

The Canadian Law of Toxic Torts, by Lynda Collins & Heather Mcleod-Kilmurray

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Book Review

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Abstract

Book review of The Canadian Law of Toxic Torts.

Keywords

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**THE CANADIAN LAW OF TOXIC TORTS,
by Lynda Collins & Heather McLeod-
Kilmurray¹**

MEINHARD DOELLE*

THERE ARE MANY BOOKS on Canadian tort law for academics, students, and practitioners. Somewhat surprisingly, this book by Lynda Collins and Heather McLeod-Kilmurray is the first to focus on tort law exclusively through the lens of the environment and human health. As such, it is long overdue. With the rush in the 1980s to pass legislation to address environmental issues, tort law gradually stepped into the background of environmental law. However, as the inadequacy of environmental legislation has become more apparent in recent years, advocates for the protection of the environment and human health are returning to the common law, including tort law.²

The Canadian Law of Toxic Torts is in many ways an exploration of not just tort law, but the relationship between environmental legislation and the common law, and the resulting gaps, overlaps, areas of uncertainty, and confusion. Environmental regulations in Canada have been largely based on either an explicit or an implicit balancing of the environmental harms, risks, and uncertainties

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1. (Toronto: Thomson Reuters Canada, 2014) 305 pages.
 2. See *e.g.* Richard Lord et al, eds, *Climate Change Liability: Transnational Law and Practice* (Cambridge, UK: Cambridge University Press, 2012).

associated with human activities against their social and economic benefits. The predominance of this balancing approach to environmental regulation poses some fundamental questions for tort law: What role should and can tort law play to support, counter, or refine the distribution of risk and harm associated with this approach to environmental regulation? When does and should tort law apply in situations where the regulatory approach is implicitly asking individuals to bear a personal burden (usually in the form of impacts or risks to human health or property, in the name of net social and economic benefits at a societal level)? When does the personal burden warrant compensation under tort law? When does it warrant prohibiting the activity?

This paradigm of environmental regulation, if thoroughly and consistently implemented, might prompt one to look at controlling the environmental impact of human activities as a two-step process. Step One would be to ensure that a given human activity results in net benefits at a societal level in the face of environmental impacts, risks, and uncertainties. An effective regulatory system would only approve activities that result in net societal benefits and would seek to maximize those net benefits. Step Two would be to ensure a fair distribution of the benefits, impacts, risks, and uncertainties of those activities that offer a net benefit to society. Regulation, under this approach, might be viewed as the primary vehicle for ensuring and maximizing net benefits, but it is less clear how the responsibility for ensuring a fair distribution of benefits, impacts, risks, and uncertainties is shared between regulations and tort law.

As the book explores in some detail, both regulation and tort law can have a role to play in ensuring a fair distribution.³ The advantage of tort law over regulation is its greater ability to react to specific circumstances. The disadvantages largely relate to the cost of litigation and related access to justice issues. What is clear is that regulatory approaches in Canada often have not adequately addressed the distribution issue. One of the book's overall messages is that the current role of tort law in this respect is unclear and, even if it has a role to play in ensuring a fair distribution when regulations fail to do so, much is falling through the cracks.

In short, as the authors argue persuasively, tort law could play a more significant and effective role in ensuring a fair distribution of benefits, impacts, risks, and uncertainties of activities that have net societal benefits.⁴ It could also serve as a safeguard against activities (either authorized by regulations or not regulated) that ask individuals to bear too heavy a personal burden. Finally, there will be circumstances where regulatory systems do not adequately protect

3. Collins & McLeod-Kilmurray, *supra* note 1 at 6-7, 159-61, 224-29.

4. *Ibid* at 259-60, 278, 296-97.

individuals against harm caused by failure to comply with regulations. This is a third potential area in which tort law may be called upon to fill gaps left by the regulatory system.

The book is well structured, with chapters on property torts, personal torts, negligence, causation, defences, and remedies forming its heart. The subject matter of toxic torts is introduced with a historical account of the role of tort law in environmental protection. The authors make the point that tort law had an important role to play in environmental protection long before environmental legislation took centre stage. The book then provides an important introduction to the gap between scientific and legal approaches to facts, evidence, and uncertainty. The challenges associated with these different perspectives on what is known about the environmental and human health consequences of human activities, of course, go well beyond tort law into regulatory and environmental assessment processes, making this chapter of the book important reading for anyone interested in environmental law. The chapter on the science of toxic torts primarily sets the stage for the later discussion of the challenges associated with toxic tort cases, particularly with respect to causation.

The coverage of property torts illustrates one of the key strengths of the book. The authors offer a very accessible and insightful overview of public nuisance, private nuisance, trespass, *Rylands v Fletcher*, and riparian rights.⁵ The sections on the first four of these, in particular, offer a combination of up-to-date analysis of recent developments along with careful consideration of how these torts apply in an environmental context. The result is a clear picture of the potential for each of these torts to address unfairness in the distribution of harm to human health and the environment, and a thoughtful assessment of the key challenges associated with the application of each tort in an environmental context.

For public nuisance, the authors identify the special injury rule as the key limitation to its more effective use.⁶ For private nuisance, the key challenge identified is the need to prove that the contamination of the plaintiff's property is causing actual harm in the form of human health impacts or material property damage.⁷ For trespass, the main limitation identified is the directness requirement. The rule in *Rylands v Fletcher* is identified to be in a state of uncertainty with respect to a number of its key elements, including the meaning of "non-natural

5. The discussion of riparian rights is a bit Ontario-centric, in that it fails to note that this common law right has been extinguished or significantly restricted by statute in most other jurisdictions in Canada. See *e.g. ibid* at 79-80, ch 4.

6. *Ibid* at 53-56.

7. *Ibid* at 56-57.

use,”⁸ and the application of the tort to intentional releases, often approved under regulations.⁹ Not discussed in any depth is the issue of foreseeability of harm, another area of uncertainty.

The analysis on the intentional interference with the person similarly offers a thorough and thought-provoking assessment of the torts of battery, assault, and intentional infliction of nervous shock. Perhaps the most provocative perspective introduced in this chapter is the claim that involuntary exposure to a substance of unknown risk or harm to humans constitutes an involuntary experiment on the person so exposed.

With respect to negligence, the authors draw an interesting comparison between an established area of negligence law—consumer protection—and the much less developed case law on negligent exposure to chemical substances. Perhaps worthy of separate coverage in the chapter would have been the area of regulatory negligence. Major hurdles to the application of negligence law are identified as the standard of care and the issue of causation. The latter is covered in a separate chapter and reflects the broader implication of the causation challenge beyond negligence. This chapter is largely based on the considerable previous work of the authors, and covers a broad range of challenges and potential solutions to the causation issue, including the evolution of the “but-for” test in Canada, and various proposals for reform, both through the judiciary and through legislative changes.

The book provides a good general overview of defences and the policy context within which they are utilized. Defences covered include statutory immunity, statutory authority, contributory negligence, voluntary assumption of risk, consent, necessity, act of god or a third party, and applicable limitation periods. Of these, the defence of statutory authority is covered in most detail, as the authors explore in depth its relationship to other defences and consider its application to selected individual torts, including nuisance, negligence, and *Rylands v Fletcher*.

The book offers a thorough treatment of available remedies.¹⁰ It covers various forms of damages, interlocutory and permanent injunctions, and the lesser-known waiver of tort remedy. Given the central importance of remedies, a tort-by-tort discussion of remedies would have been helpful here. A more detailed discussion of how the availability of various possible remedies affects the ability of a given tort to contribute to the respective goals of ensuring net benefits

8. *Ibid* at 74.

9. *Ibid* at 74-79.

10. *Ibid* at 74-79.

and ensuring a fair distribution would also have enhanced this chapter. The role of various forms of damages, for example, in either discouraging activities that do not offer net benefits or ensuring a fair distribution, would have been helpful. A tort-by-tort consideration of these issues would have given the reader a more complete picture of the contribution various torts can be expected to make to the protection of human health and the environment.

The Canadian Law of Toxic Torts is generally very well researched. It is a wonderful source of little-known tort cases from Canada and common law jurisdictions around the world. It introduces students and practitioners alike to lesser-known tort law concepts such as waiver of tort (an alternative basis for determining the appropriate remedy), interference with *profits à prendre*, and conversion. As with any project of this magnitude, a few notable limitations did creep into the final version. For example, the discussion of the review process for the domestic substances list under the *Canadian Environmental Protection Act, 1999*¹¹ is somewhat dated. In addition, the discussion on adaptation to climate change¹² does not recognize the emergence of a significant body of case law on adaptation liability, particularly in the context of flooding damage and municipal infrastructure.¹³

This assessment of tort law through an environmental lens, as demonstrated by the authors, includes many innovative approaches and ideas on how to move tort law forward to become a more effective tool for environmental protection and the protection of human health and property from the harmful effects of toxic substances. It will serve as a wonderful source of ideas for anyone looking for inspiration to pursue toxic tort litigation. Particularly compelling, for example, is the analogy of looking at the exposure of people to a substance with unknown effects as an uncontrolled experiment without consent.¹⁴ Similarly forceful is the analysis of the key barriers to each of the torts becoming an effective tool in the

11. See *ibid* at 20.

12. See *ibid*, ch 13.

13. Jon Kusler, "Government Liability and Climate Change: Selected Legal Issues Related to Flood Hazards" The Association of State Wetland Managers (7 October 2014), online: <www.aswm.org/pdf_lib/government_liability_and_climate_change_kusler.pdf>; Laura L Zizzo, Travis Allan & Alexandra Kocherga, Stormwater Management in Ontario: Legal Issues in a Changing Climate (April 2014), online: Zizzo Allan Professional Corporation <www.creditvalleyca.ca/wp-content/uploads/2014/05/Stormwater-Management-in-Ontario_Legal-Issues-in-a-Changing-Climate_2014.04.29.pdf>.

14. Collins & McLeod-Kilmurray, *supra* note 1 at 87.

environmental field, and arguments for how and why these barriers should and can be removed by courts.¹⁵

In short, the book is an invaluable guide to toxic torts for students, practitioners, and academics alike. In particular, it is essential reading for anyone confronted with a potential environmental tort claim and anyone interested in reforming tort law to make it a more effective tool for protecting humans and the natural environment from the harmful effects of toxic substances.

15. See *e.g. ibid*, chs 4-6.