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Canadian Tort Law: A Review for the Nineties

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“. . . criticism is action, interpretive action that results in consequences which increase the meaning of ideas-as-signs and thereby brings about a measurable increase of the real world.”

Roberta Kevelson (1990)

“Pierce, Paradox, Praxis” *The Image, the Conflict and the Law*.

I. Introduction

Canadian Tort Law: Cases, Notes and Materials was the casebook selected by the teachers of first year tort classes at Dalhousie Law School for the 1990-91 academic year.¹ In the preface to a recent issue of the *Journal of Legal Education, Women in Legal Education: Pedagogy, Law, Theory and Practice*, the editors ask: “Has the entrance of women into legal education made any real difference?”² The editors comment further:

Women as a group first presented a visible challenge to traditional legal education in the late 1960s [when] a group of women in New York first organized a ‘Women and the Law’ conference to explore issues of special concern to women- family law, criminal law, discrimination law, reproductive rights and constitutional law.³

My purpose in writing this review follows from a tradition initiated by feminist scholars. My analysis of *Canadian Tort Law: Cases, Notes and Materials* begins with a survey of the casebook with commentary concerning its historical development as a casebook, focussing on instances where gender issues are raised. I then offer a critique concerning the lack of consideration and misappropriation of gender issues in the recently released 1990 edition of the casebook, using illustrative examples from the casebook and a selection of two feminists’ critique of tort law. Some modest suggestions for improvement are made

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1. C.A. Wright, A.L. Linden and L.N. Klar, *Canadian Tort Law: Cases, Notes and Materials*, 9th ed. (Toronto: Butterworths, 1990), hereafter referred to as *Casebook* (9th).

2. Carrie Menkel-Meadow, Martha Minow and David Vernon, “From the Editors” (1988), 38 *J. Legal Education* 1, at p. 1.

3. *Ibid.*

throughout the review, and the perspectives of two feminists are offered as a starting point for a discussion of tort law in a broader social context.⁴

II. *History of the Casebook*

The first edition of Cecil Wright's text *Cases on the Law of Torts*,⁵ appeared in 1954. Wright identified his two main objectives in the preface:

First to provide material that would raise not only most of the important problems of tortious liability but which would also serve as a basis for study of the judicial process. Second, to find some means which would, at the same time, demonstrate that principles in the law of torts were not as simple as they seemed when embalmed in a textbook, and in any event, provided no inevitable answers, and that questions of proof and choice of 'starting points' were of equal, if not greater, importance in both the study and practice of law.⁶

A great deal has changed in the law of tort since 1954. Since then, nine editions of the casebook have gone to press. The structural format of the casebook has been preserved throughout the years and the format is not unlike that used in William Prosser's well-known American tort law casebook⁷: intentional torts are covered in the early chapters, followed by a lengthy consideration of negligence.⁸ Chapters dealing with more

4. My criticism may approach a more vitriolic level than is warranted. I can only note that six years and two new editions of the tort law casebook have gone by since Mary Joe Frug re-read contracts and presented a potent but constructive criticism of a contracts casebook. It seems the editors have ignored this critique and so I write to engage them and their readers, Canadian torts scholars and students, but more specifically to remind them — a re-write of the casebook is now overdue. By contrast, the text used in the criminal law course at Dalhousie, Don Stuart and Ronald J. Delisle, *Learning Canadian Criminal Law*, (Toronto: Carswell 1990), does include feminist critiques by Carrie Menkel-Meadow, at pp. 45-49 [an extract from Carrie Menkel-Meadow, "Portia in a Different Voice: Speculation on a Women's Lawyering Process", 1 Berkeley L. J. 39, at pp. 44-55]; "Toni Pickard, at p. 461-464, [extracted from Toni Pickard, "Culpable Mistakes and Rape: Harsh Words on Pappajohn" 30 U. of T. L.J. 415 (1980)]; and a short extract by Catherine McKinnon, at pp. 490-1, [from Catherine McKinnon, "Feminism, Marxism and the State: Toward Feminist Jurisprudence", 8 Signs: Journal of Women in Culture and Society 653, at pp. 646-7 (1983)]. However, even this work does not escape the occasional practice of using cases in which women are violently murdered, assaulted or portrayed in a derogatory way.

5. C.A. Wright, *Cases on the Law of Torts* (Toronto: Butterworths, 1954).

6. *Ibid.*, p. v.

7. *Prosser on Torts* (St. Paul, Minn.: West Publishing Co., 1941). The Prosser casebook continues to be a strong influence on the format and content of *Canadian Tort Law* casebook. A recent edition, W. Prosser, J. Wade & V. Schwartz, *Cases and Materials on Torts*, 7th ed. (Westbury, N.Y.: The Foundation Press, 1982), has been analysed with respect to gender issues in Carl Tobias, "Gender Issues and the Prosser, Wade and Schwartz, *Torts Casebook*" (1988), 18 Golden Gate U. L. Rev. 495.

8. Cecil Wright somewhat prophetically states, in the 1st edition: "No apology is offered for what may, to some, seem undue attention to the subject of negligence. Not only is it of the

specialised subjects such as strict liability, nuisance, misrepresentation and defamation are also carried through the years to the present and several new topics have been added, including tort liability of public bodies and officials, products and occupiers' liability and business torts.

In the inaugural edition, Cecil Wright posed these questions to the reader following the extract illustrating battery:

Suppose a man kisses a young lady against her will. Has a tort been committed? Suppose the young lady was asleep when kissed and a third person told her when she awoke.⁹

By contrast, the *Restatement of Torts* (1934) offers the following example, (note the use of gender neutral language) "A proposes to kiss B. B neither resists nor protests by word or gesture. A kisses B. A is not liable to B."¹⁰

Cecil Wright died in 1967, (just prior to the release of the 4th edition). Subsequently, Allen Linden took over as editor of the casebook. The 5th edition, released in 1970 contained "about one half of the material taken word for word from the fourth edition".¹¹ It also introduced a new format in which the case extracts were followed by notes, usually in the form of a question. For example, following *Cole v. Turner*¹² the editors of the fifth edition pose the questions:

utmost practical importance but, despite an apparent simplicity, it contains problems of fundamental importance and difficulty and, viewed as a whole, affords an excellent opportunity of examining how the judicial process operates in a developing branch of the law." *Supra*, note 4, p. v. These comments predate the important *Wagon Mound* decisions, *Dorsett Yacht*, and *Hedley Byrne*.

9. *Supra*, note 6, p. 12. This question may have been first introduced to a tort law casebook by William Prosser in 1941, *Supra*, note 7, 118, "Silence and inaction may manifest consent where a reasonable person would speak if he objected. The girl who makes no protest at a proposal to kiss her in the moonlight may have mental reservations that it is without her consent, but the man who does it is none the less privileged. On the other hand, of course, silence does not operate as consent where no reasonable man would so interpret it, as where one defiantly stands his ground under the threat of a blow."

10. American Law Institute, *Restatement of the Law of Torts*, Vol. I (St. Paul: American Law Institute Publ., 1934), p. 98. The more recent, *Restatement of Torts* (2nd) (1965) illustration (at para. 50) has adopted the Wright/Prossner approach by using a new example in which A becomes a young man; B, a girl; and the following: i) seclusion: ii) Prosser's 'inward objection of the 'girl'; and (iii) 'moonlight' are added: The new example reads: "A, a 'young man', is alone with B, 'a girl', in the moonlight. A proposes to kiss B. Although inwardly objecting, B neither resists nor protests by word or gesture. A kisses B. A is not liable to B." [emphasis added]. This example fosters the notion that women are incapable of speaking their mind and buys into the myth that they may not know their own mind. Further perusal of the *Restatement* (2nd) contains similarly strange examples, (e.g. at p. 75 where 'A' is described as "an eccentric and mentally deficient old maid.")

11. Wright, C.A. and A.L. Linden, *Cases on the Law of Torts*, 5th ed. (Toronto: Butterworths, 1970), p. ix.

12. *Nuis Prius*. (1705), 6 Mod. 149; 87 E.R. 907, cited in *Casebook*(9th), p. 2-5.

4. Suppose a young man kisses a girl against her will. Is this a battery?
5. What if the girl was asleep at the time and found out what happened afterwards when someone told her about it? What interests are being protected here?¹³

It is interesting to note the changes in language from the passage in Cecil Wright's edition from which it is adapted. The hypothetical "man" is now "a young man" and the "young lady" becomes "a girl". The latest edition of *Canadian Tort Law* poses the same questions following the assault cases, but these are restated to remove the sex of the hypothetical actors and to make the question a personal one:

8. Can a kiss be a battery?
9. What if you are kissed while you are asleep and only find out about it later? What is the interest being protected here?¹⁴

Further to the questions on kissing as a battery we are asked in another casenote in the latest edition:

You are standing on a fast moving bus and start to fall. You reach out and grab another passenger's leg. Battery? What if you grab the other bus passenger's leg not to steady yourself, but **merely for enjoyment**? Does it make any difference if it is a man grabbing a woman's leg or vice versa? [emphasis added]¹⁵

These comments seem to open the door to a discussion of gender issues, in my opinion, but do not go far enough. The treatment of gender issues and sexism in *Canadian Tort Law* is problematic and at times far from appropriate. For the most part, gender issues are not raised, and only superficial changes to the casebook have been made to put the material into a context which reflects the real lives of Canadian men and women. Editors may justify the style of the casebook as a reflection of the Socratic (casebook) method of teaching. Perhaps this needs to be challenged as well.¹⁶ The present comment is, however, restricted to the treatment of gender issues.

III. *Feminist Perspectives on the Study of Tort Law*

In her analysis of a contracts casebook, Mary Joe Frug stated:

My objective is critical in nature, for I believe a feminist analysis should change one's consciousness. However, I do not intend to deliver a diatribe

13. *Supra*, note 10, p. 24.

14. *Supra*, note 1, p. 2-6. Note also the 'interests being protected' have mystically converged to "the interest" in this edition.

15. *Supra*, note 1, p. 2-6.

16. See, for example, Steven Allen Childress, "Historicizing Law Schools: An Alternative to The Socratic Tunnel Vision" 38 *Buffalo L. Rev.* 315 (1990) at pp. 318-322 and citations therein.

against the casebook or its editors. Rather, I am writing this for the readers of other casebooks . . . [i]f these endeavors are successful, I hope that casebook readers will be liberated from some of their opinions about gender, opinions that casebooks foster and sustain.¹⁷

What about the effect of the women's voices in the field of tort law? Are readers liberated from some of their opinions about gender? Unfortunately, *Canadian Tort Law* does not ask these questions, or it continues to "foster and sustain" stereotyped opinions.

According to Leslie Bender, feminist retorts ". . . are the offspring of feminist theories united with tort law".¹⁸ There is no consideration of this perspective in the casebook and it is a conspicuous oversight. The inspiration provided by feminist authors could easily be adapted and included in *Canadian Tort Law*.¹⁹ The feminist voices referred to in this paper have been invaluable in advancing my understanding of gender issues in general and more specifically in the field of tort law.²⁰

Lucinda Finley has written several articles that consider how feminist theory can inform this study of torts. She writes:

I teach torts, a mainstay of the first year curriculum. Judging from the way casebooks present this subject, one would think that notions about gender roles and gender stereotypes are irrelevant to the past development or current understanding of tort law.²¹

17. Mary Joe Frug, "Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985), 34 *Amer. U. L. Rev.* 1065.

18. Bender, Leslie "Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities." (1990), 1990 *Duke Law Journal* 848, at p. 848.

19. Some of the work in this paper is included in a supplement to the 1990 edition of the casebook which is being produced for next year's class and is available from the author by request. Research towards producing the casebook supplement and in writing this article arises from a need to overcome the ignorance towards gender issues which Brian feels and believe is perpetuated in *Canadian Tort Law*. I appreciate the support of my torts professor, David Vanderzwaag who was receptive to the idea of a critical review of the casebook and who, along with Jennifer Bankier found some funding for the casebook supplement project. Tarel Quandt, Caroline Cohen, Bill Charles, Dale Darling, Michelle Gignac, Moira McConnell, Leon Trackman, Brenda McLuhan, Jennifer Banker and David read this manuscript at various stages in its evolution and offered good advice along the way. Many thanks to them!

20. I agree with feminist colleagues who deny that men can be 'feminists' because men can't experience the world as women do. I am writing this review from my perspective as a male first year law student. Mary Joe Frug, to whom this article is dedicated, takes what may be a better view. She writes, "Some individuals who explore and analyze gender characteristics implicitly subscribe to that aspect of gendered thinking that privileges 'male' traits over those generally thought to be female. I maintain, however, that a gender-focused analysis is feminist only when its analyst is consciously oppositional, when the analyst seeks to change the impact of gender categories either to improve the position of women or to liberate both sexes from gender constraints." [footnotes omitted], *Supra*, note 2, at p. 1067. Mary Joe Frug was stabbed to death on April 4, 1991. See the recent *Yale Journal of Law and Feminism* [3(2) Spring 1991] and *Harvard Women's Law Journal* [14 Spring 1991] for a series of recollections of Mary Joe's life and work by her friends.

21. Lucinda M. Finley, "A Break in the Silence: Including Women's Issues in a Torts Course," (1989), 1 *Yale J. Law and Feminism* 41.

Leslie Bender, in an earlier review of the woman's voice in tort law, sets out some of the basic deficiencies inherent in the field:

That implicit male norms have been used to skew legal analysis can be seen in tort negligence law. To assess whether a defendant's conduct is negligent, and hence subject to liability, we ask whether the defendant has a duty to the plaintiff and whether she has met the legally required standard of conduct of care. It is alternatively described as the care required of a reasonably prudent person under the same or similar circumstances, or of a reasonable person of ordinary prudence, an ordinarily prudent man, or a man of average prudence.²²

The 'reasonable person' is introduced in the 9th edition of *Canadian Tort Law* using an historical approach to this "term of art". An extract from *Vaughan v. Menlove*²³ acquaints us with the first articulation of the 'reasonable man' standard.²⁴ In the current edition of *Canadian Tort Law* the case is followed by the searching questions:

Should any allowance be made in negligence law for stupid people? How can it be said that the defendant was "at fault" when he did his best?²⁵ [emphasis added]

Similarly, an extract of Alderson's decision in *Blyth v. Birmingham Water Works Co.* (1856: Court of Exchequer) is included in the 9th edition for its use of the oft-cited:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.²⁶

Given the wide scope and breadth of feminist writing, and the availability of critical papers on the inappropriateness of this test, an annotation that directs us to this literature is not an unreasonable request. In addition, the editors' obsequious use of the male pronoun throughout the text is unyielding, particularly following the "Reasonable Person" section:

Does a reasonable person have to take steps to guard against lightning? against an earthquake? Would it make any difference if he lived in Ottawa or San Francisco?²⁷ [emphasis added]

22. Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988), 38 J. Legal Educ. 22, at pp. 21-22.

23. (1837), 3 Bing. N.C. 467; 132 E.R. 490 cited in *supra*, note 1, p. 4-13.

24. The 'reasonable man' was not given any special treatment in the first 4 editions of the textbook. Under the format changes which occurred in the 5th edition, the 'Reasonable Man' was given a separate heading, at p. 175. In the next edition, the reasonable 'person' replaced the 'man' when the test is formally articulated in the casebook but no other editorial changes are made with respect to gender neutral language.

25. *Supra*, note 1, p. 4-15. Although the case appears, these questions with respect to the parties in the case are not raised in editions of the casebook edited by Cecil Wright.

26. *Ibid.*

27. *Supra*, note 1, p. 4-16, casenote 4, following *Blyth*.

Leslie Bender summarises her objections to the reasonable man and the reasonable person 'standards' and notes the superficial nature of the response to the feminist critique:

My concern with the "reasonable person" standard is twofold. Does converting a "reasonable man" to a "reasonable person" in an attempt to eradicate the term's sexism actually exorcise the sexism or instead embed it? My second concern is related. Should our standard of care focus on "reason and caution" or something else?

It was originally believed that the "reasonable man" standard was gender neutral. 'Man' was used in the generic sense to mean person or human being. But man is not generic except to other men. Would men regard a "prudent woman" standard as an appropriate measure of their due care? As our social sensitivity to sexism developed, our legal institutions did the "gentlemanly" thing and substituted the neutral word 'person' for 'man'. Because 'reasonable man' was intended to be a universal term, the change to 'reasonable person' was thought to continue the same universal standard without utilizing the gendered term 'man'. The language of tort law protected itself from allegations of sexism, it did not change its content and character.²⁸

The reasonable woman standard is no longer just a matter for discussion among academics. In a US Federal District Court, the "reasonable woman" standard was explicitly invoked in considering the nature of a work environment with respect to sex discrimination. A headnote for the case in United States Law Week describes the issue and elaborates the reasonable woman test:

The contested issue in this case is the objective evaluation of the work environment at the shipyard. The objective standard asks whether a reasonable person of the employee's sex, that is, a reasonable woman, would perceive that an abusive working environment had been created. . . . The fact that some female employees did not complain of the work environment or find some behaviors objectionable does not affect this conclusion concerning the objective offensiveness of the work environment as a whole.²⁹

This can, of course, be viewed as only a minute step in the education of the legal community. By contrast, there are too many examples of ignorance and insensitivity to women and to gender issues emanating from the bench. Re-education of the legal community can only come from concerted and systemic attention to gender issues and by introducing these issues at an early stage in the education of lawyers. What follows is a case study, from *Canadian Tort Law* which illustrates

28. *Supra*, note 22, at p. 22.

29. 59 U.S.L.W. 2470.

some of the problems inherent in superficially responding to the concerns of feminism.

IV. *A Case Study of the Defense of Consent: Madalena v. Kuun*

The defence of consent is not only important in a discussion of the intentional torts of battery and assault but is central to the gender issue discourse. Any consideration of the importance of this discussion is absent from *Canadian Tort Law*. The editors begin the section of the casebook on *Defences to Intentional Torts* with consent. The first cases consider consent to medical treatment,³⁰ and these are followed by cases in which gender is an issue. In the 1990 edition the editors chose to include a 5 page extract from a 1987 British Columbia Supreme Court case, *Madalena v. Kuun*,³¹ in which a plaintiff seeks damages in assault from her stepfather for his sexual abuse. In summarising Mr. Justice MacKinnon states:

I am driven to conclude that the acts complained of were not against the will of the plaintiff but rather with her consent. Accordingly, her action must be dismissed. The defendant Kuun is not entitled to costs.³²

The case extract that is used by the editors contains a lengthy account of the circumstances surrounding the sexual abuse, and a discussion by the judge on the issues of consent and capacity. A subsequent decision of the British Columbia Court of Appeal overturning the trial court decision is given at the end of the case extract. It is quite clear that the Appeal Court does not agree with the decision of the trial court:

We are of the opinion that the trial judge, after finding that the defendant was guilty of sexual abuse, criminal misconduct, breach of trust and in breach of his duty to act in the best interests of the plaintiff and to protect her from harm, **should not have given any consideration to the defense of consent.**³³ [emphasis added]

30. *O'Brien v. Cunard Steamship Lines* (1891) 154 Mass. 272; 28 N.E. 266. Tobias notes, ". . . the plaintiff was one of a group of 200 immigrant women who failed to protest the vaccinations which permitted them to enter the United States. She seems meek, submissive and ungrateful unless one appreciates certain facts in the record on appeal." See note 6, *supra*, at p. 520. These facts will be included in the forthcoming supplement to the casebook we are preparing.

31. (1987), 35 D.L.R. (4th) 222, hereafter referred to as *Madalena* (1987) [rev'd *M.(M.) v. K.(K.)* (1989), 61 D.L.R. (4th) 382, 50 C.C.L.T. 190, 38 B.C.L.R. (2d) 273 C.A.].

32. *Ibid.*, at p. 237 [D.L.R.] cited in *supra*, note 1, p. 3-20. The use of Mr. or Madam Justice is not a convention that this author agrees with but it is the preference of the editors of this journal and appears from here on.

33. *M.(M.) v. K.(K.)* (1989), 61 D.L.R. (4th) 382, 50 C.C.L.T. 190, 38 B.C.L.R. (2d) 273 C.A.) at p. 210, [C.C.L.T.], hereafter referred to as *Madalena* (1989).

In addition to this strong denunciation the Court of Appeal further concluded:

In our view, the conduct of the defendant was analogous to incest and it is unthinkable that the courts of justice would permit such a defense to be put forward in a case involving incest.³⁴

In this writer's opinion, the inclusion of such a long extract from a discredited decision suggests a clear lack of understanding of sexual and gender issues by the casebook editors. The *Madalena* case extracts are followed by notes including the question, "Do you agree with the trial judge or the Court of Appeal?" Surely, the editors need some guidance as to a more appropriate manner in which to present this material.³⁵

Similarly, the notes following an extract of the American case, *Samm v. Eccles*,³⁶ (concerning whether a woman can bring an action for ". . . injury resulting from severe emotional distress she claims to have suffered because he persistently annoyed her with indecent proposals"³⁷) use the following hypotheticals:

1. The defendant asks a 12-year old girl to go to bed with him. She gets very upset and becomes ill. Liability? The defendant asks a 25-year-old woman, who is nine months pregnant to go to bed with him. She is so shocked she becomes extremely sick. Liability? What if a 35-year-old woman propositions an **innocent lad** of 14?
2. Suppose a 21-year-old woman is *invited* to have sexual relations by the dean of her college. She suffers a nervous breakdown. Liability? . . . [emphasis added]³⁸

The specific language used in these examples is problematic for several

34. *Ibid.*, at p. 212, [C.C.L.T.].

35. I would suggest that the trial court case not be used as the leading case extract. If this material is to be included in the text on the issue of defence of consent then the Court of Appeal decision should be featured. Not only does the Court of Appeal list the relevant facts in a less sensational way, (see *Madalena* (1989), at pp. 192-198 [C.C.L.T.]), it is the relevant and binding case — the defence of consent is absolutely not available in this situation. In addition, the editors may want to include the extract from *Prosser on Torts* which is cited in the decision but omitted from the casebook extract of the appeal decision and reads: "There are however, certain criminal acts, such as those fixing the age of consent to sexual intercourse, which obviously are intended to protect a limited class of persons against their own lack of judgement, and so against their own consent. In such a case, the direction for public policy has been considered to be clearly indicated, and it is generally agreed, except for one or two cases that the consent will not bar the action." *Prosser on Torts*, 3d ed. (1964), at p. 108 cited in *Madalena* (1989), at p. 211 [C.C.L.T.]. More importantly, the editors should reconsider why this case is included in the casebook.

36. (1961), 11 Utah 2d 289; 358 P. 2d 344, cited in *supra*, note 1, p. 2-27.

37. *Supra*, note 1, p. 2-27.

38. *Ibid.*, p. 2-29. See note 35, *supra*, for policy reasons that argue against using these examples. Perhaps the editors are trying to raise the issue of outrageous behaviour which is used in the United States for the tort of emotional distress.

reasons. In the first example, the euphemism 'go to bed with' is inappropriate where the 'defendant' is proposing to sexually assault a 12 year old victim as is the term 'invites' in conveying any sense of the relation between the parties in the second example. The use of the description 'an innocent lad' is a moral curiosity when this is juxtaposed with the other hypothetical victims in the first example, a 12-year-old girl and a 25-year-old woman who is nine months pregnant. Does this add to the culpability of the 35-year-old woman who intends to sexually assault him? In addition, I question whether these examples are meant to be considered as a similar class of victims and if so, why? Surely, each of these situations must be appreciated in a different context and can't simply be lumped together in a single note, just as each individual case requires a specific contextual framework in order for a judge or jury to reach a conclusion. What necessitates the addition of such details as the fact that she is pregnant, the stage of pregnancy she has reached, and the qualification concerning the innocence of the lad? Are these the qualities upon which we should focus in our analysis of whether or not mental suffering is intentional?

Lucinda Finley makes cogent observations concerning the pervasive lack of sensitivity by casebook editors in presenting material of this type:

Although old cases of men 'taking liberties' with women may appear in some torts courses to illustrate doctrinal areas such as assault and battery, I suspect these cases were originally selected by casebook editors for their titillating potential than for the opportunity to examine a serious and harmful situation confronted far too often by far too many women. The use of the occasional 'sexy' case may actually contribute to the denigration of women in the classroom.³⁹

The extract that precedes *Madalena* in the casebook is *Graham v. Saville*,⁴⁰ in which a woman seeks damages against a married man who "told the plaintiff he was a bachelor and induced her to agree to marry him."⁴¹ This case is another relic from the 1st edition of the casebook that is still used as a leading case extract. In the last edition edited by Cecil Wright the editors ask: "Suppose that defendant has intercourse with plaintiff under a promise of future marriage? Would an action lie for assault? or deceit? or is this simply "seduction" which, in the absence of legislation is normally not actionable by the one "seduced"?"⁴² The notes

39. *Supra*, note 21 at p. 55.

40. [1945] O.R. 301, [1945] 2 D.L.R. 489.

41. *Ibid*, cited in *supra*, note 1, p. 3-14.

42. *Casebook* (4th), p. 114. This question is resurrected as casenote 5 in the latest edition however the comments regarding seduction are replaced with "Is it rape?" *supra*, note 1, p. 3-16.

that replace these in the latest edition are no more instructive. For example, casenote 6 asks, "Is there a battery if the defendant induces the plaintiff to go to bed with him in return for a counterfeit \$50 bill?" What sort of useful discussion does this facilitate? Are we to assume that the amount of consideration is significant? (It was increased from \$20, in the previous edition).

Further editorial changes that demonstrate the evolution of editorial irresponsibility is evident on examination of the notes following the *Graham* case extract. In the 1985 edition, the immediate predecessor to the current 9th edition, note 8 reads: "Despite the light treatment of the material in the above pages, the problem is a very serious one. What can tort law do to reduce the number of these incidents? Could the tort action serve as a weapon in the battle against rape? or is criminal law a better tool?" In the latest edition the first sentence is modified to read: "The problem of rape is a very serious one . ." Apparently, the editors are more comfortable in not acknowledging the 'light' treatment of this issue and thus fail to respond to their poor treatment of the subject which was first noted 15 years ago.⁴³

The last question in these notes asks the following: "Donna points a pistol at Paul and tells him that she will shoot him if he does not consent to have sexual intercourse with her. He submits. Battery?"⁴⁴ Ironically, this question was first posed in the edition which marked Linden's editorial debut in 1970 as follows: "Donald points a pistol at Paula and tells her that he will shoot her if she does not have sexual intercourse with him. Battery? Rape?"⁴⁵ The change in sex of the actors in this hypothetical serves no instructive purpose. If it is the intention of the editors to achieve some gender equality then they are quite misguided in the attempt. The original hypothetical illustrates the real experiences of women, whereas the tailored version is complete fiction. There is little, if any, empirical evidence that women rape men at gun point. The deliberate invocation of such an unlikely event demonstrates that the editors have not developed any sensitivity to the issue of domination in sexual assault.⁴⁶ As Elizabeth Sheehy writes, in a compelling analysis of the regressive influence the *Charter* may be having on reforms of Canadian rape law:

43. *Casebook* (6th), at p. 110. "Despite the light treatment of the material in the above pages, the problem is a very serious one. ." The passing of 3 editions has not addressed this deficiency.

44. *Supra*, note 1, p. 3-16.

45. *Casebook* (5th), at p. 121.

46. The editors delete the question 'Rape?' from this casenote in the 9th edition of the casebook. Why?

Rape and fear of rape have a constant and pervasive impact upon the lives of women. The laws which prohibit rape, and the legal process by which this crime is or is not punished, reinforce relations of dominance between men and women, shape attitudes and ideologies regarding male and female sexuality, and colour women's experience of rape and their own credibility as actors in the criminal justice system. Canadian legislators have come some distance in meeting women's demands for an effective legal response to rape, as evidenced by the 1982 rape law reforms to the Criminal Code of Canada.⁴⁷ [footnotes omitted]

The authors of *Canadian Tort Law* and all instructors who teach in this area of law, have a duty to include gender issues and to consider the relations of dominance and subordination that often permeate civil actions. This observation is particularly relevant when considering the issue of consent in both the medical context and in cases involving trespass to the person which is considered in the case study above. The advantages of taking such an approach in enhancing the experience of all members in the torts classroom are specified by Lucinda Finley:

Crucially, integrating women's issues into a basic course such as tort law can also help women feel less alienated from law school and from the law. The legal curriculum's silence concerning women's issues is deafening to many students; it is a major contributing factor to these students' feelings of marginalization and anger. Acknowledgement of gender issues in torts can help women feel less like outsiders in the enterprise of law, and may encourage them to engage in open dialogue, to bring up their experiences, to scrutinize the exclusiveness or inclusiveness of various legal rules, and to raise previously unraised questions about the assumptions and impacts of the law- all of which can only enrich class discussion and deepen the understanding of the material for everyone.

Male students can also benefit from the inclusion of women's issues by learning more about the gendered nature of the world. Because what is based on male needs or experiences is too often presumed to be the human norm, many men may be unaware of the extent to which attitudes about gender roles shape and constrain us all, including men. Male students may begin to question that which they might otherwise take for granted. By questioning, they might start to think about the need for change.⁴⁸

In her article, "A Break in the Silence: Including Women's Issues in a Torts Course." Lucinda Finley offers many examples where women's issues could be brought into a course in tort law. This and other feminist articles cited in this paper, offer a perspective on teaching and learning tort law that is not found in *Canadian Tort Law*. A consideration of the need to discuss gender when dealing with the intentional torts of trespass

47. Elizabeth A. Sheehy, "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?" (1989), 21 *Ottawa L. Rev.* 741.

48. *Supra*, note 21, at pp. 42-43.

to person, as well as the maleness of the 'objective' standards in negligence law and the role of domination in consent defences constitutes a major part of a casebook supplement that has been prepared by this author for use by the 1991-92 class of students at Dalhousie Law School.

V. *A Starting Point? The Tort of Discrimination*

In this section, I consider a starting point for a discussion of human rights issues in Canadian tort law which could compliment the suggestions contained in the work of Leslie Bender and Lucinda Finley, cited in this paper which specifically contemplate an enhanced treatment of women's issues in tort law.

Canadian jurisprudence has benefitted from the appointment of several women to the bench, including Justice Wilson who recently and regrettably resigned from the Supreme Court. She was the first woman appointed to our highest court and was sworn in on March 30, 1982. In a retirement ceremony, held at the Supreme Court, Antonio Lamer recalled the words Bertha Wilson used in her swearing in ceremony:

We cherish the free and open society which has been built here with its rich mosaic of creeds, cultures and customs. We shape our future with sensitivity and imagination and flair.⁴⁹

Prior to this move to Ottawa, Bertha Wilson practiced law in Ontario for seventeen years and served as an Appellate Judge in Ontario.

Antonio Lamer acknowledges the great legacy of 161 Supreme Court cases to which:

. . . Madame Justice Wilson appended her signature . . . Of these 161, 51 are major decisions under the *Charter of Rights and Freedoms*, 35 important non-*Charter* criminal law decisions, and 75 in other areas of public and national importance. Landmark decisions such as *Singh*, *Kosmopolous*, *Peleck*, *Morgentaler*, *Crocker*, *Andrews*, *Turpin*, *Tutton & Waite*, *Lavallee* and so on and so on . . . On top of that she wrote 86 appellate judgements while on the Ontario Court of Appeal.⁵⁰

In *Bhadauria v. Seneca College*⁵¹ Justice Wilson, writing for a unanimous Ontario Court of Appeal, acknowledged the new tort of discrimination. Madame Justice Wilson writes in the *Bhadauria* case:

49. Cited in Antonio Lamer's remarks in "Retirement Ceremony of the Honourable Bertha Wilson", Supreme Court of Canada, Dec. 4, 1990. Wayne Chapman, at the same time, makes note of an important tort law decision, "... the 1984 *City of Kamloops* decision [which] imposed clear liability on municipalities for negligence to their taxpayers." written by Bertha Wilson.

50. *Ibid.*, p. 3.

51. *Bhadauria v. Seneca College* (1979), 11 C.C.L.T. 121 (Ont. C.A.). This case is considered in *supra*, note 1, casenote 16, p. 8-48.

The plaintiff has a right not to be discriminated against because of her ethnic origin and alleges that she has been injured in the exercise and enjoyment of it. If she can establish that, then the common law must, on the principle of *Ashby v. White*,⁵² . . . afford her a remedy.⁵³

Despite its approval by academics⁵⁴ and Mr. Justice Linden⁵⁵ who found Madame Justice Wilson's judgement to be "an eminently sensible one, which I am bound to follow",⁵⁶ the door to the new tort of discrimination was summarily closed by Chief Justice Laskin on appeal to the Supreme Court in 1981.⁵⁷ An exploration of the reasons for the Supreme Court decision and its retreat from this development in the field of tort law is documented in *Canadian Tort Law* but is not featured. It is this writer's modest suggestion that such material represents a useful and somewhat less conventional starting point for a discussion of not only gender issues but the role of tort law in our society.

VI. Conclusion

In summary, *Canadian Tort Law* does little to serve its predominant audience, first year law students, in appreciating tort law. What is otherwise a well researched and evolving project is seriously flawed and in need of rewriting.

Specifically, important gender issues are conspicuously avoided in the casebook. As well, the treatment of issues that could be quite useful in considering a feminist perspective in tort law is misguided and ill-conceived.

The road map approach to teaching that the casebook employs is useful when the map is up to date and the traveller is made aware of points of interest (and construction zones) along the way. Without these warnings some opportunities are lost; the journey becomes unpleasant and tiresome. *Canadian Tort Law* is admirably current on case law but poorly 'signed' throughout.

52. *Ashby v. White* (1703), 2 Ld. Raym. 938, Holt K.B. 524 [rvd. 1 Bro. Parl. Cas. 62 (H.L.)].

53. *Supra*, note 51, pp. 132-33 [C.C.L.T.].

54. *Supra*, note 1, casenote 18, p. 8-49.

55. *Ibid*, casenote 17, p. 8-49.

56. *Aziz v. Adamson* (1979), C.C.L.T. 134, at p. 139.

57. *Bhadauria v. Seneca College* [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193, 37 N.R. 455, 14 B.L.R. 157, 17 C.C.L.T. 106, 82 C.L.L.C. 14, 22 C.P.C. 130.