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## Book Review: Traité de droit civil: les obligations, par Jean-Louis Baudouin; La responsabilité civile délictuelle, par Jean-Louis Baudouin

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## BOOK REVIEWS

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### REVUE DES LIVRES

*Traité élémentaire de droit civil: les obligations.* Par JEAN-LOUIS BAUDOIN. Montréal: Les Presses de l'Université de Montréal. 1970. Pp. xlvi, 434. (\$17.00)

*La responsabilité civile délictuelle.* Par JEAN-LOUIS BAUDOIN. Montréal: Les Presses de l'Université de Montréal. 1973. Pp. vlvi, 567. (\$17.50)

These two volumes which are part of a series devoted to a systematic survey of the civil law of the Province of Quebec cover what is usually considered as the core of any legal system, namely the law of contracts and torts. Without a good grasp of the general theory of obligations, it is impossible to fully understand other parts of the civil law.

Although the volumes are written for law students in the Province of Quebec, the wealth of material they contain make them a valuable source of reference for Quebec practitioners and for comparatists elsewhere.

Professor Baudouin in a very clear and concise style has given us an excellent analysis and synthesis of the law of obligations. His discussion of many difficult questions is always penetrating and often illuminating. At times his exposition of classic subjects contains original approaches which will refresh the minds of readers used to the age old explanations or theories.

The author has also included in his work many topics which are not usually found in treatises on torts such as the influence of social security measures on the granting of damages, or the special problems involved in the application of workmen's compensation legislation. In both volumes Professor Baudouin also refers us to the relevant statutory laws completing the Civil Code.

An excellent analytical index as well as a table of cases and of statutes enable the reader to quickly find what he is looking for.

The outline of the volume on obligations does not depart from the three-part classical division of the subject: the sources of obligations, that is contracts and quasi contracts (due to their importance, delicts and quasi delicts are dealt with in the other volume), the effect of obligations and the extinction and trans-

mission of obligations. In each part the author emphasizes the role of decided cases without neglecting the views of leading scholars. At the end of each chapter, there is a short bibliography for the reader who wishes to deepen his knowledge of the questions discussed in the text.

Of particular interest is Professor Baudouin's analysis of cause or consideration. After distinguishing between the cause of obligations and the cause of contracts, he indicates that the Civil Code, in articles 984 and 989, only deals with the cause of contracts which he defines as the determinant motive that induces a person to enter into a contract. Such a cause is concrete and subjective and varies with each person and each contract. It is a useful concept because it enables the judge to annul a contract where the parties had in mind an unlawful or illicit purpose or, in other words, a purpose contrary to the public policy of Quebec. Thus, he believes that the revised Civil Code should contain two articles: one dealing with the cause of obligations stating that in bilateral contracts obligations are inter-dependent and an article providing for the nullity of any contract whose purposes or effects are contrary to public policy.<sup>1</sup>

The chapter on third party beneficiary contracts<sup>2</sup> could have been more detailed. As long as Quebec courts do not allow a consumer of a product which does not fulfill the manufacturer's warranty to sue the manufacturer directly for breach of contract<sup>3</sup> but force him to sue the distributor, it could be argued that in order to sue the manufacturer in contract, the third party beneficiary contract technique should be used. The distributor, when purchasing the product, stipulates with the manufacturer for the benefit of the consumer so that when the consumer suffers damage as a result of the defective product, he has a direct contractual right against the manufacturer.<sup>4</sup>

The chapter dealing with risks in the case of non performance of obligations contains a clear analysis of a very difficult problem.<sup>5</sup> Although it is true that today, in practice, the problem of risks has lost some of its importance in most contractual transactions due to the fact that the parties will take out an insurance policy, it still plays a significant role in the case of contracts for the transfer of property.

<sup>1</sup> P. 127 *et seq.* See already arts 13, and 990 C.C.

<sup>2</sup> Stipulation pour autrui, p. 174.

<sup>3</sup> He can sue the manufacturer for negligence: *Ross v. Dunstall* (1921), 52 S.C.R. 393; *Ferstenfeld v. Kik Company* (1939), 77 Que. K.B. 165; *Modern Motor Sales Ltd. v. Masoud*, [1953] 1 S.C.R. 149. Cf. Tancelin, Comment, *supra*, at p. 90.

<sup>4</sup> On the basis of *Halle v. The Canadian Indemnity Co.*, [1937] S.C.R. 368. *Contra*, Cour d'Appel de Paris, 4 juillet 1970, D. & S. 1971, 73.

<sup>5</sup> P. 188.

The chapter devoted to specific performance is very interesting from the point of view of comparative law as the author demonstrates that Quebec law occupies an intermediary position between the French civil law and the common law.

In the volume devoted to delictual responsibility, the author, for pedagogical reasons, concentrates on responsibility upon proof of fault. Following tradition, he covers capacity of discerning right from wrong, fault, damage, and causal connection between fault and damage. The rest of the volume is devoted to responsibility upon presumption of fault including responsibility for inanimate things and for animals. Special chapters discuss responsibility resulting from the use of automobiles, workmen's compensation legislation and responsibility in the case of wrongful death. The final chapter deals with prescription. The author regrets that due to space limitations, he was unable to cover certain topics such as professional responsibility, conflict of laws and some questions of procedure.

A very unusual and interesting feature of the volume on delictual responsibility which should especially please practitioners is the use of tables that give: 1) the usual amount of recovery in the case of some types of injury<sup>6</sup>; and) the influence of social and economic factors on the outcome of litigation. The author was able to obtain these by resorting to jurimetric techniques. For instance, in the case of responsibility of the father for the acts of his minor children, Professor Baudouin notes that when the father knew his son's behaviour, he was held responsible in seventy-eight per cent of the cases but when he did not, he was absolved in eighty per cent of the cases. In the case of responsibility of masters and employers, the author shows that personal selection of the employee by the employer had no particular effect on the happening of the accident thus disproving the view held by some authors that the responsibility of the employer is based on his fault in choosing the wrong employee.

It is a pity that the author did not devote more space to the new no-fault insurance schemes now in force in some jurisdictions.<sup>7</sup>

The best chapter of the volume is probably the one devoted to the concept of fault.<sup>8</sup> With respect to the theory of abuse of rights he seems to deplore the fact that Quebec courts have not favoured the view that a person commits a fault when he exercises a right in an anti-social manner.<sup>9</sup>

In the chapter dealing with causation, one must be grateful to the author for the clarity with which he presents what is still one

<sup>6</sup> *E.g.* pp. 112, 119, 121.

<sup>7</sup> See chapter on responsibility resulting from the use of automobiles, p. 331, at pp. 335, 336, 387.

<sup>8</sup> P. 41.

<sup>9</sup> P. 61.

of the most obscure and difficult part of the law of delictual responsibility.<sup>10</sup> The same could be said of his analysis of the notion of care in the case of responsibility for things other than buildings.<sup>11</sup>

Although the two volumes are not major treatises, they go beyond what civilians call the *précis*. As the author points out, it would have been an error to undertake a more ambitious project at a time when the whole of the Civil Code is being revised.

For Canadian lawyers interested in the civil law of Quebec the two volumes constitute an excellent introduction to a difficult subject of great practical importance. In the Province of Quebec they will probably be considered as classics. The many critical remarks and suggestions for improvement which the author makes, will no doubt be of great help to those who are revising the Civil Code.

With the appearance at almost the same time of Professor Baudouin's treatise on delictual responsibility and Professor Linden's treatise on *Canadian Negligence Law*,<sup>12</sup> Canadian lawyers are very fortunate to be provided with excellent analyses of both the civil law and the common law. One can now truly say that Canadian legal scholarship in the field of torts is coming into its own.

J.-G. C.

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<sup>10</sup> P. 140.

<sup>11</sup> P. 276

<sup>12</sup> (1973), reviewed in (1973), 51 Can. Bar Rev. 707.

<sup>1</sup> The series has now expanded to include: *Studies in Canadian Tort Law* (1968), A. M. Linden (ed.); *Studies in Canadian Business Law* (1971), G. H. L. Fridman (ed.); *Studies in Canadian Family Law* (1972, 2 vols), D. Mendes Da Costa (ed.); *Studies in Canadian Criminal Evidence* (1972), R. E. Salhany and R. J. Carter (eds).

<sup>2</sup> Published in 1967 and now referred to as *Studies in Canadian Company Law*, Volume I (hereinafter referred to as *Studies*, Volume I).

<sup>3</sup> *Studies*, Volume I was reviewed in the following journals: (1968), 46 Can. Bar Rev. 519, by L. C. B. Gower; (1968), 14 McGill L.J. 518, by G. McCarthy; (1968), 18 U.T.L.J. 207, by L. Getz; (1968), 3 Man. L.J. 156, by E. A. Braid; (1968), 6 Alta. L. Rev. 325, by K. Mis.