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Book Review

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BOOK REVIEW

Studies in the Law of Torts, Clarence Morris. The Foundation Press, Brooklyn, New York. (To be published in late 1951).

It is perhaps unusual to review a book in advance of publication. In this case a reversal of the usual procedure seems justifiable because of the certain interest of Professor Morris's former students, a large number of whom are now practicing law in Wyoming; and it happens to be feasible since the book is a collection of articles previously published in the law reviews. And if familiarity increases interest, those who have studied torts under the reviewer or in other schools will find old acquaintances, for these essays are standard assignments for outside reading in that course. This does not mean that the book is a collection of hornbook discourses for the freshman law student; here is solid matter and good advice for the lawyer; and the publication of the book is a recognition of the value of these essays as a permanent component of a law library.

The larger part of the book consists of a series of related though separate articles on the negligence issue: what should be the standard of care, how can an attorney prove that the defendant has or has not complied with it. The first of these studies, *The Role of Expert Testimony in the Trial of Negligence Issues*, shows the value of using the technically trained witness to establish the facts, where accidents happen in settings foreign to common experience, and to evaluate the parties' conduct by giving opinions as to its propriety. The danger spots, limits, and pitfalls of this technique are emphasized. The second, *Admissions and the Negligence Issue*, explores the possibilities of proving what the defendant did or should have done by his own express or implied admissions. Next is *Proof of Safety History in Negligence Cases*, discussing the proof of other accidents (or their absence) to establish the dangerous nature of premises (or their safety) and the bearing of this evidence on the issue of the defendant's knowledge of the danger. Later comes *Custom and Negligence*, showing the value and the effect of proving that the defendant was or was not following the usual practices of the industry when the accident occurred. In *The Role of Criminal Statutes in Negligence Actions* a careful and flexible judicial selection of criminal proscriptions as the basis of civil liabilty is advocated, and in *The Role of Administrative Safety Measures in Negligence Actions* a real gap is filled by the recognition that our modern complex industrial system is largely regulated not by statute but by rules of commissions and bureaus, and the effect of violation of or compliance with such regulations is treated at length. Related to this series in spirit is *Proximate Cause in Minnesota* with its careful differentiation of cause in fact problems (the evidence needed to connect the act and the result) and problems of remote causation (the arguments along psychological and doctrinal lines for limiting the scope of liability). Although originally

written for and published in the Minnesota Law Review, and relying principally on Minnesota cases, the article is quite complete as that jurisdiction has had many cases which ilustrate the various techniques and theories discussed.

In this series of articles Morris is the lawyer's law professor. Not a plugger of rules, he teaches understanding and application. These studies do not lay down black-letter rules, they do not lead the lawyer by the hand as does a question and answer trial practice manual, but they do show the lawyer the state of the law and the philosophy behind it, and most important, how he may utilize that philosophy in influencing courts on behalf of his clients. Each article is largely devoted to advocacy: what the plaintiff's attorney should prepare and how, what defense counsel may do affirmatively or negatively. Morris's skill as a *raconteur* shows through the printed page, cases are presented not as dry holdings but as problems arising at a trial for court or attorney to solve, and the solution is frequently pin-pricked by a pungent criticism or a suggested line of cross-examination that might have changed the result.

The remaining essays expose another and perhaps earlier aspect of Morris's work. In *Torts of an Independent Contractor* he explores the many situations which give rise to exceptions to the rule of non-liability of the employer, and suggests the policies and economic factors which do and should lead to responsibility in these cases. *Notes on "Balancing the Equities"* (written with Dean Page Keeton of the University of Texas School of Law) suggests a rational analysis of the problem of granting or withholding equitable relief against encroaching trespassers or prepetraters of nuisances, and rational measures for dealing with these wrongdoers without inflicting excessive punishment or unnecessarily enriching the plaintiffs. *Inadvertent Newspaper Libel and Retraction* deals with the inadequacies of the present law and procedure for handling the case of the libelled plaintiff whose general reputation has been restored through retraction. The last two studies lean heavily on *Punitive Damages in Tort Actions,* the last in the book. Here Morris notes the double function of the judgment, reparation to the plaintiff and admonition to the defendant, and seeks out a satisfactory solution of the case where simply making the plaintiff whole may not sufficiently discourage repetition of the wrong.

In this last group the writer is the legal philosopher seeking the answers to why and how the law has come to be what it is, where it is going or should go. But even in this pursuit these discourses are not solely for the edification of other law professors. Presumably judges are rational beings who may be influenced to give or withhold relief or to say certain things to juries by appeals to the intellect. A little Morris, well understood, passed on to the judge at the phychological moment, may do a world of good, and in the proper case one article may counterbalance a

whole strapful of reporters. Legal philosophy, at least of this sort, is not an esoteric exercise, it should be the foundation of every argument and decision. In these essays Professor Morris has advanced interesting and stimulating ideas on how the law ought to function in a too limited number of situations.

Perhaps I have overemphasized the practicality of the book, on the theory that law professors and law reviews are too often suspect. A busy lawyer would probably not use this book daily in his practice. But he would get enjoyment and enlightment from reading it.

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