Liability in Negligence, J.C. Smith, Toronto: Carswell, 1984. Pp. *xxxiii*, 273. $38.00 (softcover).

Professor Smith's new book is both unusually provocative and refreshingly concise. It effectively summarizes more than twenty years of work on negligence law. The book contains substantial portions of previously published articles, reworked where necessary, and skillfully integrated into a coherent theory. Starting from his now classic analysis of the "mystery of duty", Professor Smith analyzes the conceptual confusions which he sees as accounting for the uncertain state of the law in matters of economic loss, remoteness, nonfeasance and the convergence of tort and contract.

Although the references are up to date, the approach is curiously anachronistic. In the past ten years, Canadian legal theory has tended toward functionalism, economic analyses of law and other approaches which purport to provide a "deep" understanding of what is "really" going on in private law. These theories view legal principles and stated reasons for judgment as ideology or other phenomena masking a noumenal world understandable only in the non-legal categories of economics, psychology, sociology or other disciplines. In short, the trend in recent years has been toward reductionism. Law and legal principles are to be reduced to economics, social engineering, etc. This book, on the other hand, couples respect for stated reasons in judicial decisions with careful conceptual analysis. The result is a kind of modern scholasticism. Law is seen as a discipline sufficiently autonomous to support meaningful argument and analysis on its own terms. This is doctrinal analysis, then. But it differs from normal academic writing in the depth and clarity of the analysis. This is what analysis of legal doctrine should be — but rarely is.

The author does not attempt to justify his approach, nor does he provide a polemic against the reductionists. Nevertheless, by drawing out the logical structure of negligence law and in showing how uncertainty is generated in large measure by conceptual confusions, the book provides support for those opposed to reductionism. A deep analysis of the nature of negligence, systematically relating it to moral and other normative theories, is not provided. It is shown, however, that within the current terms and concepts of the law we can achieve a considerable degree of consistency and justice. This alone diminishes the reductionist temptation, which relies in large measure on the widespread belief that much law, including negligence, has become a mass of arbitrary rules and confusions whose only salvaton lies in the fresh vision of another intellectual discipline.

Some of the limitations of Professor Smith's approach can be seen by considering his discussion of remoteness and foreseeability. He analyzes the development of remoteness doctrines from *Polemis*[1] through *Wagon Mound No. 1*[2] and its various modifications, and then reformulates the remoteness test in this way: *"Damages resulting from a negligent action are not too remote if they are reasonably foreseeable in the particular, or are one of the*

[1] *Re Polemis & Furness, Withy & Co. Ltd.*, [1921] 3 K.B. 560 (C.A.).

[2] *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.* [1961] A.C. 388; [1961] 1 All E.R. 404 (P.C.).

reasonably foreseeable class of injuries."[3] Many pages are spent showing how 92 per cent of the reported remoteness cases in Canada, England, Australia, and New Zealand are consistent with this test. Thin skulls, medical complications, rescuers, and the like are all shown to fit the test. But to accomplish this feat, some subtle discriminations are necessary. For example, consider *Patten* v. *Silberschein*[4], which Professor Smith argues was wrongly decided. The plaintiff was robbed while lying unconscious on the road after an accident caused by the defendant's negligence. On Professor Smith's analysis, the robbery was not foreseeable in the particular and, "in the place and time in which it occurred, [it was] too rare an event to be said to be a member of a foreseeable class."[5] The court held that the loss was not too remote, although the reasons would not be accepted today.[6]

How are we to determine whether this particular accident, injury, or loss is foreseeable? Presumably, if it is itself highly probable, it will be considered foreseeable and if, on all available evidence it has an extremely low probability, it will be considered unforeseeable. But except for these two extremes, what can we say? How probable must something be before it is "foreseeable"? This is the problem which rightly baffles many first year law students. That an accident victim might be rendered unconscious and then robbed before regaining consciousness would seem unlikely in most areas of North America, but it is hardly so bizarre as to be unimaginable or even astonishing. What grounds then, could one give for saying it was "unforeseeable"? Foreseeability is connected in some loose way with probability, but if that were the whole of it, disputes over foreseeability should have resolved themselves to factual or scientific disagreements. The book gives us no analysis of foreseeability. The notion we all absorbed in our legal training is called upon and applied; as readers we are left to our intuitions.

We fare no better when considering the foreseeability of classes of accidents or injuries.[7] In some ways we are confronted with even greater difficulties. As with particular events, we are given no guidance as to how we are to divide the middle ground between the extremely probable and the nearly impossible. In his discussion of the robbed accident victim, Professor Smith says that the event was *"too rare"* to be foreseeable as a member of a class. We are given no further analysis or justification, even though this is intended to show that the court took the wrong view. This merely throws us back on our intuitions. In addition, the notion of a class of events or a kind of event is both theoretically and practically troubling. Any particular event in the real world can be described in numerous plausible ways. Thus, it can be a member of many different classes. For example, *Patten* v. *Silberschein* can be described as

[3] J.C. Smith, *Liability in Negligence* (Toronto: Carswell, 1984) 159-160.

[4] 51 B.C.R. 133; [1936] 3 W W R. 169 (S.C.).

[5] *Supra*, note 3, at 144.

[6] *Supra*, note 4. McDonald, J. relied in large measure on an interpretation of *Polemis* given in *Salmond on Torts*, 7th ed., p. 153. The passage rejects any restriction of damages to "natural and probable" consequences, holding that if a person is negligent "he is liable for the consequences, whether probable or not".

[7] Like the cases, Professor Smith does not maintain a distinction between kinds of events (or accidents) and kinds of injury. This is surprising, since it is far from obvious that foreseeable events or accidents are extensionally equivalent to foreseeable injuries.

a case of a male Caucasion of a particular age being robbed while lying unconscious on a particular Vancouver street after being involved in a non-fatal pedestrian/truck collision. But it also can be described just as correctly as a case of someone suffering a monetary loss as a result of a serious accident. While the former description might specify a class which is very unlikely to be instanced in the world, the latter specifies a class of events which are much more likely to occur. Any event can be described in a way which makes it rare, or which makes it common.

What is the legally relevant description? Neither this book nor the cases which have followed *Hughes* v. *Lord Advocate*[8] offer us any answer. This is disappointing, since Professor Smith is one of the few authors working in this field who has the analytic skills to do justice to the problem. There is much difficulty involved, and a simple answer may not be possible. The problem is very much like one that troubles ethical theory. Act utilitarianism is a theory of obligation which assesses the rightness of actions by comparing the outcomes of particular actions against the outcomes of alternative particular actions. Because of various difficulties with this theory, philosophers developed a number of other versions of utilitarianism often lumped together under the rubric of "rule utilitarianism". Although these theories have a number of significant differences, they all are characterized by their emphasis on rules, kinds, or types of action, rather than particular acts. In other words, these other theories apply the utilitarian principles in various ways to categories of action rather than individual actions.

After some time, philosophers realized that these theories were tenable only if the categories or kinds of actions could be specified in unique, morally relevant ways. In a justly famous book, Professor David Lyons in essence argued that the only possible morally relevant description of a kind of act included all morally relevant features of the specific instance being considered, and so any attempt to assess kinds of acts in the end became equivalent to assessing particular acts.[9] The analogy to *Hughes* v. *Lord Advocate* and Professor Smith's reworded test of remoteness is clear. The test of remoteness looks at the foreseeability of categories or kinds of action; the newer tests of moral rightness look at the consequences or utility of categories of acts. Both rely on a satisfactory specification of the types or kinds of action. The philosophical debate suggests the difficulty of the issue.[10]

A satisfactory analysis of remoteness which accepts the *Hughes* v. *Lord Advocate* approach must show how there can be a unique, legally relevant description of an event. It is a simple matter of language and logic that any event, such as an automobile accident, can be described in numerous ways,

[8][1963] A.C. 837; [1963] 1 All E.R. 705 (H.L.). Smith's reformulation of the test appears to combine the kind of particular foreseeability relied upon in *Palsgraff* with the type-foreseeability of *Hughes*.

[9]David Lyons, *Forms and Limits of Utilitarianism* (London: Oxford U.P., 1965). Although his argument requires most of the book to develop, his central insight is that "*general utilitarian properties* — those properties that are relevant for the application of utilitarian generalization — are causal properties in virtue of which the universal performance of acts of that kind would produce some utility or disutility." (p. 57) These are the morally relevant properties within utilitarian theory. For purposes of judging the moral rightness of a specific case, all morally relevant features, and only such features, must be considered. As a result, considering the specific case as an instance of a kind of action and applying the utilitarian principle to general performance of that kind of act will yield the same result as applying the utilitarian principle directly to the particular act.

and thus is a member of several different classes or categories at the same time. Our assessment of the likelihood of the event happening will depend on which category we take to be relevant. "One object striking another," describes an event which we would find much more probable than, "an automobile striking a bus". Yet they both may be perfectly accurate descriptions of an accident. Neither description is inherently "better".

The "best" description depends on the use to which it will be put. When we have a legal purpose, some descriptions will be too broad and some will be too narrow. To the extent that there is consistency of results in remoteness cases we can presume that the legal community has developed some means of focussing on a single, legally relevant description. If there were more than one legally relevant description in a specific case, there would be the possibility of dissent, since the assessment of likelihood, and hence foreseeability, depends on the description. If the decided cases are as consistent as Professor Smith claims[11], the legal community may have arried at some procedure, intuition, or understanding which isolates the legally relevant description. It is the task of legal theory to explicate the criteria implicit in judicial practice.

By working within the established legal concepts, Professor Smith is able to illuminate the logical "map", as it were, of negligence law. But as the discussion of remoteness showed, not all of the problems of negligence law are matters of internal logic. Foreseeability is not a concept so intuitively obvious that we can leave it forever unanalyzed in the law.

There are, then, limitations inherent in the conceptual approach, and it is hoped that this book will stimulate careful argument at the boundaries of traditional concepts. Whatever the final verdict on the limitations, they do not detract from the considerable importance of the book. It separates the various issues of a negligence action in a way which sheds important light on the significance of old standards like *Winterbottom* v. *Wright*[12] and *Donoghue* v. *Stevenson*[13], and modern classics like *Anns* v. *Merton London Borough Council*[14] and *Rivtow Marine Ltd.* v. *Washington Iron Works*[15]. The analysis yields two central conclusions: the law of negligence cannot be reduced to a single liability principle, and the *prima facie* duty doctrine properly applies only to risks of physical harm resulting from action (i.e. misfeasance). These two theses run counter to the beliefs of many, if not most, judges, practitioners and legal academics today. That in itself is enough to make the book required

[10]One must be careful not to assume that the analogy is perfect. From the unlimited number of properties which could be ascribed to an event, the morally relevant ones were those causally related to utility or disutility. On Professor Lyons' theory, relevance was ultimately determined by the utilitarian theory itself. If remoteness is analyzable solely in terms of probability, this approach would result in the most complete description being taken as the relevant one, since specifying greater detail will almost always affect the probability of that kind of thing happening. Indeed, considerations such as this might well be a *reductio ad absurdum* of the probablistic theory of remoteness.

[11]*Supra*, note 3, chapter 10.

[12](1842), 10 M.&W. 109; 152 E.R. 402 (Exch.).

[13][1932] A.C. 562 (H.L.).

[14][1978] A.C. 728; [1977] 2 All E.R. 492 (H.L.).

[15][1973] 6 W.W.R. 692; 40 D.L.R. (3d) 530 (S.C.C.).

reading for everyone seriously interested in negligence law. The book seems ideally suited for judges facing a legally "hard case" and professors designing an advanced course on the theory of tort law.[16] Even if the major theses ultimately fall to criticism, their refutation will require a degree of clarity and conceptual refinement rarely, if ever, seen in legal writing about negligence.

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[16]It is worth noting that the book contains five appendices, totalling 88 pages, organizing and summarizing virtually every remoteness case in England, Canada, Australia, and New Zealand which is of significance to the major problems of remoteness. The organization and summary provided by these appendices might well be worth the price of the book.

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