
Professor Linden is unusual in the world of the Canadian common law school: he has just published a legal textbook! To lawyers in many other countries this fact may seem unworthy of exclamation, but doubtless Canadians in the profession must be astonished to discover a domestically written and published "law book" on a basic subject that in form is neither casebook, statutory annotation nor a series of diffuse essays of widely varying quality and subject matter, and that has been written by a full-time professor of law. Dean Arthurs 1 is not the first to comment on the paucity of modern Canadian law books on fundamental subjects, but I doubt that all his attempts at rationalization in terms of the Reichian model are capable of throwing up a smoke-screen thick enough to blind many of us to what may be generously described as a certain lack of commitment by too many of our professors of law to serious, long-range legal scholarship. As an erstwhile full-time law teacher who wrote only legal articles and essays I must of course note here a mea culpa. It may now be hoped, however, that Professor Linden will amongst his colleagues become a precursor of this grander and more enduring sort of scholarship, and that in future he will have more success in this role than the very few who have preceded him. But what of the book itself under review?

At the outset let it be understood that Linden's book enjoys a great many positive and welcome features. It places its subject within a well-known and yet sufficiently comprehensive and flexible framework to be of immediate value to student and practitioner alike. In fact, the book, perhaps too strenuously as we shall later see, tries to be all things to all people. However, in offering up as many Canadian cases as it does, and leading British and Australian ones as well, while simultaneously discussing the theoretical and social underpinnings of his subject, the author is obviously keeping one eye fixed on the multi-faceted market to which his work must appeal. Certainly, the practitioner should find here a great deal to his satisfaction. The concepts and principles at work are usually well described and explained and Canadian cases are not only footnoted but very often discussed or at least given skeleton treatment in the text itself. This may not remove the need for resorting to other secondary research materials such as the Canadian Abridgement, but it should provide on many occasions welcome relief from the frustrations often attendant upon reliance on digests of this sort. Then too, for the person interested in deeper and more thoughtful study there is a goodly provision of references to many excellent articles and books, as well as to what may at times seem a surfeit of American jurisprudence.

Of course, what a book of this kind does risk, if I may be permitted to use one of the favourite words of the negligence litany, is falling between two

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stools. There may be so much space devoted to expatiation upon concepts, models, theory and proposals for reform that both practitioner and student alike will feel more at home with familiar digests and established non-Canadian works on torts and negligence. On the other hand, case law may so predominate that the text becomes an unreadable and incomprehensible imbroglio and the carefully planned framework finds itself crushed beneath the weight of it all. I think it fair to conclude that in these waters Linden has steered his craft well for the most part. Even where one or the other does seem to verge on the oppressive, the reader is usually able to skip over those portions without losing the thread being pursued at the moment.

I do believe, however, that the very nature of the subject which Professor Linden has undertaken to weave “into a coherent whole” has presented him with problems that he has attempted, unfortunately, to avoid or ignore. This is a situation that probably flows from the very human desire to confine a subject within set and certain boundaries. Occasionally there is an admission that this is really not too practicable when suddenly, for example, one comes upon a discussion of consent to a battery both in the midst of a lengthy discourse upon the doctor’s standard of care and while explaining volenti non fit injuria. It may be stated in defence that this situational or more functional approach should allow, if not require, reference to all the various ways in which tort law deals with actions against doctors and sports participants, and yet Linden does not do so nor has he set out to do so.

The reader may be slightly unnerved as well to find seven pages devoted to the netherworld of trespass and negligence when the book virtually ignores these same marches in relation to nuisance, Rylands v. Fletcher and occupier’s liability. Millner, polemical though he often be, does recognize that the rivulets of negligence that have meandered into these other areas must be analyzed and investigated if only to demonstrate the evolutionary process at work, one that has generally favoured negligence. In a work that claims to be devoted to a study of this somewhat mercurial subject there seems little excuse for failing to deal with its general impact on other closely related areas of the law such as nuisance and Rylands v. Fletcher, occupier’s liability and animals, for example. These omissions seem particularly strange in view of the space occasionally devoted to the relationships between

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4 Id. at 50.
5 Id. at 379-80.
6 Id. at 200-06.
7 M. Millner, Negligence in Modern Law (1967).
negligence and trespass, 10 criminal law 11 and contract. 12 There may be good reason for suspecting that the undue emphasis placed by the book on products liability and the automobile 13 has diverted its author's attentions from some of the general implications and developments he might otherwise have noted.

Linden leaves no doubt that negligence will continue to play an important role in serving the needs of society and its citizens. Not only does he spend a few pages in his introductory chapter 14 on this topic but dwells at great length in his last chapter 15 on the great benefits which negligence, and tort law in general I would assume, offer us. And yet ironies fairly leap from the pages! One chapter 16 seems free of doubt that motor vehicle accidents are generally badly served by negligence law, and yet so much of negligence law as it has evolved and been discussed by Linden depends on automobile jurisprudence. Linden goes further, however, and almost enters the world of parody in deciding that forty-two pages, 17 or almost ten per cent of the book's legal analysis, should be devoted to the manner in which the courts and negligence law have handled, not motor vehicle legislation in general, but the very specific requirements and prohibitions that are to be found in such enactments.

There is of course the further irony mentioned above that concerned as the author apparently is about the future of negligence law he proves unadventurous in pursuing its future applications. In addition to those areas referred to earlier one might have expected more rigour and searching analysis to be applied to the possible erosion of contract law at the hands of negligence. To refer to the interplay in the context of products liability, is, in light of the stringent conditions imposed by sale of goods acts, neither novel nor demanding. However, other situations, in particular those areas dealing with the provision of services and negligent misstatements where statutes have less play, do raise questions with respect to the contract-negligence penumbra about which the reader might have anticipated some words of wisdom. Another area that Linden ignores is administrative law. One might wish to make little or nothing of this apparently immaterial omission but for the fact that he claims that tort law, and presumably negligence law in particular, "is an ombudsman." 18 It is true that reference is made 19 to the prophylactic consequences tort law may have for the citizen and his relationships with the police, but, as amazing as it may seem, nothing is said of how

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10 See supra note 5.
11 Supra note 2, at chs. 4 and 6B, and at 480-82.
12 Id. at 384-96, 442-48.
13 Chapters 10 and 11 and a goodly part of chapter 4 devoted to these subjects occupy more than 125 pages or 25% of the book's text.
14 Supra note 2, at 2-4.
15 Id. at 468-05.
16 Id. ch. 11.
17 Id. at 108-50.
18 Id. at 493.
19 Id. at 494-96.
tort law performs the function of ombudsman in the very area of the law for
which this official's work is most famous. Appeals and judicial review may
be thought sufficiently curative of the unlawful acts and decisions of ad-
ministrative bodies, but this is hardly borne out, the recent Welbridge case
notwithstanding, by the results of recent negligence actions in relation to pub-
lic acts and administrative decision-making.

If the foregoing represents unfortunate examples of "underkill" in the
book, these, it might be said, are counter-balanced by sections of unnecessary
proximity and discussion. One already referred to contains page after page
of description of how the courts in negligence actions have dealt with infringe-
ment by the parties of highway legislation in relation to speeding, lights,
brakes, tires and the like. Certainly this is not irrelevant to the lawyer
wishing to research his own particular fact situation, but it does mar and
distort an otherwise useful discussion of the impact of legislation on standard
care. Surely, Linden did not intend his work to replace the digests and
specialized books or handbooks on this subject, nor I am sure is a text of
this sort meant to substitute for that degree of detail which one might find in
an article or treatise. The same fault may be assigned to the discussion of
custom as it applies to standard of care. Nobody doubts the importance of
this matter to an assessment of the standard of care in a particular case,
but to devote an entire chapter to it alone, in view of the numerous articles
on it to which the author is able to draw our attention and the scope of
the book itself, seems an almost supererogatory effort. One might also ask for
contributions of comparable length on the relationship between negligence
and such matters as subsequent repairs, past relevant acts of one of the
parties and statistical evidence. Why as well must seven pages be given
over to the not particularly startling conclusion of equally divided negligence
accepted by Leaman v. Red?

Occasionally too one is led to wonder about the placing of particular
subjects in the book. Tort lawyers have shown some concern for the inno-
cent plaintiff who has been unable to identify which of two or more poten-
tially negligent defendants are responsible. Linden refers to this under res ipsa loquitur and yet he gives no functional or analytical reason for
discussing the same problem confronting a plaintiff many pages later.

20 Welbridge Holdings Ltd. v. Metropolitan Corp. of Greater Winnipeg, [1971]
21 See e.g., Molot, Tort Remedies Against Administrative Tribunals for Economic
Loss in Special Lectures of Law Society of Upper Canada 413 (1973); Halsbury
180-195 (4th ed.).
22 Supra note 2, at 115-50.
23 In fact, he refers to the major ones at n. 12 of chapter 11.
24 See his references in n. 1 of chapter 4.
25 E.g., MacKay v. Saskatoon, 26 D.L.R.2d 506 (Sask. 1960); C.P.R. v. Calgary,
29 Supra note 2, at 192-23.
30 Id. at 257-60.
More unfortunate still is the treatment given to statutes. The opening pages of chapter 4 give examples of statutes expressly imposing "civil liability" and there is no doubt that provisions of this sort are mentioned as subjecting persons to a statutory duty of care. As the discussion proceeds, references continue to "tort liability for breach of criminal statutes" and the like and it is only by noting that this chapter appears amongst those devoted to the issue of standard of care and by reading further that one realizes a distinction must be drawn between the impact of statute on standard of care and on duty of care questions. Although because of his own familiarity with this particular subject one may safely assume that Professor Linden is well aware of this distinction, the chapter remains curiously awash with these muddied waters and despite occasional references to the distinction some confusion may well arise in the mind of the untutored reader as to what Linden really has intended to survey here. This situation may have been further confounded by the author's consideration of the "leading case in Canada" of Ostash v. Sonnenberg and his quotation from the judgment of Mr. Chief Justice Smith who speaks of a statute and its regulations as both imposing "the duty of care" and providing "all the essentials of negligence." A prey to what is far too common to the book as a whole, a descriptive report rather than an analytical discussion of case law, not suprisingly Linden chooses to offer no explanation about this or about the relationship between statutory duty of care or tort, so well known in Britain, and his own later discussion of what may be called the implied duty of care based on statute. It is all the more perplexing when he can refer at length to cases relying on federal statutes such as the Canada Shipping Act and the Railway Act, but make only passing reference to others like Direct Lumber Co. Ltd. v. Western Plywood Co. One cannot help but be dismayed by this failure, if not refusal, to seize the helm and try to steer a course for the reader.

Professor Linden's interest in the partnership between tort law and criminal law is well evidenced in these sections of his book on the influence of penal legislation on the law of negligence. And yet, there appears to be a deliberate reluctance to hammer the point home. The defences of contributory negligence and volenti non fit injuria are discussed but that of ex turpi causa is carefully omitted. Cases like Rondos v. Wawrin are mentioned in the text but, amazingly, not with respect to this latter defence. Why, in view of the growing jurisprudence on this subject as well as Lin-

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21 Id. at 83.
22 Id. at 85.
23 Id. e.g., at 90-91, 99 and 105.
25 Id. at 323-24.
26 Supra note 2, at 230-32.
27 [1962] Sup. Ct. 646. One may note here that the constitutional aspects of this area are not even mentioned, strange behaviour indeed in one of us who spent at least a year of study in the United States.
den's own concern for the interplay between criminal law and negligence, he should have chosen completely to ignore this matter is a mystery and so obvious an omission in a book of such scope as to be almost bewildering. The influence of criminal law might also have led Linden to make some mention of punitive damages. It is true that he has not set out to write about the measure of damages and that ordinarily punitive damages are associated with other torts than that of negligence, but it is nonetheless interesting that though not awarding them two Canadian courts at least \(^4^0\) have considered their applicability in a negligence action.

A few other points are worthy of note here. For example, do not emergency situations affect standard of care and should not the author have made mention of this and the Alberta Emergency Medical Aid Act in his earlier discussion of professional malpractice? \(^4^1\) Why are the posted-notice cases ignored in the section dealing with volenti? \(^4^2\) Why can complete recovery by a consumer be denied to him only on the basis of the defence of volenti \(^4^3\) and why cannot he instead be considered to be 100\% contributorily negligent? It is Linden's failure or refusal to consider this ultimate use of apportionment legislation that makes his criticisms of the last-clear-chance doctrine and the appropriateness in this area of the rationale of causation weaker than need be. \(^4^4\) And, more whimsically perhaps, there is Linden's strange suggestion that, in effect, the proper law of the tort in situations of products liability should be that of the jurisdiction where the article was manufactured or where the manufacturer's head office happens to be. \(^4^5\) Whether this is a plea for a "continental tort policy" or a grander one on behalf of a unified world law may have to await elucidation in the second edition.

Having said all this I would not want the reader to dismiss the book as possessed of little value. Lawyers are wont to differ and many of the criticisms presented above were intended to be constructive and, perhaps as well, to express a philosophy and approach which Professor Linden consciously considered and rejected while writing his book. None of this is intended to detract from the general comprehensiveness of his coverage and references, nor does it have anything but praise for the editing, the indices and the tables which doubtless will make the book an invaluable research tool.

More specifically, for example, his chapter on standard of care at the very outset \(^4^6\) discusses the important factors that likely influence courts in

\(^4^2\) Supra note 2, at 47.
\(^4^4\) Supra note 2, at 415 (n. 257).
\(^4^5\) Id. at 350-55. See also id. at 294-97.
\(^4^6\) Id. at 398-99, 425.
\(^4^7\) Id. at 8-17.
their measuring of risk and the required conduct of the reasonable man in the circumstances of a particular case. It is these factors that lend the greatest air of reality to this metaphysical creature and open doors to a resourceful counsel wishing to aduce material and relevant evidence. The special problems attendant upon the youthful, mentally deranged, professional, specially qualified and handicapped defendant are also given the space they deserve. It is only unfortunate that because of the textbook's limited scope there is never discussed the next question of what legal consequences flow against the person hiring an expert, competent or otherwise, who happens to cause damage through his negligence. But vicarious liability and the independent contractor are large enough topics in themselves and could not be adequately dealt with here or in the book's discussion of duty and dangerous chattels and activities. Certainly devoting almost half the text's discussion of general negligence law to standard of care questions is more than reasonable in view of the importance of this issue to cases where liability is in dispute.

In spite of earlier adverse comments on Linden's attention to the impact of statutes on negligence law, surely nobody at this date would dispute their increasing importance. It may be a grave flaw in many basic courses on the law of torts given during first year so to emphasize the judicial process and case-law technique that students remain too little acquainted with the legislative Leviathan constantly at work. The many pages Linden spends on the interplay of the two is assuredly a recognition of realities. This recognition is further amply demonstrated in his discussion not only of how legislation affects the torts solution to automobile cases but as well of how statute is gradually and almost inexorably superseding that solution.

All in all, and despite its high price, this book should find its rightful place in the library of every Canadian legal practitioner. After Reid's Administrative Law and Practice, Linden has restored my faith in Butterworth's Canadian Legal Text Series.

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47 Id. at 115-50, 230-39, 437-51.
48 Id. at 451-467. It is perhaps unfortunate that Professor Linden did not spend more time on similar schemes proposed to exclude tort law not only from the area of damage caused by motor vehicles in particular but from all or most personal injury cases in general.
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