BOOK REVIEWS

Rediscovering the Law of Negligence

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I

Allan Beever's *Rediscovering the Law of Negligence*, Hart Publishing, 2007, attempts to resurrect the old pre-*Anns* test law of negligence. Its purpose is to outline and defend a "principled approach" to negligence, and to use this as a critique of the policy-centred approach we now use. It is not a textbook, but a work of legal theory directed at revealing an intelligible order in the law that would make the pattern of negligence cases hang together systematically and in a morally appealing manner. Beever agrees with E Weinrib that the moral principle of corrective justice (that people should make good their wrongs) best explains and morally justifies negligence. The rest of the book is a criticism of the recourse to distributive justice concerns at the policy-input phase of establishing whether a duty of care exists, which Beever considers a constitutionally improper assumption of political power by the courts.

The book is philosophically top-heavy, but once the principled approach is explained it is applied straightforwardly to the conventional categories: the standard of care, duty and remoteness, causation, and defences, along with tricky and emerging aspects of the law, such as the distinction between misfeasance and nonfeasance, the liability of public bodies, wrongful birth and conception, economic loss, loss of a chance, and nervous shock. Beever's diagnosis: a branch of the law in a state of unpredictability; his prescription, a return to the principled approach, which return the book aims to herald. It is well worth a read, for students especially, as an exposition of what the law could be like, and as a clear and critical perspective on what some see as the disintegration of the private law. Will it be the cockcrow of a new dawn for the law of negligence? Not at all.

II

The book's thesis is that Lord Atkin's neighbourhood principle from *Donoghue v Stevenson*, when supplemented by a small number of other canonical decisions, provides an organizing principle that brought to the law of negligence an unsurpassed and subsequently forgotten degree of coherence. Under this "principled approach" a defendant owes a duty of care to a claimant only if the defendant created an unreasonable risk of the claimant's injury, where an unreasonable risk is one that is substantial, or small and there was no good reason for failing to eliminate the risk. This approach does not require any reference to social policy to limit liability, because the question of liability is determined purely between the parties as a matter of legal right (an "injury" at law being the violation of a legal right).

The principled approach was abandoned because of its perceived inability to contain liability, particularly in relation to economic loss. Rather than clarify it, as Beever would have liked, since 1977 the courts have made it less clear by referring to policy considerations as reasons indicative in particular contexts that a duty of care should not be imposed. This is the state of the law post *Anns* and *South Pacific Manufacturing*. The concern is that there is no fixed or even identifiable class of relevant policy considerations that can be said to provide determinants of the duty of care. This robs the law of any real content, with the reference to an essentially inarticulable and open-ended notion of "policy" encouraging litigants and courts to engage in wide-ranging debates about which there is nothing approaching general consensus. Elsewhere, and to the extent that the New Zealand courts have followed suit, the *Anns* test has been replaced by incrementalism, but this apparent shift is only nominal, insofar as the question of whether imposing liability is "fair, just, and reasonable" imports a covert reference to policy under a different and less transparent nomenclature. The signature of this uncertainty is noticeably longer judgments characterized by a much greater emphasis on the facts, which are necessary to ascertain the "justice" of the case and the policies relevant to whether in all the circumstances a duty of care should be imposed.

Beever argues that the law is inadequate in this state. A defendant owes a duty of care to a claimant if the defendant placed the claimant at a reasonably foreseeable risk of injury, which, when cast generally, captures too many possible injuries. This creates the need to restrict the ambit of the duty of care with reference to an open-ended class of potentially relevant considerations. The consequence is a departure from corrective justice as the organizing principle of the private law in favour of broader social concerns captured more properly by the principle of distributive justice. The law of negligence is no longer a social mechanism for achieving justice between two parties, but something more like a branch of politics.

III

The problem, then, is that the modern law of negligence, so long as it involves recourse to policy considerations, is indeterminate: it is incapable of justifying only one result on a given set of facts, because one person's assessment of the "weight" that should be attributed to a policy consideration — such as, say, economic efficiency, or the value to be placed on housing — will often vary from the next person's. Corrective justice, on the other hand, which looks purely at the relationship between the parties, is largely apolitical, and, unlike distributive justice, does not require reference to a patterned theory of justice (a picture of the ideal distribution of goods in the society), which theories are politically controversial. A focus on legal rights and their dispositive or determinative quality is a substitution for such controversy: does the claimant have a legal right that could ground recovery on the basis that the right was violated by the defendant? *Did the defendant create an unreasonable risk of the actual loss suffered by the claimant?* Emphasis on the doctrine of right checks the basic criticism of the old approach with respect to economic loss — that it permits indeterminate liability — because factual losses do not equate to violations of primary legal rights.

Though the emphasis on legal rights has a rather nostalgic quality, the book is not just a tribute to the genius of the House of Lords before Lord Wilberforce. In some respects it is pitched at readers of the future. Its treatment of causation is particularly instructive. What the law regards as causation is more often a normative rather than an empirical matter, concerned to label something the cause of something else only when it suits us to do so for the purpose of allocating moral responsibility and imposing liability. Beever emphasizes the face-saving need for the law to keep pace with the physical sciences. He argues the principled approach does not require special legal notions of causation ("substantial factor" tests, "real and substantial cause" tests, "targeted 'but for' causation" tests) in the context of negligence, because factual causation is always subject to the normative inquiry of whether a given loss, even if it was caused, was nevertheless too remote. As Lord Atkin said in *Donoghue v Stevenson*:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

But when *ought* one to have foreseen certain consequences? Only, Beever argues, when one has created a real risk of their occurrence. So the

claimant's injury is not remote if the defendant created an unreasonable risk of it. Asking whether the claimant's injury was reasonably foreseeable is shorthand for asking whether the defendant created an unreasonable risk of that injury. This does not entail that all reasonably foreseeable loss resulting from negligence is recoverable, and there is no need to import social policy to provide such a limitation. As pure economic loss, for example, does not flow from the violation of a right in the claimant, it is irrecoverable according to the ordinary principles of the law. Importantly, on this model, reasonable foreseeability is not merely a liability limiting mechanism that suits the social policy goal of avoiding indeterminate liability, but an explanation of the normative relationship linking a defendant's wrongdoing to a claimant's injury.

IV

Rediscovering the Law of Negligence, like other examples of interpretive legal theory, is doing something similar to what our ancestors did when they identified the figures of their gods on the face of the stars. Though it imposes order on the complex, it does so by relegating a whole lot of detail: the principled approach functions as a critique of decisions that depart from it, which decisions in Beever's view should best be abandoned. That is the text's deficiency. Though the reader is confronted with an impressive reconstructive exercise, there is still the nagging sense that lawyers and judges have already had a try and found it too hard to apply the principled approach neatly: it is difficult to see how it could be retrieved without a revolution on par with Lord Atkin's in *Donoghue*. Codification could take us there, but codification could just as well substitute the policy preferences of the courts with those of the legislature. The fact that this does not happen regularly, especially in the shadow of New Zealand's accident compensation legislation, indicates either support or indifference to the outcomes of most tort cases on the part of the legislature. This in turn implies legitimacy. This legitimacy is bolstered in cases where the relevant policies are drawn from legislation.

So when we compare the book with the cacophony of detail in New Zealand's standard text, *Todd on Tort*, it is plain that *Todd*'s faithfulness to the law compels a degree of incoherence when conceived as a complete picture of the law. It is not a picture of when liability *will* exist, but rather of when it has existed. *Rediscovering the Law of Negligence* is intended to distil the essence of all this, and present a law of negligence that can be expressed abstractly, independently of the specific contexts in which liability has been found to arise. That is admirable. However, the fact that the courts are indicating that questions of liability in negligence cannot be determined in that way, "undisciplined by facts", would suggest that in

terms of a ranking of values, the interests of justice in the particular case press more heavily than the theoretical virtue of consilience. Who, after all, should be surprised by that? If the overall pattern of cases cannot accurately be described as an expression or instantiation of this or that moral principle, this is not necessarily a criticism of the law, to which end Beever deploys the fact, but an indication that interpretive legal theory is no longer a fruitful research programme in the context of the law of negligence.

New Zealand Family Law in the 21st Century

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New Zealand Family Law in the 21st Century, published by Brookers in 2007, seeks to place important aspects of New Zealand family law in a broad and critical perspective, particularly as they emerge from legislative initiatives. Despite the work's length and appearance,[1] the introduction reveals that Dr Inglis did not intend it to be a compendium of, or a comprehensive reference source on, New Zealand family law.[2]

Dr Inglis had the ideal credentials to undertake this effort. He had a successful academic career, during which he wrote two textbooks on family law. Subsequently, he worked as a Family Court Judge for several decades, before retiring in 2003. His writing is informed by many years of applying the sometimes fallible law to the human tragedies that come before the Family Court. In particular, the reader gains a window into Dr Inglis's thought on human interaction and on how family law seeks to organize and regulate that interaction. The result is an impressive treatise on the current status of family law in New Zealand, which looks well beyond legislation and case law. Additionally, it offers carefully expressed criticisms on the operation of family law and the specialized courts that apply it.

The book is arranged in seven parts. The first contains two brief introductory chapters dealing with the nature and development of family law. These address some of the challenges that arise from the current legislative extension of the definition of family. They also discuss whether it is valid to speak of comprehensive family law policy in New Zealand. The writer makes the following observations:[3]

> The current mix of three different kinds of 'relationship status' is capable of creating no doubt unintended complexities which are likely to guarantee the continued survival of the legal profession....
>
> It is hard to judge which of the developments in New Zealand family law have resulted from a strong general public desire for change, or the need to apply a band-aid to what is perceived to be a current problem (reactive reforms), or simply from political ideology (proactive reforms).

1 Inglis, *New Zealand Family Law in the 21st Century* (2007) contains some 1,200 pages and shares the layout and cover style of the Brookers series of comprehensive textbooks on constitutional law, equity, and torts.

2 Ibid ix.

3 Ibid 7.

These quotations exemplify a style and approach found throughout the book. Dr Inglis continuously challenges easy assumptions and facile generalizations. He attempts a better understanding of what it is that moves the individuals who find themselves engaged before the Family Court and how their experiences are relevant to the development of the law. Good examples of these challenges are Dr Inglis's critique of the unintended effects of no-fault divorce reform, and his analysis of the problems associated with zealous attempts to regulate private behaviour in exhaustive detail through legislation.

The second part of the book discusses the legal family in the 21st century. It starts with a discussion of the legislative "de facto relationship" concept, of which Dr Inglis notes:[4]

> It remains unclear why, in a modern society, it was seen as necessary to impose incidents of the status of marriage or civil union on a range of people who for good reasons of their own exercise their freedom of choice to live together and run their lives outside either status.

Having thus introduced one aspect of the legislative restructuring of the traditional concept of marriage and family, the author addresses the results of applying legislative provisions and reforms to reproductive technology, an issue described as "quite as complex as all legal fictions tend to be ... a matter of working patiently through each category of case".[5] In evaluating the practical consequences of the legal concepts underlying the twenty-first century family, Dr Inglis concludes that the various reforms will "likely ... keep the Family Court busy and ... provide a constant flow of work for the family law bar", with the latter involved because the legislation "will seem virtually incomprehensible except to the trained eye".[6]

The third part of the book addresses the history, jurisdiction, and structure of both the Family Court and its practice and procedure. It pays brief attention to the place of family law within the entire legal constellation and considers what the future may hold for the Family Court. Although lacking detail, and therefore not exhaustive enough as a reference source for practitioners, the chapters on procedure and evidence provide a very good overview for those with a more than passing interest in the actual operation of the Family Court. Extensive attention is given to appeals from the Family Court, which is helpful as this is an area that is poorly covered in the existing literature. The text covers possible options for future streamlining of appeal provisions. Although the author traces the procedural system of the Family Court back to its equitable (and therefore Canon Law) heritage, he regrettably omits to discuss the appeal provisions

4 Ibid 43.
5 Ibid 66–67.
6 Ibid 84.

in this (Civil Law) context, which would have been an interesting addition to the text, particularly relevant in the context of the increased use of inquisitorial interventions in the Family Court.

The fourth part, headed "the protective jurisdiction", is the book's most voluminous. The title is appropriate, as the author approaches the topics in this part from the *parens patriae* perspective of family law,[7] although he hastens to explain that this perspective ought not to be confused with the *parens patriae* jurisdiction in a broader sense, which, of course, remains within the inherent jurisdiction of the High Court. This part addresses the welfare principle, the concept of parentage and the ensuing relationships between parents and children, and the complexities that can arise when the child's parents' objectives diverge. Separate chapters deal with child care and protection, persons under disability, domestic violence, and adoption. These topics are approached from a practical perspective, explaining why these matters warrant intervention, what form that intervention takes, and how this has been applied in legislation and case law. The text does not exhaustively cover all minute details and eventualities, but maintains a broad approach that explains how the law and the courts operate, with enough attention to anomalies and important specifics to inform a critical observer, and without glossing over practical difficulties.

Part Five uses the same practical approach and deals with property and maintenance, or the "distributive" arm of family law. The discussion is again interlaced with various critical observations, often framed with a dry sense of humour. A good example is the comment that section 2D(3) of the Property (Relationships) Act 1976 — which lists what is to be taken into account in determining whether two people live together as a couple — would "appear at first sight to encourage palm tree justice", but that the courts may be expected to "manage to interpret [it] so as to avoid any such unappetizing if not farcical consequence".[8] The author analyses the objectives of the 1991 Child Support Act in a similar style:[9]

> The mixed messages and inconsistencies conveyed by the statement of objectives in section 4 tend to enhance a difficulty in matching what is stated in section 4 to be legislative policy with the plain words of the remainder of the Act.

This Act's anomalies and inconsistencies get much attention. Dr Inglis suggests that its review is long overdue; he describes the Act as "not something a developed nation can take pride in".[10]

The last two parts of the book are brief and provide a broad overview of relevant legislation and some key decisions. Part Six looks again at the

7 That is, that the "protective jurisdiction" has been derived from the *parens patriae* principle, either by direct statutory intervention, or by gradual "osmosis" in a common law process.

8 Inglis, supra note 1, 959.

9 Ibid 986.

10 Ibid 1047.

termination of relationships, but now though the "traditional" lens of the processes that must be traversed, with three short chapters on separation, void marriages and civil unions, and dissolution. Part Seven, appropriately headed "post mortem", discusses family protection and testamentary promises.

It is important, in concluding, to consider *New Zealand Family Law in the 21st Century*'s value and audience. Despite its substantial size and price, it provides clear value. The book's audience, however, requires further consideration.

Athough this book is not a new version of Dr Inglis's earlier academic textbooks, students of family law will be able to use it as a textbook. It does not have the often confusing detail of the existing texts for practitioners, while it is more than detailed enough to support teaching in the most important aspects of family law. Its main advantages as a family law textbook, however, are its focus and resultant structure, and its style of narrative, which continually provokes the reader to think about the objectives of the law and legal process, rather than providing ready-made templates for application. As a result, this book appears destined to become compulsory fare for (advanced) family law students.

Specialized legal practitioners, including the judiciary, will also find this book very helpful as an aid to place their always developing knowledge and experience in a fresh perspective and framework. The speed and scope of legislative changes, combined with the lack of comprehensive structure in legislation and reform, can easily lead to a loss of general overview as a result of the daily focus on details. This text will be a thorough, yet pleasurable, way of remedying that problem, while it provides sufficient critique to stimulate thinking about what family law seeks to achieve (or perhaps should seek to achieve).

There is a vast audience of non-legally trained professionals who regularly engage with the Family Court in some way. One can think of social science experts and providers of ancillary services, such as counsellors, managers of social service agencies, and support programme organizers. This book will be invaluable for these professionals to obtain or increase an understanding of the workings of family law and the legal process. In a similar vein, the book would be useful as a reference source for instructing those who will engage with families in distress in the community, such as social workers and police.

This book ought to be on the shelves of every policy maker, lobbyist, and politician who forms or expresses an opinion on anything relating to the Family Court. Those seeking to change the law and the institutions applying it, would be assisted greatly by the historical and social context in which this book places these matters. It also provides many useful pointers for future developments.

The increasing number of "lay advocates" that support individuals engaged with the court process or campaign for change in family law and

procedure (for instance the many fathers' rights and support groups), will also find this book helpful for their support role, and especially informative in placing their case-based and anecdotal opinions in a wider frame of reference. They will discover (perhaps sometimes to their surprise) that there is, in fact, much greater judicial awareness of the difficulties that arise from using an instrument as blunt as the law to operate on something as precious and sensitive as emotional relationships.

These categories are certainly not exhaustive. This work will reach well outside the traditional audience for books of this nature, emphasizing the impressive legacy that Dr Inglis has left to New Zealand family law.