
Book Review: Canadian Negligence Law, by Allen M. Linden

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Book Reviews

CANADIAN NEGLIGENCE LAW, By ALLEN M. LINDEN, Toronto: Butterworths. 1972, Pp. xv, 575. (\$45.00).

Allen Linden has placed the legal profession, especially in Canada, into renewed debt with this third volume on torts under his name. In sponsoring a few years ago a collection of *Studies in Canadian Tort Law*¹ succeeded by his remarkable revision of *Wright's Cases on Torts*,² he inspired the hope of eventually following these up with a full-fledged text entirely from his own pen. The present volume seeks to fulfill this role and add yet another credential to his aspiration of donning the late Dean Wright's mantle as the premier torts scholar in Canada.

The work is also in another respect within a Canadian tradition of legal writing. For notwithstanding its title, it is in essence a collection of essays and thus part of a genre stretching back to Falconbridge's *Conflicts*. Several, indeed most, of the chapters carry a familiar ring to those students of Professor Linden's previous writings, but this does not detract from the welcome of having his observations conveniently collected between hard covers and made available for instruction and reference to a much wider public. In any event, all the material is carefully brought up to date and supplemented so as to present itself as a more or less comprehensive work in the area of negligence. In scope, despite its gaps, it thus bears comparison with Maurice Millner's excellent English monograph on the subject.³

Negligence is of course the hard core of tort law, though its days appear numbered. As I now feel constrained to warn my own class at the opening lecture, torts — and especially negligence — is a dying subject, with no-fault automobile plans in North America and the cradle-to-grave compensation system in New Zealand jostling as undertakers. If Professor Linden's enthusiasm cannot retard this historical process, his book brings at least vivid awareness of what we stand to lose in fun and fascination once this dire event has overtaken us. Indeed, I believe he shares company with many other tort enthusiasts like the late Dean Prosser and certainly myself, in being attracted to the subject, not because of any Pangloss-like admiration for its distillation of wisdom but because of the kaleidoscope it offers of human and legal foible. The Canadian experience is in this respect as rich as any, and furnishes a rewarding target for Professor Linden's talents in wit and criticism. The

¹ (Toronto: Butterworths, 1968).

² (5th ed. Toronto: Butterworths, 1970).

³ *Negligence in Modern Law* (London: Butterworths, 1967).

present is, of course, not a suitable occasion for musing about the qualitative performance of Canadian courts, save to say that Professor Weiler's recent pessimistic appraisal of the Supreme Court's record⁴ could be easily paralleled as well on the provincial level. For Allen Linden this poses somewhat of a dilemma: while dedicated to the cause of national identity and therefore predisposed in favour of autochthonous "Canadian law", the quality of the material at his disposal rarely matches his own fervour. Thus there is more for him to criticize and deplore than to praise. But such, in any event, is the lot of law professors the world over.

The author's style is well-known to all his readers: lucid and breezy, more in the journalistic than the pedantic scholarly tradition. Nor can he be faulted for "hiding the ball": his own value-judgment ("ready for the plaintiff") is rarely obscured; if anything, the "other side" is sometimes given too short a shrift. But the cases are diligently collected and arranged, and unfold their story with accuracy and interest. My praise in this respect is muted by only two reservations: first, in several (though, inconsistently, not all) chapters, almost only Canadian decisions are discussed without reference to the English precedents around which these really revolve: it is a bit like describing the solar system without the sun. Secondly, there is a tendency at times merely to line up the cases, vaguely reminiscent of A.L.R. annotations. In large measure, this is no doubt symptomatic of the modern inclination to being result-oriented and suspicious of doctrinal pronouncements in judicial opinions. In part also it is aided by the deplorable style endemic in Canadian judgments of making do with conclusionary statements supported at best by a string of citations, but with few if any efforts to disclose the court's reasoning. If Australian courts tend to err in the opposite direction with often prolonged and irritating self-agonizing, there is surely a middle ground staked out by contemporary English and the better American practice.

However that may be, Professor Linden might here and there have been more forthcoming with guidance. To take as one example the vexing catena of cases dealing with the perennial Canadian problem of *violenti* and the drunk driver. It may well be that lawyers in the robing room (or on the bench) need get no closer than that it all just turns on whether the passenger's involvement was "rather extreme";⁵ but Mr. Gordon at least has shown⁶ that it is possible to arrive at an intellectually more satisfying rationale. On much the same lines, I must confess disappointment over such non-principled "trailing-off" as that "the recurring cases will be sorted out gradually, but much will always depend on the good sense of judge and jury".⁷ Admittedly, this formula can count Lord Wright⁸ and Lord Denning⁹ among its sponsors, but can we

⁴ *Groping Towards a Canadian Tort Law: The Role of the Supreme Court of Canada* (1971), 21 U. of T. L. J. 267.

⁵ A. Linden, *Canadian Negligence Law* (Toronto: Butterworths, 1972) at 373.

⁶ (1966), 82 L.W.R. 62.

⁷ *Supra*, note 5 at 322.

⁸ *Bourhill v. Young*, [1943] A.C. 93 at 110.

⁹ *King v. Phillips*, [1953] 1 Q.B. 429 at 442; *S.C.M. v. Whittall*, [1970] 3 W.L.R. 694 at 702.

professors really ask for the same indulgence that we are prepared to extend to our (favourite) judges?

But all this is just minor carping. This is a fine book which I have been all the happier to review, in gratitude for the help I am confidently anticipating from it in the future.

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