Documentary Evidence in Canada. By J.D. EWART, in association with MICHAEL LOMER and JEFF CASEY. Toronto: Carswell Legal Publications. 1984. Pp. xxxvii, 294 and Appendix. ($40.00)

The authors have produced the first book-length discussion in Canada of this important practical subject. It is a major contribution to the relatively sparse Canadian literature in the area and is all the more so for being truly national in scope. A significant addition to any lawyer's library, it will be particularly welcomed by counsel who must regularly deal with the intricate and neglected issues that arise from the use of documents as evidence in litigation.

The topic of documentary evidence has been interpreted quite broadly. As one would expect, the discussion includes business and banking records, public, government and judicial documents. But the book also includes chapters on such diverse and significant subjects as the doctrine relating to documents found in a person's possession, the use of documents to "refresh the memory" of witnesses and the use of provincial evidence laws in federal proceedings. While this breadth and diversity are achieved only at some cost in terms of overall coherence, they result in the book being of greater usefulness than would have been the case had it been confined to the admissibility and means of proof of the various categories of documents.

From the point of view of presentation, this volume is entirely satisfactory. The text is clearly written, well subdivided for ease of reference and admirably documented. Welcome additions include tables of cases and statutes, a chart showing the corresponding provisions of the statutes of the various jurisdictions and an eighty-two page appendix setting out the relevant legislation and the Uniform Law Conference's draft Uniform Evidence Act. The book is well indexed and clearly printed.

The first test of a book is whether it meets the objectives the authors set for themselves in writing it. In this case, the reviewer's task of applying the test is simplified by the authors' clear statement of their

purposes. They set out to produce both a research tool and a reference source for use in the courtroom:[1]

> The discussion in this book of each doctrine is intended to be sufficiently comprehensive to be of value to those who seek to understand fully the details, the strengths, the weaknesses, and the possible future development of the particular legal rule, while at the same time being sufficiently well organized and concise to be of assistance when time does not permit an exhaustive analysis.

Beyond doubt, the organization and subject matter of the book make it a useful research tool for practitioners. Its completeness makes it an obvious starting point for any further work in the area and its detailed subdivision and thorough indexing make it possible to find the relevant discussion quickly. Moreover, the work is a good deal more than a concatenation of well-crafted case summaries. There are several sections setting out historical material which, as one so often finds in the law of evidence, makes the present law understandable, if not always defensible. Citation of English and American cases and treatises provides a useful counterpoint to the Canadian material as well as welcome sign posts when the Canadian law appears unsettled. Particularly valuable are the authors' treatment of section 30 of the Canada Evidence Act,[2] the use of copies of documents, the means of proof of a criminal record and the use of documents for the purpose of refreshing memory.

But while the authors' objectives are, in large part, met, the text, even when judged by that standard, is not without flaws. The greatest is a tendency to accept uncritically doctrinal statements without attempting to test them against fundamental principles. Two examples will illustrate the point. The authors write that two fundamental principles are at the root of most exceptions to the hearsay rule: necessity and the existence of some circumstantial guarantee of trustworthiness. They go on:[3]

> Of these two fundamental standards, the second is by far the more compelling; a court can feel relatively comfortable in breaking new ground if it has been satisfied that the circumstances of the document's creation provide an adequate substitute for the traditional safeguard of cross-examination.

The passage, taken on its own, leads one to suspect that the authors are too ready to accept this rationalization of the cases when, in fact the cases have not been very faithful to what is termed the "two fundamental principles". Some of the questions that are glossed over include the following. To what extent do existing hearsay exceptions rely on convincing substitutes for the oath and cross-examination? Is it not true that several hearsay exceptions are preoccupied with the testimonial factor of the declarant's sincerity and fail to take account of very great dangers of misperception or inappropriate use of language? Could it not be argued

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[1] P.2.

[2] R.S.C. 1970, c. E-10.

[3] P. 14.

that necessity is a major reason for the admission of hearsay evidence? This review is not the place to pursue these issues. But a text on any aspect of evidence law closely related to the hearsay rule is, or should have been.

The suspicion of shallow analysis is unfortunately confirmed, for example, by the authors' treatment of *Conley* v. *Conley*.[4] The Ontario Court of Appeal admitted, under the common law business records exception to the hearsay rule, the notes of a private investigator hired by the petitioner in a divorce action to make observations of the respondent spouse and the co-respondent. It seems difficult to imagine a case in which there could be fewer circumstantial guarantees of the trustworthiness of what was recorded—one of the "fundamental standards" justifying admissibility. But the case escapes without critical comment, even though it is referred to five times in the text. A decision such as this surely calls for either some revision of the "two basic principles" to which the authors repeatedly refer or some criticism of the decision itself. But neither is forthcoming. The result is that the reader is left to fend for himself in the midst of a confrontation between principle and authority.

Another example of this type of flaw may be drawn from the authors' discussion of whether opinion evidence may be admitted in documents otherwise falling within the business records exception.[5] That discussion overlooks at least two fundamental and difficult propositions, the first being that not all "opinion" evidence is excluded even though not given by "an expert"[6] and the second that there is no clear line between statements of fact and statements of opinion.[7] In the absence of any mention of these matters, it is difficult to take much of value from the authors' discussion of what for them is the main issue. The fault appears to be an overreadiness to accept the existence of legal rules, in this case the opinion rule, without probing their content or assessing their significance in light of the particular subject under discussion.

This tendency not to probe deeply enough reduces the extent to which the book will be of value to those, as the authors put it, "who seek to understand fully" the various subjects canvassed. It may be that this objective was difficult to achieve in light of the other goal of producing a useful courtroom reference book. But, whatever the reasons for it, the noted deficiency is a serious and unfortunate one.

So much for my assessment conducted according to the objectives the authors' set for themselves. I turn now to two brief remarks about the

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[4] (1976), 70 D.L.R. (2d) 352, [1968] 2 O.R. 677 (Ont. C.A.).

[5] Pp. 65-67.

[6] See *Gratt* v. *The Queen*, [1982] 2 S.C.R. 819, (1982), 144 D.L.R. (3d) 267.

[7] *Gratt* v. *The Queen*, *ibid.*, at pp. 835-836 (S.C.C.), 281 (D.L.R.), per Dickson J.; and see S. Schiff, Evidence in the Litigation Process (2d ed., 1983), pp. 451-453 and R.J. Delisle, Evidence Principles and Problems (1984), pp. 268-274.

endeavour which they chose to undertake. The first is simply that it is unfortunate that the approach is not somewhat more theoretical, in that it could usefully assess the case law, which is so thoroughly researched and expounded, in the light of more fundamental principles of evidence law and the adversary process. Such assessment would have provided a sounder basis for future development of the law than is to be found in this book as written. The second comment is that the work lacks unity in that there appears to be no unifying theme and no coherent set of principles helping to knit it together. It does not form a satisfactorily integrated whole.

These criticisms notwithstanding, Documentary Evidence in Canada is a workmanlike contribution to a much neglected area of the literature and will be welcomed with enthusiasm by those engaged in offering, or objecting to, documentary evidence in the courts. It also provides a firm foundation for those who would respond to the authors' challenge "to improve upon these initial offerings".[8]

T.A. CROMWELL*

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Consumers and the Law, Second Edition. By ROSS CRANSTON. London: Weidenfeld and Nicolson. 1984. Pp. xli, 503. (£22.50 bound, £10.95 paperback).

Professor Ross Cranston of the Australian National University has recently published the second edition of his 1977 book on Consumers and the Law, one of twenty books in the Law in Context series published in England by Weidenfeld and Nicholson. While I am not at all certain of the value of the book to many of its potential audiences, it represents a refreshing change from the typical narrowly focused legal text.

The substance and format of the book are similar to the first edition. Like the other books in the Law in Context series, it attempts to relate the law (i.e. doctrinal and statutory substantive and procedural rules and principles) to the broader social economic and political reality within which the law operates. That object is certainly met to a very considerable degree. However, the book has its weaknesses. Cranston fulfils his interdisciplinary objectives insofar as he makes frequent use of empirical data and case studies to support his arguments and conclusions. But, these data are often developed in special social and national contexts, and are used to justify conclusions far broader than the data would support. More

[8] P. 2.

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importantly, on numerous occasions the author makes statements of fact which he uses to develop his position while relying on nothing more than his perception of reality. I would prefer consistency, or at least an explanation for the omission of the data, and the reason for his willingness to make the point in any event, and without foundation.

This oversight is a direct result of Cranston's multi-disciplinary, multi-national perspective on an incredible range of topics which include the relationship of consumer protection law to the economic recession, the export of hazardous products to developing nations, collective organization, competition policy, self-regulation, standard form contracts, exclusion clauses, judicial and legislative control of contract terms, contract liability for dangerous and inadequate goods and services, tort liability for dangerous and inadequate goods and services, transfer of ownership and registration regimes. . . . I could go on, but I have only briefly outlined the subject-matter content of the first third of the book. The scope of the book is admirable, and is certainly necessary to a full appreciation of this particular social institution. Yet an audience made up of economists, psychologists, public policy analysts, sociologists, political scientists and lawyers will perceive that the information and analysis from their own discipline, even if accurate, is somewhat superficial. They may rightfully think that the analyses of the others' disciplines are no different. I think that the inter-disciplinary approach is an extraordinarily valuable one if the reader is intellectually curious and is seeking a fuller understanding of a particular social institution or phenomenon. But it is best carried out when it is a cross-disciplinary perspective, is limited to a more narrowly defined topic and is the product of a collaborative effort between scholars in separate disciplines. The author may simply have tried to do too much.

Certainly, he might have sought out a Canadian editor, if only to ensure that Supreme Court of Canada decisions such as *Naken* v. *General Motors of Canada*[1] are noted when they overrule appellate decisions which are discussed at length. Moreover, if an author states that his text refers "frequently" to developments in Canada, he should ensure that statutory references are current, and coverage is minimally complete.[2] A Canadian lawyer might well think he has acquired a defective consumer product.

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[1] Cranston cites the Court of Appeal decision in 1979 ((1979), 92 D.L.R. (3d) 100, 21 O.R. (2d) 780), and while he does not tell us the date at which the law is presented, the publication date of 1984 suggests that the Supreme Court of Canada reversal of the Court of Appeal handed down on February 8, 1983, and reported at (1983); 144 D.L.R. (3d) 485 could have been discovered. Certainly, the granting of leave to appeal ought to have been noted; see [1979] 1 S.C.R. viii.

[2] For example, no mention is made of the Saskatchewan and New Brunswick legislation (Consumer Product Warranty and Liability Act, 1978 S.N.B., C-18.1, as amended; Consumer Products Warranties Act, R.S.S. 1978, c. 30) which respectively impose strict liability on manufacturers of defective consumer products. While reference is made to the

But this criticism may very well miss the point. I think that Cranston is not writing for lawyers, Canadian or otherwise, who want information to assist them in predicting what judges will do. He admits that very few lawyers will practice "consumer law" on anything more than an ad hoc basis, and legal aid subsidization of consumer dispute resolution (outside the housing and welfare areas) has traditionally been limited. The audience which will gain the most from this book will be lawyers who are familiar with the legal definition of a particular issue, and who will pick up the book in order to explore that topic in a more sophisticated way. Cranston admits at the outset that the book is not descriptive, and states that it is his intention to demonstrate that regulatory measures are better control devices than self-regulation or private law enforcement. The book does not consist of a series of detailed statements of the law. Rather, it adopts the following format: a *brief* outline of the legal issues, and the way in which they have been resolved; then a critical analysis of the merits or demerits of the particular solution; and finally, recommendations for reform. Thus, a Canadian will find the book enlightening if he is curious about consumer protection policy and law in Australia and England; and while the detailed statutory developments and case law may be decidedly different from jurisdiction to jurisdiction, the issues with which lawyers, judges and bureaucrats must deal are virtually identical. The discussion of fundamental issues will be directly relevant to Canadian readers, and in most cases the technical legal errors can be forgiven.

But Cranston's theoretical perspective is where the book suffers its most serious shortcomings. His arguments about the desirability of a particular solution are to a large degree traditional lawyers' arguments —focusing on blameworthiness, causation, moral culpability, liability based on rights and obligations, and the like. The value of a book such as this lies in its inter-disciplinary perspective, and here Cranston, perhaps because he tried to write alone, is at his weakest. For example, his analysis of strict products liability ignores the wealth of literature on accident theory, and economic analysis of products liability. His discussion of advertising contains little more than trite platitudes about brainwashing, and fails to review the considerable psychological literature on consumer perception of information. And the discussion of criminal law "regulation" of products liability does not include recent work by sociologists describing the possible criminality of Ford Motor Company in the context of its continued marketing of automobiles in light of the fact that several hundreds of consumers would be killed or severely injured as a result of its product design decisions.

British Columbia Trade Practice Act, R.S.B.C. 1979, c. 406 it is referred to as the Trade Practices Act 1974. In addition, while the criminal law treatment of usurious interest rates are discussed, no mention is made of section 305.1 of the Criminal Code, R.S.C. 1970, c. C-34, as amended, which establishes a 60% annual rate of interest ceiling.

Other classes of readers including economists, political scientists, public policy analysts, and sociologists may in fact benefit much more from the book than will lawyers. Certainly the discussion of the law, its complexities and difficulties, and practical implications, is developed much more fully than the economic, political, or sociological rationales and analyses. Notwithstanding the simplicity of the doctrinal legal description, those lay audiences will certainly appreciate the legal issues more fully, and may be stimulated to apply their particular skills in evaluating Professor Cranston's position, and in developing their own theories to explain the legal phenomena.

In his conclusion Professor Cranston reiterates his thesis that government controls are the "best protection" for consumers, and that private market relationships augmented by private law and self-regulation, are of minimal effect. His extensive analysis of the particular defects of those institutions supports his thesis. He is particularly astute in pointing out the costs of government regulation of private market arrangements in achieving its objectives, and is equally persuasive in pointing out the ad hoc nature of judicial law reform in light of the attitudes of the judiciary, the substantial procedural deficiencies of private law enforcement, the limited judicial remedial tools, and the incremental, interstitial methodology of private law reform. However, he expresses his solution as "government regulation" without a sophisticated analysis of the components of the reform program, and an analysis of its costs. He identifies the values which support the approach, and tells us that our concerns with agency capture and inadequacy of resource allocation are not as serious as one believes. His plea for effective consumer participation in government policy is, of course, legitimate and *perhaps* the answer to this problem. My concern lies with the generality of his remarks, and the failure to provide us with the specific details of the reform measures if we favour his general proposals, and agree with his expressions of concern with existing institutions.

On balance this book is a refreshing perspective on the institutions and methods which we have available to us to regulate the quality of goods, services and information which individuals now acquire and use. The detail and critical analysis is, in light of the scope of the book, remarkable in its accuracy and sophistication. Lawyers would be well-advised to read the book closely whether or not they participate in consumer advocacy. Their effectiveness as advisors to government and business will be improved immeasurably by a thorough understanding of the social, political and economic environment in which "legal" relationships and the law operate.

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Report on Covenants in Restraint of Trade. LAW REFORM COMMISSION OF BRITISH COLUMBIA. Victoria, B.C.: Queen's Printer for British Columbia. 1984. Pp. 76. (n.p.)

As a head of public policy covenants in restraint of trade seems rightly to be a discrete legal topic concerned with issues distinct in kind and in substance from the traditional and multitudinous categories of illegality, cast as they are in the moral mould of the late eighteenth century English squirearchy. It is hardly surprising, then, that the Law Reform Commission of British Columbia should study and publish its findings and recommendations on covenants in restraint of trade separately from its earlier Report on Illegal Transactions (1983). The Report on Covenants in Restraint of Trade is a fine one. It is extremely well-written in a spare and perhaps elegant style which never detracts nor diverts from the substantive content. It is a model of clear, precise legal prose.

The Report does not pretend to be exhaustive; indeed it would appear that the constraints within which the Commission apparently operates determined the extent and depth of the study. Absence of research resources, the unavailability of specialized knowledge and expertise in certain aspects of the topic and publication space limitations have precluded a fuller treatment.[1] However, despite these difficulties it may fairly be said that the Commission has produced an excellent little study of some current problems relating to restraint of trade.

The general rule with which the Report is concerned is stated thus: "[A] covenant in restraint of trade is unenforceable unless the restraint in issue is reasonable in the circumstances of the case".[2] The particular issue with which the Report is concerned is the effect on the parties when a covenant is broader than required to protect the reasonable and legitimate business interests of the covenantee so that it is struck down as unenforceable. The Commission dubs this the "overreaching" problem and devotes the Report primarily to its study. Of the Report's six short chapters, the first briefly introduces the issues, and the second and third chapters analyze the historical development of the notion of restraint of trade and the current law, with particular emphasis on the test of reasonableness in balancing the private and public interests at stake. Certain features of current concern are emphasized in these chapters. First, the Report contrasts the restrictive Anglo-Canadian approach to covenants with the more innovative, if controversial, American approach which permits courts to partially enforce covenants by re-writing contracts to provide for reasonable restraints. This partial enforcement rule goes well beyond the Anglo-Canadian judicial techniques of construction as to reasonableness and exercise of the "blue pencil" to create a reasonable construction. Sec-

[1] Pp. 38 and 45.

[2] P. 9.

ondly, the Report indulges in an excursion into the special problems raised by contracts which provide for vertical and horizontal restraints of trade and suggests that the application of principles developed in contracts of employment and for the sale of businesses may not be straightforward. Vertical restraints are found typically in sales agreements between parties occupying different positions in an industry, whereas horizontal restraints typically arise where parties occupying a similar position in an industry agree to regulate it in a certain manner. The latter tend to fall within the ambit of the Combines Investigation Act.[3] Thirdly, the Report reminds us that where covenants are found to be unenforceable, the present common law provides remedies to protect the covenantees' interests, including the economic torts, an action for damages for breach of contract when a covenantor solicits former customers whose goodwill he covenanted to sell, and an action for breach of fiduciary duties owed by employees and executives. Fourthly, the changing content of the reasonableness test is probed, in particular the evolution from an economic to a legalistic test in the face of the increasing adducement of expert economic evidence concerning the industry-wide impact of the agreement at issue. Judicial self-confidence in determining a reasonable balance of public and private interests is giving way to judicial retreat behind reformulations of reasonableness in terms of the liberty of the subject and the familiar protection of personal interests when faced with a barrage of economic evidence with which the judiciary is untrained to deal.

The fourth chapter abstracts from the earlier chapters possible areas for reform, while the fifth chapter contains the proposed reforms. The Commission acknowledges the need for reform of the contemporary doctrine of restraint of trade since it is difficult to discern precisely what interests the common law protects and to determine in advance whether a court will strike down a particular covenant. The Commission finds it more difficult, however, to see the way ahead. In this, it is hardly alone! Thus, it leaves the determination of restraint cases with the courts, after canvassing the possible creation of specialized tribunals. It declines to examine specific areas of economic activity with a view to making particular recommendations on an *ad hoc* basis for the regulation of peculiar problems.[4] It refuses to recommend the statutory abolition of the anomalous distinction between coming to a restriction imposed on land and imposing a restriction on land already owned which arises in the context of solus agreements, primarily because of fears about its impact on land law.[5] It eschews radical solutions such as proposing that all covenants in restraint of trade be enforceable according to their terms, or, conversely, that all covenants should be void.

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[3] R.S.C. 1970, c. C-23, as amended S.C. 1974-75-76, c. 76.

[4] For example, Medical Practitioners Act, R.S.B.C. 1979, c. 254, s. 94.

[5] *Esso Petroleum Ltd.* v. *Harpers Garage (Stourport) Ltd.*, [1968] A.C. 269 (H.L.).

Instead, the main recommendation of the Report is that courts be permitted a discretion of partial enforcement similar to that exercised in the United States. The specific model recommended for adoption in British Columbia is that found in section 8 of the New Zealand Illegal Contracts Act, 1970, with certain modifications. Thus, the Commission recommends that where a contract or a portion of a contract constitutes an unreasonable restraint of trade, a court may delete a portion, or modify the contract to produce a reasonable restraint as at the time the contract was entered into and enforce the contract as modified. A court may refuse such relief where the deletion or limitation would alter the bargain so as to make it unreasonable, or the conduct of the party seeking to enforce the contract with or without the modification disentitles him to relief. Unlike the New Zealand legislation, the proposal gives power to limit only, but also gives the court a wide discretion to take any relevant factor into account in its deliberations.

The adoption of this proposal raises several further issues which the Commission addresses. First, it defends the possibility that courts may award damages and equitable relief in respect of a breach of a covenant that has been re-written on the grounds that the effect of the existence of such sanctions should be to ensure that the covenantor will act reasonably and that the enforceability of the re-written contract is upheld. Secondly, the Commission declined to recommend that courts be empowered to order the restitution of all or part of the consideration when they refuse to enforce a covenant in restraint of trade on the grounds that a deterrent to overreaching would be removed and that damages available *ab initio* is the more appropriate solution. Thirdly, the contract modification proposal would be applicable where covenants in restraint of trade relate to obligations to do or not to do so something in British Columbia.

Finally, the sixth chapter explores the possible impact of the recommendations on the overreaching problem. The obvious effect of the proposals is to remove the all or nothing result achieved under the present law, under which a covenant is either enforceable as a reasonable restraint of trade or it is unenforceable. It makes no difference whether it was too broadly drafted deliberately or inadvertently. The Commission acknowledges that its proposals will not cause the disappearance of the overreaching problem; however, it believes that the temptation deliberately to draft illegitimately broad covenants will be curbed if the courts actively exercise the discretion which would be given to them. Judicial invocation of doctrines such as unconscionability and unequal bargaining power give the Commission cause for optimism; however, with specific regard to employment contracts, it suggests that courts be directed specifically to the circumstances of the contract formation.

Criticisms of the Report may be allocated into two categories, those which address the Report within the same constraints within which it was prepared, and those which address what the Report ought to have included.

In a sense, it is difficult to take substantive issue with the proposals. They represent a moderately progressive way forward. They are all of a piece with contemporary judicial willingness to intervene somewhat more than in the past with "bargains freely made". They have been tested in other jurisdictions. They are more satisfactory than the current law. In the absence of alternatives in the imperfect legal world in which we live the recommendations are obvious and sane. Some observers may doubt whether the judiciary is really capable of the exercise of the discretion which it might be given; indeed the Law Reform Commission itself in the earlier part of its Report comments on the loss of judicial self-confidence in balancing private and public interests. However, it can be expected that the courts will muddle through as they have done for the past eight hundred years or so.

Several specific comments may be made. First, it is unfortunate that the opportunity to rid the present law of the distinction between covenants imposed before and those imposed after the acquisition of a business was not seized. Fears of interfering with land law seem to be an unjustifiable excuse for retaining the status quo when the Commission in the same breath urges the courts to reconsider the distinction.[6] Secondly, the main recommendation that courts be given a discretion to modify covenants in restraint of trade is made in the context of the employment contract only, despite the fact that both the Report and the law are concerned with at least three other contractual contexts wherein such covenants are found today. Why? Thirdly, some greater cross-referencing should have been made to the earlier report on illegality. Fourthly, the Commission's commendable sensitivity to British Columbian needs may well have blinded it to the fact that the important issues in restraints of trade today arise not in the context of selling shoestores in Burnaby (to adopt a favourite example from the Report), but rather in the large cartel-like practices which insidiously reach into all provinces from outside.

Admittedly, it is unfair to judge the Report on the basis of the issues which it did not address, particularly when the Law Reform Commission apologized for not addressing them. Nevertheless, it has to be said that the significant issues relating to vertical and horizontal restraints of trade are not fully addressed, although there is sufficient American material on the topic. This failure does not reflect inadequacy in the research and proposals, because the Report, as has been said earlier, is excellent within its constraints. Rather, it raises the larger question of the role of a Law Reform Commission. Surely its role is not merely to advocate changes in the common law which the courts would reach within four or five years in any case? It is almost as certain as death and taxes that the courts will millimetre the law forward.

M.H. OGILVIE*

[6] Pp. 28-29.

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Liability in Negligence. By J.C. SMITH. Toronto: The Carswell Company. 1984. Pp. xxxiii, 265. ($38.00)

This book contains an extended essay on the central concepts of negligence —duty, risk, remoteness—based on some of the author's earlier writings in several periodicals. His principal thesis propounded in the first chapter is that the root cause of the malaise affecting the contemporary law of negligence is a lack of consensus concerning the precise function of these fundamental concepts. An issue such as liability for nervous shock to a bystander is treated by some as one of duty, but others as one of remoteness. Worse still, the same judge may not only switch from one to the other in successive cases, but even confess that it makes no real difference, that there is more than one way of expressing the same thought. The chief culprit is of course Lord Denning whose tergiversations on mental shock and economic loss provide well-known illustrations of the perceived confusion. In the author's view, duty addresses the problem of "extension", i.e., "the limitation on the law of negligence itself"; risk deals with the "harm foreseeable if care is not taken in acting", and remoteness with the "limitations on the liability of particular defendants within the boundaries of the law of negligence".[1]

Professor Smith insists that the "obscurities and difficulties" besetting judgments in this area are not only attributable to a confusion regarding the proper function of the several concepts but, more important, are also resolvable by heeding his own prescription. Clarity of thought and expression are, of course, important values in the law, for the purpose of communication and even analysis. But there are those, including this reviewer, who harbour a large measure of skepticism concerning the wellsprings of decision-making, who would look for an explanation of unevenly developing and ambiguous case law more in uncertainty of legal policy than in the conceptualistic trappings in which such policy is couched. The very history of these concepts belies the idea that they carry "proper" and invariable meaning. As the author himself notes, duty is not a necessary notion at all, since other legal systems do without it and some commentators would make us believe that it was not clearly established in English law until *Donoghue* v. *Stevenson*[2] in 1932. French law subsumes such issues under the embracing notion of *cause*, German law comes closer to our own modern approach by listing protected interests in the Code, significantly omitting economic loss. Many of the issues nowadays discussed by us in terms of duty used to be dealt with under causation or remoteness, e.g., mental shock, economic loss.

Is it not all just a question of fashion whether to explain a particular conclusion in terms of one rather than another of these concepts? Does it

[1] P. 50.

[2] [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.).

really make a difference to the outcome whether one is preferred to another? Obviously Professor Smith has not been caught by the academic mainstream of Realism and believes in conceptualism as a still vital force in decision-making. That he is not alone is shown by the fact that Lord Denning's robust views about the nature of judicial reasoning have not been universally accepted in England and the Commonwealth.[3] In the United States however we are all realists, no doubt because judicial behaviour makes this even more inescapable—in the home of what C.K. Allen (an Australian Tory at Oxford) once contemptuously derided as "jazz jurisprudence".

Professor Smith next addresses the distinction between misfeasance and nonfeasance which he considers categorical for defining duty, though woefully neglected in recent decisions. The point is well taken. In *Anns*[4] the focus was on whether the municipal authority's failure to inspect the foundations of the building fell into the sphere of administrative policy or mere operational negligence, little if any attention being paid to the fact that it was the culpable builder, not the authority, which had created the risk of subsidence. Smith rightly criticizes the court's cavalier assumption that *Donoghue* v. *Stevenson*, a decision dealing with a manufacturer's duty not to put into circulation dangerous products (misfeasance), provided a *prima facie* mandate also for a duty to inspect (nonfeasance) merely because the loss was foreseeable. While acknowledging that in an increasing number of special situations duties of affirmative action have been recognized, he is on firm ground in submitting that, whereas actively creating an unreasonable risk of personal injury is today actionable in the absence of a clearly identified countervailing policy (Lord Reid in *Dorset Yacht Co.*,[5] Lord Wilberforce in *Anns*[6]), the presumption in case of omissions is reversed, i.e., a special case has to be made for the imposition of a duty of care; this because a duty to act trenches on individual liberty.

To my disappointment, however, Smith stops dead precisely where the issue becomes interesting, viz. whether an affirmative duty should be demanded by homeowners from a public authority committed to a program of safety inspection. Why did their Lordships[7] assume such a duty

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[3] Though Bell's recent analysis of English appellate decisions, including tort decisions, support the view of the political function of decision-making. J. Bell, Policy Arguments in Judicial Decision (1983), ch. 3.

[4] *Anns* v. *Merton London Borough Council,* [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.).

[5] *Home Office* v. *Dorset Yacht Co. Ltd.,* [1970] A.C. 1004, at p. 1027, [1970] 2 All E.R. 294, at p. 297 (H.L.).

[6] *Supra,* footnote 4, at pp. 751-752 (A.C.), 498 (All E.R.).

[7] And since, the Supreme Court of Canada in *Kamloops* v. *Nielsen,* [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1.

"without saying"? Surely, because government in a welfare state is charged with many service functions and it is widely believed that it should, as a matter of social policy, in general be accountable to those injured by negligent failures to implement those functions. Conservatives may deplore the trend towards proliferation of public welfare, but it can come as no surprise that, as a corollary of demanding and paying for it, the public has come to entertain corresponding expectations of protection and advantage.

The author next turns to the problem of economic loss as illustrative of the prevailing confusion regarding the different functions of duty and remoteness. His conclusion is as follows:[8]

> . . . a duty to take care is owed regarding pure economic loss resulting from acts which create a risk of physical harm to persons or property. That economic loss may, however, be too remote for recovery if it raises the possibility of large losses to indeterminate numbers of persons. . . Economic loss not resulting from the creation of a risk of harm to persons or property raises an issue of extension. No duty is owed unless there is a right interfered with.

Whether this formula moves us any closer to a resolution of the problem is doubtful. Smith often leaves the reader guessing whether his apodictic statements are intended to be descriptive or normative. The preceding extract is actually prefaced, "it is now at least clear from the decided cases that. . .". That this cannot be accepted without reservation, however, is revealed by his own difficulties in explaining (justifying?) *Rivtow*[9] and by his doubts concerning *Junior Books*.[10]

In dealing with the "Convergence of Contracts and Torts" Smith addresses the question whether the tort liability of *Donoghue* v. *Stevenson* could apply "to the very negligently manufactured article itself".[11] Does it depend on whether the article is dangerous or just shoddy? In either case, does it matter whether there was an accident, i.e., a sudden physical change? Or is it sufficient for tort that the dangerous article justified an expenditure to prevent an accident? Smith notices the conflict of opinion in *Rivtow* and the difficulty of reconciling the majority view with that in *Junior Books,* not to mention the three-way split in *Junior Books* itself.[12] But where exactly does *he* stand? In vain do we look for guidance on what should be the legitimate province of contract, what justifies the survival of the privity requirement in face of the temptation to turn its flank *via* tort? What respect, if any, is due to exemption clauses subject to which

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[8] P. 58.

[9] *Rivtow Marine Ltd.* v. *Washington Iron Works,* [1974] S.C.R. 1189, (1973), 40 D.L.R. (3d) 530.

[10] *Junior Books Ltd.* v. *Veitchi Co. Ltd.,* [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.).

[11] P. 72.

[12] To which can now be added the Delphic treatment by Wilson J. in *Kamloops, supra,* footnote 7.

the defective product or service is being supplied? Was it good policy to permit the plaintiff in *Junior Books* to sue the sub-contractor and thereby renege on his own agreement with the head contractor not to complain of defects after twelve months?

Professor Smith might well plead that the majority judgments in *Junior Books* also failed to address these vexing questions seriously: following the Reid-Wilberforce formula of asking whether any policy militated against the *prima facie* liability for foreseeable harm, they merely used the occasion to dismiss with disdain the "floodgates" argument instead of coming to terms with the contract-tort relationship. Bluntly, should a breach of contract give a cause of action to third parties merely because the breach is negligent and loss to them is foreseeable? The California Supreme Court recently declared that some bad faith breaches of contract were also torts sanctionable by punitive damages.[13] But in so ruling the court was not only conscious of what it was doing but positively desired to bring about that result. A pathetic insight into the corresponding quality of recent English decisions, for which alone the present book was worth publishing, is supplied by Lord Denning's confession to the author that it had not occurred to him that *Dutton* "was not just another case of physical damage, and that . . . he was not conscious of the distinction discussed in *Rivtow* of applying *Donoghue* v. *Stevenson* to the cost of repairs of the article itself in contrast to damage to other property caused by the defective product".[14] Indeed, the House of Lords in *Anns* were equally insouciant, just as they apparently had been unconscious in *Hedley Byrne*[15] of breaking new ground in admitting recovery for purely economic loss. Is this a desirable method of law reform?

The second half of the book deals with remoteness. Its incontestable thesis is that despite the aberration of *Wagon Mound (No. 1),*[16] foreseeability is in practice applied quite differently, much less narrowly, to remoteness than to culpability. Rather than follow those who see in the cases an inevitably wide range of judicial discretion, Smith proposes the following test:[17]

> Damage is not too remote when it is either foreseeable in the particular, or falls within a class of possible damages, which class satisfies the foreseeability condition, although any particular event falling within the class may not satisfy that condition.

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[13] *Seaman's Direct Buying Service* v. *Standard Oil of California*, 36 C. 3d 752 (1984).

[14] P. 73, footnote 58.

[15] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

[16] [1961] A.C. 388, [1961] 1 All E.R. 404 (P.C.).

[17] P. 138.

He submits that ninety-two per cent of the cases from England, Canada, Australia and New Zealand (listed in four appendices in a kind of *catalogue raisoné*) conform to this test, which therefore provides a more reliable guide to judicial practice. He allows, however, that policy has engrafted exceptions for nervous shock (*McLoughlin*[18]) and economic loss (where the risk is solely of economic loss, it must be foreseeable "in the particular").

Inevitably, this provokes the question whether specific policy factors are not at work also in many other cases. One of the often silent persuaders is the plaintiff's superior ability to prevent the damage (as in *Lamb*[19]) or his superior ability to calculate and absorb the loss (as in the cable cases). Moreover, the suggested test itself would leave a substantial range of discretion in its application (what is a "class"?). Can the judge's "instinctive feelings" (Watkins L.J. in *Lamb*[20]), which Smith concedes to be the clue to judicial behaviour, really be replicated in his own austere and simplistic formula? Is the problem not in reality too complex and ineffable for words to do it justice?

JOHN G. FLEMING*

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Legal Rights and Mental Health Care. By STANLEY S. HERR, STEPHEN ARONS and RICHARD E. WALLACE, JR. Lexington, Ma.: Lexington Books, D.C. Heath and Co. 1983. Pp. 208 ($22.95)

Law and psychiatry have been conducting guerilla skirmishes, punitive raids and even "Take no prisoners" frontal attacks against each other for decades.[1] Legal Rights and Mental Health Care surely, therefore, has a

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[18] *McLoughlin* v. *O'Brian*, [1983] 1 A.C. 410, [1982] 2 All E.R. 298 (H.L.).

[19] *Lamb* v. *Camden London Borough Council*, [1981] Q.B. 625, [1981] 2 All E.R. 408 (C.A.).

[20] *Ibid.*, at pp. 647 (Q.B.), 421 (All E.R.).

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[1] The debates between the disciplines have been both extensive and acrimonious across a broad band of issues. One can acquire a sense of the main features of the conflict by examining a few representative articles concerning civil commitment on involuntary psychiatry. A sampling, tremulously chosen, might include three articles by T.S. Szasz; The Sane Slave: Social Control and Legal Psychiatry (1972), 10 Amer. Crim. L. Rev. 337; Involuntary Psychiatry (1976), 45 Univ. of Cin. L. Rev. 347 and On the Legitimacy of Psychiatric Power (1983), 14 Rutgers L.J. 479, all of which emanate from a leading exponent of the anti-psychiatric school. As a counterbalance, C.G. Schoenfeld, An Analysis of the Views of Thomas S. Szasz (1976), 4 J. Psych and Law 245, or H. Shwed,

formidable task before it, in pursuing its principal goal of providing a "concise introduction to an area of the law that is undergoing rapid transformation. . ." "for an audience of mental health practitioners".[2] Moreover, the authors seek to impart knowledge from this alien and sometimes hostile legal territory with a conciliatory spirit, noting that "there is a necessity for an exchange and sharing of the differing perspectives of clinicians and advocates",[3] that there is an acute need for concerted efforts, and that there are "compelling reasons to work together in defending . . . mutual clients' claims on society for rights, not charity".[4] The book should be assessed on the basis of whether these are practicable goals and whether the volume is a significant step in the intended direction. The reviewer's short answers would be that on many important levels these aspirations for cooperation by lawyers and psychiatrists are realistic and attainable and that the book achieves major successes in its rather daunting task.

There are many imposing barriers to be overcome in effecting any mutual understanding let alone joint action on the part of psychiatrists and lawyers. The obstacles express themselves in sharp differences at many levels where at least some modicum of mutual knowledge and respect could produce major advances.[5] To add rancour to what otherwise might be mere difference of opinion, these multi-faceted conflicts are frequently clouded by attitudes which raise allegations that the opposite party is either a monstrous, authoritarian abuser of human rights or an untutored, naive, obfuscating intruder, depending on the professional affiliation of the name caller.

The authors wisely avoid wrangles over theoretical and remedial questions. They seem to write in a manner almost miraculously devoid of medical defensiveness or accusation. Their concerns and their strengths

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Social Policy and the Rights of the Mentally Ill: Time for Re-examination (1980), 5 J. Health, Politics, Policy and Law 193 would both be instructive. J. Robitscher, The Impact of New Legal Standards on Psychiatry (1975), 3 J. Psych and Law 151 or J.M. Ray, F.G. Gosking, Historical Perspectives on the Treatment of Mental Illness in the United States (1982), 10 J. Psych and Law 135, are both helpful in their broad survey of developments in psychiatry and law.

[2] P. 3.

[3] P. 4

[4] *Ibid.*

[5] Kathleen Jones has emphasized four areas of debate between the legal and psychiatric attitudes to mental health in The Limitations of the Legal Approach to Mental Health (1980), 3 Int. J. Law and Psych 2. She noted that there are sharp differences in conceptual law (formulating principles of jurisprudence), remedial law (concerned with the application by courts of penalties against illegal action), prescriptive law (formulation of general legislation) and civil liberties (concerned with drawing rules more tightly in pursuance of human rights). The authors of Legal Rights and Mental Health Care could be said to concentrate on the latter two cases.

emerge from a dedication to working in the practical realm, albeit with a firm and clear legal background and with a constant eye on general principles and vital civil liberties. Despite what each proclaims,[6] law and psychiatry are often bedfellows anyway, and much of the accusatory climate which has characterized relations between the professions may be seen as tactical camouflage. Both have social control functions, both tend to legitimize societal values as ordained by the dominant elite, both feel most comfortable with conforming behaviour, and often both would like to blind themselves to powerful contextual factors in society and the economy. Psychiatry may or should help the individual in her relations with the relevant social system and should assist in clarifying how she is affected by her warped society. Law should ensure that these good works are performed in an atmosphere where freedom of speech, thought and action is maintained. This book ought to nourish the potentially valuable services of psychiatry and law, without encouraging either discipline to be mired in the flagellation of the other or the defence and exultation of itself. It allows that there will be valid disagreements, even hostility at times, but undertakes the hard job of providing a more objective and professional ground for such altercations.

Most of the book will be of interest to lawyers concerned with the interrelationships of law and psychiatry, especially as it portrays the development of many important principles in American constitutional law as they have been invoked on behalf of the mentally ill. Canadian lawyers ought to become more deeply involved in issues affecting this under-represented minority, given that the old excuse of there not being a vehicle for the assertion of rights has been obviated since the entrenchment of the Canadian Charter of Rights and Freedoms.

For the practitioner and scholar who wishes to plunge into the mental health area, several chapters will be worthy of special attention. For example, Chapter 3, Competency and Consent, lays the foundations for much of the profession's involvement, in its succinct presentation of competency as a legal doctrine which guarantees personal freedoms against unwarranted restrictions. The standards and tests of competency, themes which reverberate throughout mental health law, are explored in a manner which transcends the usual labelling exercises, with which the law frequently satisfies itself. Consent is properly linked to competency, al-

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[6] Several articles appearing in a recent collection (Symposium: Dialectics in the Discourse of Law and Psychiatry (1980), 3 Int. J. Law and Psych. p. 211 *et seq.*) will provide the reader with a stimulating introduction to the troubling issues of the political significance of legal and psychiatric attitudes to mental illness. Of particular interest to the reviewer have been: D.N. Weisstub, Psychiatry and the Political Question, at pp. 219-234, M. Edelman, Law and Psychiatry as Political Symbolism, at pp. 235-244; L. Longman, Psychiatry; Law and the Reproduction of Capitalist Ideology: A Critical View, at pp. 245-256.

though the authors' ready acceptance of third-party approval as a way of administering treatment to the marginally competent client will cause disquiet among those opposed to any intervention without the actual consent of the patient.

Chapter 5, The Right to Refuse Treatment, develops along lines similar in outlook to Chapter 3, maintaining that the qualified right to refuse a proposed remedy is well established at a constitutional level for the involuntarily confined, the exception being the person judicially declared incompetent and on whose behalf a substituted consent is provided. The authors do not argue for a removal of this legal constraint on the absolute right to refuse, but they do provide a guiding principle for the clinician's discretionary decision making, which the reviewer believes would be well extended throughout the interstices of the relationship between psychiatry and law: "... [the] client's right to be let alone, to be unwise, [to] allow the client to bear those consequences [of a treatment decision] with dignity".[7]

In Chapter 6, the Principle of the Least Restrictive Alternative, the authors submit that that principle is a pervasive rule of general application, requiring that "basic rights not be curtailed more than is necessary, to achieve the purpose that justifies the curtailment in the first place".[8] The book again distinguishes itself by its declaration that "the principle is of great value and utility even where not legally compelled".[9] This willingness to see the practice of medicine informed and changed, not only where the law explicitly demands alteration but also in the multitude of instances where the law cannot simply command, is promising indeed for the development of both fields and for the client/patient fortunate enough to be the recipient of the services of a more respectful legal and medical system.

Several other parts of the volume would be profitably read by lawyers outside the mental health system. Chapter 2, The Nature of Advocacy, demonstrates a comprehension of the lawyer's outlook and responsibilities which is in many ways clearer and more authentic than that proferred by many writers within the legal profession. Basic characteristics of the advocate's role are generally welcomed in the mental health field and are set forth in a manner which should give the lawyer helpful insights into her own work. The traits of sole loyalty to the client, confidentiality, presumption of client autonomy, professionalism toward mental health staff and systems, access to clients and pursuit of the full range of remedies are thoroughly discussed. The authors are further concerned to point out the need for clinician-advocate cooperation in many areas vitally affecting patients, such as social welfare benefits and institutional

[7] P. 73.

[8] P. 86.

[9] *Ibid.*

regulations and procedure. Additional chapters, which cannot receive even cursory coverage in a brief review, will have broad appeal to the non-specialist reader, such as the ones dealing with Privacy, Confidentiality and Access to Records, The Special Problems and Rights of Children and Guardianship and Other Protective Services.

The final chapter of the book, Taking Patients' Rights Seriously, provides a convincing justification and blueprint for the changes in the mental health system required by a more cautious adherence to the notion that mental patients are human beings and citizens who should have unimpeded human and legal rights. Indeed, those lawyers who may see other institutionalized clients, such as prisoners or young offenders, may be rightly awed by the lengths to which the authors are prepared to go in advancing the position of the voluntary and involuntary mental patient. Therefore, keeping apprised of relevant rights as a professional obligation, informing patients, offers of a full and fair hearing to the aggrieved, opportunities for outside consultation, and assumption of responsibility for rights issues (as opposed to habitual relegation to other professions) are among the duties which the book would put on the mental health professional. The authors conclude that nostalgia for unfettered professionalism seems futile and that there are excellent personal as well as professional reasons for the prompt and thorough adoption of a rights perspective. Real satisfaction would result for such a converted clinician from working for the rights and needs of others in a holistic spirit. Increased feelings of competence would ensue on becoming a patient advocate. The harmonization of professional goals and personal ideals which would be the product of such a reorientation would be welcomed by the conscientious. Of course, the sceptic may reserve judgment on the likelihood of this range of salubrious by-products of new attitudes to patient rights coming to fruition. However, the reviewer maintains that some movement in each of these prospective directions is certain, even if a professional state of grace is not reached, as the changes recommended in outlook and behaviour would have a profound and diffuse impact for the mental health practitioner.

Legal Rights and Mental Health Care is by no means flawless. The civil rights lawyer, conversant with the enormous body of scholarly literature and precedent which has emerged in the United States in the past two decades, may be impatient at times with the terse, albeit seldom inaccurate, coverage given to development of modern constitutional principles. She may also be more strident in her enunciation of rights in a few areas. For most legal readers (and one should include the mental health specialist despite the noted reservations), the book will on the whole be both instructive and inspirational in its economical explanation of rights concepts and in its willingness, even enthusiasm, to see legal rights percolate through the sometimes unreceptive soil of modern medicine. That this book was written for an audience of clinicians is more than a

little amazing. It should be heartening for lawyers and patients that such material is available for psychiatrists and their associates. The Canadian Mental Health Bar, assuming there is such an entity, would be well advised to read it, if they are to work effectively with the new breed of clinician which one hopes the book presages. The Canadian lawyer in general is less likely to be overcome by what may be a tidal wave of rights assertions, if she prepares herself with the stuff of Legal Rights and Mental Health Care. This is a book with high aspirations for nonetheless realistic goals. It hits its target remarkably close to the centre. It should open new doors for lawyers and psychiatrists in their relationships with one another and with their client/patients.

H. ARCHIBALD KAISER*

* * *

The International Law of Human Rights. By PAUL SIEGHART. Oxford: Oxford University Press. 1983. Pp. xxiv, 569. ($128.25)

This book was designed to be a "plain handbook for practitioners",[1] explaining what human rights are currently protected by international law. Accepting the questionable jurisprudential premise that the "is" can be divorced totally from the "ought", the author purports to operate in the real and practical world of lawyers who interpret and apply the law; he is content to leave questions about what human rights should be to "moral philosophers, social and political scientists, and others".[2]

This quest for realism is undertaken mainly by guiding the reader through the substantive provisions of the general international and regional human rights instruments that have been adopted since the end of the Second World War: primarily the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, the European Convention of Human Rights and the American Convention on Human Rights. Chapters are organized around such general headings as Non-Discrimination, Physical Integrity and Health and then further subdivided. For example, the chapter on Physical Integrity is broken down into such topics as arrest and detention, torture and other ill-treatment, freedom of movement and asylum.

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[1] P. xxi.

[2] P. xx.

The explication of the law in each subject area follows a common pattern. The relevant textual provisions in the various key instruments are set out, cross-references are made to such issues as whether the right(s) can be limited and what subsidiary instrument(s) also deal with it, and there is commentary indicating similarities and differences in the various provisions. Sometimes a brief historical outline of the right is provided. Then there is a summary, often elaborate, of the case law in the area. This case law emanates mainly from the international agencies responsible for implementing the treaties and includes decisions by the European Commission and Court of Human Rights, the Inter-American Commission of Human Rights and the Human Rights Committee set up under the Covenant on Civil and Political Rights (familiar to Canadians because of the *Lovelace* case). Not surprisingly, references to the jurisprudence of the long-established European system predominate. Finally, decisions of national courts, mainly in the Western democracies (including Canada), dealing with the particular right are mentioned.

These chapters on substantive provisions account for most of the book, but there are also chapters surveying the juridical framework of international human rights law and setting out enforcement mechanisms. Informative appendices list ratifications and reservations for the main instruments as well as full citations and source information for the cases referred to.

The value of this book for the practitioner is that it collects, in a useful form, data previously available only in a variety of sources, some of which are not easily accessible. The amount of information gathered is impressive, and together with the appendices provides a valuable research tool. Nevertheless, the book suffers from two major flaws.

First, because the author limited his sources, the descriptive outcome is often superficial. As is the case with domestic constitutional instruments dealing with human rights, international treaties contain vague and open-ended provisions which need clarification. But Sieghart refuses the interpretative help which can be obtained by recourse to scholarly writings and the international law equivalent of legislative history (the *travaux préparatoires*), with the consequence that nuances are missed and controversies ignored.[3] Notably, because of these limitations, the chapters dealing with such so-called "collective" rights as self-determination, the protection of minorities and the use of natural wealth and resources are virtually useless.

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[3] Compare the much more sophisticated exposition of the provisions of the Covenant on Civil and Political Rights, generated in part by extensive use of scholarly writings and the *travaux*, in L. Henkin (ed.), The International Bill of Rights (1981). Sieghart acknowledges the value of these sources and gives lack of time as the reason for not using them (p. xxii).

Second, considering that this book was written for the practitioner it is woefully inadequate in providing the conceptual tools required for using the raw data. Although there are practitioners who specialize in taking cases before international human rights tribunals, the weak authority of some of those agencies as well as problems of access to them and of enforcing their "decisions" make recourse to national courts and administrative tribunals a much more promising alternative, especially for the North American lawyer. In this context the lawyer will be attempting to use international human rights law as a model for interpreting similar vague provisions of domestic law—for example, our Charter of Rights. In spite of promising decisions of national courts about the appropriateness of this use,[4] Sieghart provides lawyers little guidance about how they can persuade judges to take international law into account in their decisions.[5] Additionally, his emphasis on treaty law neglects prospects for using customary human rights law for the same purpose—a use particularly important in the United States since that country has ratified very few human rights treaties. The law relating to the interpretative value of international law is similar in all common law jurisdictions and could have been set out economically.

J.E. CLAYDON*

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Lon L. Fuller. By ROBERT S. SUMMERS. Stanford, California: Stanford University Press. 1984. Pp. xiii, 174. ($19.95)

Seven books and fifty-three articles in leading American and other journals, as well as several book reviews, are listed in the works of Lon L. Fuller set out at the beginning of this book. This is a formidable corpus of work, testifying to the energy, originality, and devotion to learning of the man who is the subject of this latest in the series entitled "Jurists: Profiles in Legal Theory". Fuller's life was varied: his experience in the law diverse. Taken together they provided him with considerable insight into many facets of legal activity, which may explain his approach to the

[4] See, for example, *Re Mitchell and The Queen* (1983), 42 O.R. (2d) 481 (Ont. H.C.); *Rodriguez-Fernandez* v. *Wilkinson*, 654 F. 2d 1382 (10th Cir. C.A., 1981).

[5] For further elaboration see J.E. Claydon, International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms (1982), 4 Sup. Ct. L. Rev. 287; M. Cohen, A. Bayefsky, The Canadian Charter of Rights and Freedoms and Public International Law (1983), 61 Can. Bar Rev. 265.

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problems of legal theory. But his thinking was influenced by other than legal ideas. To quote the author, "As one might expect of an undergraduate in economics, he also drew importantly on the classical and neo-classical economists".[1] He was influenced by many philosophers, but particularly, according to Professor Summers, by Hegel and the German idealists. Any legal theorist who claims, or is alleged to claim, that he was influenced by Hegel is immediately suspect. However, one comes away from this book with the impression that perhaps, after all, Fuller was able to extricate himself from the more esoteric aspects of Hegelian philosophy, even if he did come under Hegel's spell.

Fuller wrote on many topics: on the nature of law; on legal process; on contract; and on legal education. His approach to the nature of law was to seek out its purpose and inquire into its values. He stressed the morality of law, although that, of itself, did not place him in the ranks of "natural lawyers". But he was definitely not a positivist. His exchange with Hart in the 1950's, by which he is perhaps best known to lawyers outside the United States of America (except for his *tour de force*, the 1949 article The Case of the Speluncean Explorers[2]), manifests his distaste for the positivist approach to law, and his view that law is something more than the *dictat* of the State. Indeed, as Professor Summers shows in Chapters 3 and 4 of this book, Fuller searched all his working life for ways to distinguish the moral and immoral in law, and to differentiate law from non-law. Moreover, while Fuller may not have embraced with total enthusiasm and commitment the natural law philosophy, he was nonetheless concerned with, and disposed towards some of the "general tenets and directions of thought that have historically been associated with natural law thinking".[3] At the very least he stressed "the primacy of reason in legal ordering",[4] as opposed to fiat, the formal structure of law, the innate command of the law.

In the United States, and, to a lesser extent in England, Fuller may have had considerable impact upon legal theory. His book, The Morality of Law, and some of the essays incited critical response. More recent American jurists appear to have taken an approach that is far removed from that of Fuller, as described by Professor Summers. "Fuller clearly believed that legal theory as a subject has a kind of autonomy of its own".[5] It was not a branch of philosophy, nor an applied social science, nor an exercise in the history of ideas. To read other American writers on what might loosely be termed "jurisprudence" (albeit that it is not the

[1] P. 153.

[2] (1949), 62 Harv. L. Rev. 616.

[3] P. 62.

[4] P. 66.

[5] Pp. 154-155.

traditional jurisprudence of years ago), is to learn that Fuller's autonomous subject is not as autonomous as he considered it to be. One of the crucial debates of today, and of yesterday (since it antedates the tendentious report of Professor Arthur's committee), is the exact relationship between law and other types of human activity and enquiry. Fuller might have been rejected as a suitable person for the pursuit of legal theory on the ground that he did not have the credentials, being a "mere lawyer". Fortunately for him, at least, the idea that academic lawyers should undertake "fundamental research" to be respectable and to be able to claim legitimately that they are fulfilling their proper role in the scheme of things was not in the ascendant when he was a law teacher. Perhaps Fuller's real contribution lies in the fact that he, a "mere lawyer", was able to write intelligently and with originality about legal theory, without the encumbrance of technical philosophy, economics and sociology, but from a background of understanding, literacy, and reason. As Professor Summers indicates elsewhere in this book, when discussing Fuller's activities in relation to legal education, Fuller was a "humanist"; he wished to stress humanistic values in law teaching; and his entire approach to legal theory is from the standpoint of emphasizing the rational, the humanistic, the cultural, the moral qualities of law and legal activity.

Fuller is also well-known for his contributions to the law of contract, to which Professor Summers devotes one of the twelve chapters of this book. Here, according to Professor Summers, Fuller's writings have had an enormous impact. That may be true in the United States. Outside the United States it is perhaps a more questionable remark. Professor Summers suggests that Fuller influenced Professor Atiyah, whom Professor Summers characterises as "the most important scholar in the field today".[6] There are those who would not be prepared to agree with that characterisation, in England, the United States or elsewhere. However, even if it is true, and the influence of Fuller on Atiyah is also a valid comment, it may be questioned whether that influence has necessarily been a good thing. Probably the most important notion engendered by Fuller is what is often called "reliance theory". It is highly debatable whether that theory, if it may be so styled, has been accepted by courts in common law jurisdictions, indeed whether it is desirable as an explanation or justification for contractual liability. It might even be hinted that, to the extent that Fuller directed attention to such a view of contract, he was guilty of putting others on the wrong track, maybe even on a sideline that leads nowhere but to a dead end.

Of Fuller's views on legal education it is unnecessary to speak. So far as this topic is concerned the only satisfactory comment that can be made is "*tot homines quot sententies*". Everybody, and his grandmother, has his or her own view on what is the proper approach to legal educa-

[6] P. 124.

tion, what should be taught and how. The debate has been endless: it will continue to be endless. Whether any of it is fruitful is another matter. Fashions come and go with legal education as they do with many other things. *De gustibus nil disputanda.*

All in all Professor Summers has produced an interesting, well-written book. Those who seek enlightenment as to why Fuller has achieved a reputation among legal theorists would be well advised to read it. A perusal of the chapters which encapsulate Fuller's views will probably save a lot of time and trouble. Fuller's ideas, biases and explanations are set out with clarity and devotion. The footnotes to each chapter provide references to which the really eager reader can turn for more detail and depth. In the end the reader must decide for himself or herself whether Fuller merits such detailed exposition and analysis when compared with other jurists in this series, such as Hart, Austin and Weber.

G.H.L. FRIDMAN*

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Lord Atkin. By GEOFFREY LEWIS. London: Butterworths. 1983. Pp. 248. ($37.50)

Very early on in his or her career every Canadian law student (and the same is true of their English counterparts) becomes aware of the importance of Lord Atkin in the development of the modern common law. His judgments in the Court of Appeal and speeches in the House of Lords in many famous tort and contract cases are crucial and seminal. To the Canadian student his opinions in constitutional cases (discussed at pp. 99-113 in this book) may still loom large. In England his well-known dissent in *Liversidge* v. *Anderson*[1] (into the background of which this book delves, pp. 132-157) is a landmark. For Lord Atkin himself it was, in the words of the author, "a unique event in his life, for it made him for a short time a public figure".[2] Not often do judges become embroiled in political controversy, at least in England or Canada. What seems to have caused the greatest degree of dissatisfaction with Lord Atkin's speech in that case was not the fact that he took a different view of the way to interpret the words, "If the Secretary of State has reasonable cause to

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[1] [1942] A.C. 206, [1941] 3 All E.R. 338 (H.L.).

[2] P. 132.

believe . . .", in the Defence Regulation 18B, but his reference at the end of his speech to the statement by Humpty Dumpty in Alice Through the Looking Glass that a word meant whatever the speaker chose it to mean. "The question is . . . which is to be master—that's all".[3] Apparently, as letters quoted by the author reveal, this caused considerable offence to several other judges. He also stated that he had listened to arguments that might have been addressed acceptably to the Court of King's Bench in the time of Charles I, a remark which led to the extraordinary consequence of a letter in The Times from another Lord of Appeal, Lord Maugham, suggesting that Lord Atkin was unjustified in making such a comment. It is not considered seemly for judges to conduct their disputes in the correspondence of daily newspapers, even the sedate and respectable Times. All this led to some hasty and complex political activity, which the author of this book sets out at length. It was a remarkable incident in modern English legal history.

For all the flurry in 1941, this particular speech by Lord Atkin may not have had such far-reaching consequences as some others which he made during his tenure as a Lord of Appeal. In the last Chapter, entitled "Lord Atkin's Legacy", the author refers to several other decisions which have markedly affected the development of the common law in England, and therefore indirectly, in Canada: *Re Wait*,[4] for example, dealing with questions of title to goods and the interrelation of common law and equity in this area of the law; *Bell* v. *Lever Bros.*,[5] dealing with the common law of mistake; the *Fibrosa*[6] case, in relation to frustration and, indirectly, restitution; *Fender* v. *Mildmay*,[7], which dealt with the vexed area of public policy; and, of course, *Donoghue* v. *Stevenson*.[8]

The lives of distinguished judges, whose activities on the Bench outlast their tenure of office by decades, even centuries, are often uneventful, perhaps even dull. Lord Atkin may have been involved with ecclesiastical matters, as a loyal member of the Church of Wales. But he was never concerned with politics, except obliquely in *Liversidge* v. *Anderson*.[9] He was a decent, intelligent, liberally minded exponent of the common law, extolling the view that "English law is at bottom a sensible thing".[10] The nature of his liberal philosophy, and how this was exposed

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[3] See *Liversidge* v. *Anderson, supra,* footnote 1, at p. 244 (A.C.), 361 (All E.R.).

[4] [1927] 1 Ch. 606 (C.A.).

[5] [1932] A.C. 161, [1931] All E.R. Rep. 1 (H.L.).

[6] *Fibrosa Spolka Akcyjna* v. *Farbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32, [1942] 2 All E.R. 122 (H.L.).

[7] [1938] A.C. 1, [1937] 3 All E.R. 402 (H.L.).

[8] [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.).

[9] *Supra,* footnote 1.

[10] P. 166, quoting Viscount Simon L.C., speaking on the occasion of Lord Atkin's death.

in his judgments, are examined by the author at some length (pp. 28-50). Those who have read his leading decisions will be familiar with the colourful, but informative language in which he clothed his opinions, especially such well-known "purple passages" as his enunciation of the "neighbour" principle,[11] the remarks about "ghosts of the past clanking their chains",[12] the examples of operative mistakes and inoperative ones.[13] Undeniably he was one of the most talented users of the English language ever to sit as a judge. No student of the law, at whatever level, can ignore the content of his judgments or the words in which they are expressed. What this book achieves is the presentation in a handy form of the character and contribution of a fine and innovative judge. It is well-produced, with some excellent photographs of Lord Atkin and members of his family. It would be an excellent present for a young aspiring lawyer: especially if accompanied by the words "Go thou, and do likewise".

G.H.L. FRIDMAN*

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[11] *Donoghue* v. *Stevenson, supra,* footnote 8, at pp. 580 (A.C.), 11 (All E.R.).

[12] *United Australia Ltd.* v. *Barclays Bank Ltd.*, [1941] A.C. 1, at p. 29, [1940] 4 All E.R. 20, at p. 37 (H.L.).

[13] *Bell* v. *Lever Brothers Ltd., supra,* footnote 5, at pp. 217, 224 (A.C.), 27, 30-31 (All E.R.).

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