Falconbridge's *Essays on the Conflict of Laws* (2nd ed. 1954) is the only work of a scholarly nature. However, the author does not cover the entire field. Castel's *Private International Law* (1960), is a short and up-to-date summary of Canadian rules compared to American ones. It is a book for practicing lawyers; Castel's *Cases, Notes and Materials on the Conflict of Laws* (1960), is designed for Canadian law students.


from cases, some of which are obiter dicta. The O'Connor book is made up of long lists of cases without any analysis. There is little, if any, guide to the contents of the cases cited. The legal researcher must wade through them all. Mr. Horsley has done more legal analysis than either of the two other authors. Thus lawyers may save some time by consulting Mr. Horsley's book first.

The organization of the book is superior to that of Phelan and Savage. It is a "collection of 'notes' hinged onto the text of the Highway Traffic Act". This approach is sensible since the Ontario Highway Traffic Act must be consulted first whenever motor vehicle law is to be researched. It is convenient to have the cases dealt with under the appropriate section of the statute.

When the author examines an area in detail, he does so admirably. He is concise, yet perceptive. He writes simply without sacrificing accuracy. His narrative is easy to read and easy to understand. One of the better parts of the book is the section dealing with the liability of municipalities for non-repair of highways. There is also a fine short summary of the law of bailment as it affects motor vehicles, but the author is not critical enough. For example, he merely sets out the facts and the decision in Palmer v. Toronto Medical Acts without any adverse comment. He does not discuss the conflicting policies that the courts must resolve in these cases. One is the desire to make parking lot operators responsible for the loss of vehicles left in their care. At the same time the courts are disinclined to shift losses from the insurer of the vehicle to the insurer of the parking lot by way of subrogation. The compromises reached in the cases are often confusing. It may be that legislation will be required to straighten out the confusion.

There is a good passage on section 105 of the Highway Traffic Act. The cases dealing with the statutory, vicarious liability of the "owner" of a motor vehicle are summarized, and a good picture of the law is drawn. But the author failed to cite at least one perceptive article on the subject. Although traditionally there has been a reluctance on the part of courts to cite periodical literature in Canada, the new trend is otherwise. When a periodical article

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4 Preface.
6 Pp. 37-44.
is cited, it would be helpful if the name of the author and the name of the article were given.  

Mr. Horsley's treatment of the gratuitous passenger subsection (2) of section 105 of the Ontario Highway Traffic Act is excellent. There is a full examination of the meaning of "a vehicle in the business of carrying passengers for compensation", and the other exceptions to this sub-section which the courts have created to combat its harshness. It is a pity the author merely states the decision of the case of *Duchaine v. Armstrong* and says that it followed *Harrison v. Toronto Motor Car* despite the fact that the article he cites in his support proclaims that *Duchaine* was wrongly decided if it depended on *Harrison* for support. He evades the debate on whether *Harrison* is a case of liability to a servant or liability for a servant. *Doroz v. Koch* is well-explained but is followed by *Lexchin v. McGillivray* which is docilely accepted without any criticism. *Feldstein v. Alloy Metal Sales* is not criticized in this context but is merely cited as an example of indirect compensation insufficient to qualify as an exception to the subsection. The author suggests that *Ouelette v. Johnson* may not be followed outside Ontario, but the cases he cites in support of this statement did not consider the *Ouelette* decision. In fact, one of the cases so cited was expressly disapproved of in the *Ouelette* decision. It is submitted that, on the contrary, *Ouelette* will be welcomed in other common-law jurisdictions since, for the first time, the Supreme Court of Canada has approved of the furtive evasion of the sub-section that has been going on in Ontario since 1945 as well as in the other provinces. The *Ouelette* decision will be

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Mr. Horsley merely gives the citation of the articles he does quote, see for example, p. 299.  


Pp. 296-297.  


P. 204.  


used as a springboard by the courts to continue their battle against the iniquity that can be caused by section (2) of section 105. In the future, if an expense-sharing arrangement is “of a commercial nature” rather than merely a social arrangement, the passenger will come within the exception within the exception. It is possible that courts will want to limit the Ouelette decision to the situation where a definite amount of money is calculated and paid for the transportation. However, it is more likely that all the expense-sharing cases will be cast aside, even where no fixed sum is arrived at, as long as the arrangement can be classified as “of a commercial nature”.27 The author criticizes Bohm v. Maurer28 as illogical.29 It was there suggested that the plaintiff need not himself pay anything for the transportation as long as someone else in the vehicle is paying for this transportation.30 However, in Bohm v. Maurer,31 the courts, for once, have paid due regard to the words of the statute, which specifically refer to the “vehicle”32 used to carry passengers for compensation. These decisions are not really illogical at all: wherever possible, the courts interpret the sub-section and the exceptions thereto in such a way as to allow the plaintiff to recover. The author admits that the cases are inconsistent and that some amendment of the sub-section is called for.33 He is ready, however, to permit the sub-section to continue as an absolute bar for such plaintiffs as hitchhikers, even though in no other jurisdiction in the common-law world (save New Zealand) is this so.34 This sub-section horrifies most lay people that hear about it. Almost all lawyers are agreed that it should be abolished completely.35 This can be done for the relatively minor cost of seven to nine dollars annually per motor vehicle policy.36 In 1962 there were some four hundred sixty-five passengers killed and seventeen thousand two hundred ninety-nine passengers injured in Ontario.

27 For example, see Turnowski v. Turnowski (1961), 226 N.Y.S. 2d 738 (S. Ct. King’s County), where a New York court applying Ontario law declined to allow the plaintiff, who was a passenger, to recover from his brother, who drove the plaintiff to an Ontario resort in return for the payment by the plaintiff of his hotel expenses. This case might be decided differently in the future.


29 P. 294.

30 The author indicates that Mr. Justice Morden’s statement was obiter dictum. However, it is suggested that this was one of two alternative reasons upon which the court based its decision. Where two reasons are given for a decision they are both normally considered ratio decidendi. See Cross, Precedent in English Law (1961), p. 86.

31 Supra, footnote 28.

32 Ibid., at p. 253.

33 Pp. 288, 302.

34 P. 288.

35 See the submission to the Select Committee of the Ontario Legislature on Automobile Insurance by the Special Committee of the Law Society of Upper Canada on the Trial of Damage Actions (1963), pp. 12-13.

36 Ibid., p. 13. See also submission of the All-Canada Insurance Federation, Proceedings before the Select Committee on Automobile Insurance (1963), p. 123 et seq.
This is thirty-three point six per cent of all the deaths and forty-one point six per cent of all the injuries in Ontario. Some of the victims do recover, of course, since they may be passeners in buses, taxis or they may be able to prove that someone other than their driver was negligent. However, many of them are deprived totally or partially of recovery because of this sub-section. This accident of history, that persists only because of the inertia of the legislature and the bar, must be abolished.

After carefully reading this book one wonders why the publisher saw fit to produce it. Over one-third of the book is filled completely or largely with sections of the Ontario Highway Traffic Act, regulations made thereunder, forms and other statutory material that may be obtained free of charge. Also, much of the beginning of the book deals with questions of equipment, regulation of motor vehicle licences, weight, load and size, that are hardly matters that most lawyers encounter frequently in practice. This material is of course interesting were it not that it diminishes the space and effort devoted to the most important matters of motor vehicle law. What effect does a breach of the Highway Traffic Act have on civil liability in Ontario? The author does not seem to be overly worried about the confusion in the cases but merely adds to it. He suggests that: a breach of the Act may be prima facie evidence of negligence; no civil liability will attach if a failure to comply with its provisions was not an act of conscious volition; the onus falls on the offending driver to explain how the accident might have occurred without negligence on his part; and where the defendant produces an explanation equally consistent with negligence and no negligence, the burden of establishing negligence will remain with the plaintiff. These differing situations are not categorized, explained or criticized. What about the problem of the computation of damages? There is a great deal of confusing law on this topic and it is of great significance to the practitioner. Equally important are the problems of civil procedure involved in personal injury litigation. The author ignores all of these problems completely. And what of the present system of compensating motor vehicle accident victims itself, which is being attacked from several quarters? The social questions involved are completely ignored, despite the debate that rages on across the common-law world. No mention is made of

37 See Accident Facts (1962), publication of the Ontario Department of Transport, pp. 14, 16.
38 From the Ontario Department of Transport, Parliament Buildings, Toronto.
39 Pp. 4-5.
41 See for example, Ehrenzweig, Full Aid Insurance for the Traffic Victim (1954); Green, Traffic Victims (1958); Symposium in (1954), 15 Ohio State L.J. 101; Harris, the Law of Torts and the Welfare State (1963), 10 N.Z.L.J.
the fact that in 1960 Canada possessed some 5,256,341 motor vehicles\(^\text{42}\) that caused some 247,829 reported accidents in which 3,283 people were killed and 90,186 were injured.\(^\text{43}\) No figures are given about the number of court cases arising out of these accidents nor of their results, nor of the cost of providing compensation to the victims. No assessment of the jury system is made. The impact of virtually complete insurance coverage (ninety seven point two per cent in Ontario) is not discussed. This is unfortunate as there is need for a major examination of the social cost of our present system of allocating losses arising out of motor vehicle accidents.\(^\text{44}\) No passion burns in these pages. No great insights are provided.

In conclusion, it should be said that there is still a need in Canada for a major practitioner’s book on motor vehicle law,\(^\text{45}\) with a scholarly approach. The author has improved on what we have had and for this the legal profession will be indebted to him. But, perhaps the greatest contribution of this book may be that it demonstrates the need for some major research and work in this area of the law of torts.

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\(^{42}\) Canada Year Book (1962), p. 785.

\(^{43}\) Ibid., p. 796.

\(^{44}\) For such a study see Morris and Paul, Financial Impact of Automobile Accidents (1962), 110 U. Pa. L. Rev. 913.


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