

CANADIAN TORT LAW

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A Justice of the Federal Court of Appeal

and

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Eighth Edition



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Canadian Tort Law

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About the Authors

The Honourable Mr. Justice Allen M. Linden

The Honourable Allen M. Linden has been a judge of the Federal Court of Appeal in Canada since 1990. Before that he served as a Trial Judge on the Superior Court of Ontario (1978-1990).

A former professor of tort law at Osgoode Hall Law School in Toronto, Canada for two decades, Justice Linden has taught in the U.S., Australia and the U.K. and has written several books and scores of articles about torts. Unable to give up on torts teaching, he continues to teach part-time at the University of Ottawa and at Pepperdine University, School of Law in California. In 1965, he authored a statistical study on Compensation for Auto Accidents which led the province of Ontario to adopt a no-fault auto insurance plan in 1969. Justice Linden also did a statistical study on compensation for victims of crime (1968) which influenced the Ontario government to enact a public scheme to furnish compensation to victims of violent crime. Prior to his elevation to the Bench, he served as a consultant in the litigation of Canadian thalidomide children seeking compensation from the drug company that produced the drug. Justice Linden acted as Executive Director of the Canadian Institute on the Administration of Justice from 1974 to 1978. He chaired the Law Reform Commission of Canada from 1983 to 1990.

A member of the American Law Institute, he is now participating in the preparation of the Third Restatement of Torts, helping to revise the Second Restatement of Torts, which was drafted by Dean William Lloyd Prosser, his teacher at U.C., Berkeley, where Justice Linden earned his Master of Laws and Doctor of the Science of Jurisprudence in the 1960s.

Bruce Feldthusen

Bruce Feldthusen has been teaching and writing about tort law for 30 years, primarily in Canada, but also in the United States and Australia. He is known for his book, *Economic Negligence*, now in its fourth edition, and co-authors with the Honourable Justice Allen M. Linden and Lewis Klar the popular casebook *Canadian Tort Law*, published by LexisNexis Canada. Feldthusen's analysis of pure economic loss has been adopted by the Supreme Court of Canada and now provides the organizing framework for all negligence actions in that field. He was one of the first legal academics to study civil remedies for victims of sexual

assault. Feldthusen was the research director for the Ontario Law Reform Commission's 1989 study on Exemplary Damages which has been cited with approval and adopted in many common law jurisdictions in Canada and abroad. He has also practised law, and works frequently as a litigation consultant on issues in tort law.

Preface

This book, like its seven earlier editions, seeks to furnish an overview of most of the Canadian law of torts. It now seems strange that the original edition of this book in 1972 was the first torts textbook written in Canada. Perhaps it was understandable, because, in those days, the Canadian law of torts was really just the British law of torts and there were already in existence a number of acceptable English tort texts. Perhaps, at that time, the work of the Canadian judiciary was not thought to be distinctive enough to merit separate treatment. Perhaps there were too few full-time teachers of tort law then who were able to undertake such an enormous task.

In any event, the so-called common law of torts has lost its commonality in recent years. Canadian courts, and courts in the other Commonwealth countries, have finally begun to travel along paths of their own choosing. The decision of the Privy Council in *Invercargill* has accelerated this phenomenon, as has the increasing independence of thought among the Commonwealth judiciary. The law of torts is now being rewritten so as to reflect the varying needs of each jurisdiction.

In some areas of tort law, Canadian courts and legislatures have been in the vanguard. Led by an increasingly independent and scholarly Supreme Court of Canada, Canadian judges, at all levels, have made unique contributions to the corpus of tort law. Our judges have frequently developed novel and wise solutions to thorny tort problems. They have contributed many a perceptive and even literary analysis. In the last few years the Canadian law reports have begun to crackle with new life as our judiciary becomes more confident, more profound, more creative. So significant has been the Canadian contribution that it is now commonplace to see British and other Commonwealth courts referring to Canadian authorities in their analysis. This book seeks to focus on the Canadian contribution to the development of the law of torts, but, of course, also deals to a certain extent with the U.K. material, the other Commonwealth material and, where helpful, the U.S. jurisprudence. We have not analyzed every single decision that is available on every topic, preferring to concentrate instead only on the more significant ones.

This eighth edition, as usual, has described many new cases that have added to or altered the existing law, some of them quite significant. For example, the new approach to duty of care in negligence cases, required by *Cooper v. Hobart*, the new developments in compensation for economic loss, the current views on prenatal injuries, and alterations in the law of vicarious liability, products liability and medical malpractice are among the many developing issues explained.

One major innovation of this work is the incorporation of the modern structure for analysis of pure economic loss cases recently articulated by the Supreme Court of Canada, which was based on the outstanding book, *Economic Negligence*, by Dean Bruce Feldthusen. Justice Linden is delighted that Dean Feldthusen, the Commonwealth's leading scholar in this field, has kindly agreed to become my co-author of this edition. Justice Linden is truly grateful to Dean Feldthusen for his major contribution in drawing together and rewriting with him much of the material in different parts of this book.

Another unique feature of this eighth edition is chapter 20, The Civil Law of Delict in Quebec, which is based on the work of Justice Jean-Louis Baudoin of the Quebec Court of Appeal, who is the author of Quebec's leading torts text in French, *La Responsabilité Civile Delictuelle*. We hope this chapter will be of assistance to English-speaking Canadian lawyers and judges who have tended to ignore the many interesting and useful torts cases in French that emerge from the Quebec courts.

An enormous vote of thanks go to Nancy MacKenzie, Justice Linden's talented Judicial Assistant, who slaved over Justice Linden's messy notes throughout the long, hot summer of 2006, miraculously transforming those scratchings into a readable manuscript. In addition, Justice Linden's brilliant law clerk, Jessica Orkin, deserves his gratitude for generously assisting in the research for this edition, especially for the chapter on Products Liability.

Justice Linden is grateful to Pepperdine University, School of Law, where he has served as Adjunct Professor these last few winters, to his colleagues and students there and to Dean Kenneth Starr and Associate Deans Rick Cupp and Shelley Saxer for honouring him by allowing him to teach there and supporting his work in this endeavour.

Justice Linden wants also to thank his wonderful wife, Marjorie, who sacrificed much of their summer vacation time these last few years so that he could complete this project. Her steadfast encouragement and abiding love makes it all possible and worthwhile for him.

Dean Feldthusen wishes to thank Sean Bawden, Law III, for his extensive research on the first draft of the public authority chapter. He would like to thank especially Jennifer Brigandi, Law III, who shared the work with him on every chapter he prepared. Without her meticulous attention to detail and her diligence, this volume would not have been completed in a timely fashion. Dean Feldthusen would also like to thank Justice Linden for supporting him and other Canadian torts scholars throughout his career.

The team at LexisNexis Canada Inc. — Shaun Johnson, Tina Eng and Anand Ablack — also deserve our thanks for their support and for transforming the manuscript into this most attractive book.

Justice Linden's part of this book is dedicated to Tessa Jade Weinberger, who was so accurately described as a possible "precious grandchild yet to come" in the last edition, which was dedicated before she was born to Justice Linden's other six grandchildren — Adam and Benji Wiseman; Sarah and Danya Firestone; and Julia and Ethan Weinberger.

Allen M. Linden
Bruce Feldthusen
Ottawa, Ontario
October 7, 2006

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