

BOOK REVIEWS

MORRIS ON TORTS. By Clarence Morris. Brooklyn: The Foundation Press, Inc., 1953. Pp. xxviii, 384. \$5.00.

A textbook on a legal subject usually consists of statements of principles and rules of law supported by annotations at the bottom of the page. Professor Morris' method of exposition is somewhat novel. He frequently introduces a subject with a very brief recital of the facts and decision of an important case. This is followed by discussion of the rule of law and policy considerations underlying the decision. Descriptive names for plaintiff and defendant are frequently used: such as, Mr. Angel and Mr. Imp; Mr. Pedestrian and Mr. Motorist; Mr. Victim and Mr. Joker. This device helps one to follow the thread of the discussion. Very brief abstracts of the more important cases found in recent casebooks are woven into the text. These furnish the student an excellent orientation into the discussion of the principles involved. In the first 339 pages there are only 85 footnotes and many of these are numerical citations of briefed cases.

The aim of the author can be gleaned from the preface: "This book is written primarily for first year students taking a course in Torts. . . . Since some stress is put on advocacy, the book may be of interest to young practicing lawyers. . . . This is not a search book."¹ So far as first year students are concerned, the author has without question accomplished his purpose. The discussion of the general principles of the subject is both clear and interesting. It ought not to be difficult to induce first year students to read such a book. It is, however, more than a primer for students in the first year. The unusually full consideration of policy underlying decisions should be helpful to the practicing lawyer. In a sense it is a search book for lawyers in marking out the limits in theory and supplying an orientation into the search for case law.

Approximately half of the text is devoted to negligence, including a chapter on the trends of personal injury litigation.² The emphasis on procedure and practice is important. Without this approach much of the law of negligence is confusing, if understandable at all. The approach to liability in terms of negligence, proximate cause and duty is sufficiently explored to pinpoint some of the fallacies that exist:

When a defendant's conduct is unlikely to result in harm to anyone discussion of ambit of his non-existent liability may be confusing and almost senseless.³

After referring to an Oregon case in which the court indulged in a long discussion of proximate cause Professor Morris remarks:

An abstract assumption of the railroad's fault without specifying what constituted its fault often makes discussion of the ambit of responsibility meaningless.⁴

These quotations are fundamental in the determination of liability. They are selected for emphasis only because so many courts deal in terms of proximate cause upon the assumption of negligence without any clear expression of why or in what respect there is fault. In one excellent textbook⁵ an attempt is made to account for liability on the basis of *negligence in the abstract*, an expression

1. p. vii.

2. c. XIII.

3. 173.

4. *Ibid.*

5. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 104 (1906).

devoid of meaning. Even the famous *Palsgraf* case,⁶ which has recently been revisited,⁷ might have been decided without invoking the doctrines of scope of risk or proximate cause on the ground that the defendant's servants were not at fault. Their assistance to a passenger who was in danger of serious bodily harm so outweighed in social utility any risk of harm to property or to other persons that the conduct appears entirely free from blame.⁸ If the conduct is not blameworthy, what further reason is required to hold the defendant not liable? There are many cases, however, in which minds may differ as to whether the conduct complained of bears an unreasonable risk to the plaintiff's harm. Here the scope of risk doctrine is of help. The particular actual cause is selected as the basis of complaint because, it is believed, it includes the harm in a way that makes the risk unreasonable.⁹ For no other reason is this actual cause among many others selected. To say negligence is the proximate cause of a harm means nothing more than that certain conduct is a necessary antecedent of the harm and that the conduct involves an unreasonable likelihood of producing that harm. Actual cause plus risk equals liability. If that is what proximate cause means, it is arrived at by addition and not by legal reasoning.

Under the topic Certainty of the Law on Scope of Liability Morris says:

The *general rules* of proximate cause do not tend to make the law certain or the results of cases predictable. This uncertainty is not remedied when the problem is discussed in terms of duty or negligence.¹⁰

As to the general rules of proximate cause there is no reason to question this statement despite the vast amount of discussion, the probable purpose of which was to attain these goals. However, the approach "in terms of duty or negligence" seems to offer some measure of success. Otherwise, the study of cases in this field seems futile. In many cases negligence, used as a term of relation and in connection with the scope of risk doctrine, is helpful in deciding blameworthiness and therefore liability. "In some cases specialized rules and precedents lay a sound basis for prediction."¹¹ In support of this the author mentions liability to a rescuer and the transfer of intent in some trespass actions. He then continues: "The list could be expanded to include hundreds of different kinds of cases in which the doctrine of *stare decisis* has tended to settle the law."¹² This seems to be prediction on the basis of duty. Under the title Judge and Jury the author says:

In some jurisdictions the duty approach is becoming increasingly popular, though in no jurisdiction is it universally used to solve scope-of-liability problems; in these jurisdictions the likelihood that a novel question of scope of liability will be settled by the judge, rather than by the jury, is relatively high.¹³

Cases like *Waube v. Warrington*¹⁴ support this view, but the duty approach would seem to have its greatest use in cases with recurring factual situations. In such cases verdicts and especially directed verdicts tend toward development of rules of law.¹⁵ An example is the liability or non-liability of a carrier for loss of

6. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

7. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

8. See Terry, *Negligence* in SELECTED ESSAYS ON THE LAW OF TORTS 261 (1924).

9. N. St. J. Green, *Proximate and Remote Cause*, ESSAYS ON TORT AND CRIME 1 (1933).

10. p. 192.

11. *Ibid.*

12. p. 193.

13. p. 206.

14. 216 Wis. 603, 258 N.W. 497 (1935).

15. HOLMES, THE COMMON LAW 123, 124 (1938).

goods by the concurrence of an extraordinary flood and the carrier's unreasonable delay.

In the field of misrepresentation the author disagrees with Bohlen's view of no liability for negligently giving false information if the defendant acts gratuitously. Bohlen used the analogy of supplying defective chattels in which the supplier's only duty is to act in good faith.¹⁶ The author prefers the analogy of liability of one who negligently harms another while trying to render gratuitous assistance, such as taking another to a hospital after a collision of automobiles.

When a housewife asks a former employer about the honesty of a servant looking for work, or when a life insurance underwriter asks an applicant's acquaintance about the applicant's sobriety, the inquirer expects only information already at hand. If the answer tells all the speaker knows, the speaker is not negligent in knowing no more than he does. But if he answers in negligent haste failing to use due care to marshal his knowledge, or if he draws unreasonable conclusions without stating the data on which he bases them, or if he negligently uses language meaning the opposite of what he is trying to say, he does a sloppy job of performing his undertaking and deserves liability.¹⁷

An analogy that supports Bohlen's view is found in the law of defamation. If *A* applies to *E* for employment and *E* seeks information as to *A*'s honesty from *D*, *A*'s former employer, *D*, may, if he falsely states that *A* is dishonest, subject himself to a suit in defamation by *A*. But *D* has a conditional privilege that will protect him in the absence of malice which includes either recklessness or knowledge of the falsity of the statement. Negligence on the part of *D* will not make him liable. One compensated for giving information, such as a commercial agency, may be liable for defamation on the ground of negligence or possibly at its peril. But *D* gives the information as an accommodation. If *D* knew he could be liable in defamation if he could be proved negligent in making a reply, he would not take the risk and no information would be given. This would defeat the policy underlying conditional privileges in such situations. If *D* falsely replies that *A* is trustworthy and *E*, relying on this, employs *A* with subsequent loss through *A*'s dishonesty, *E* may sue *D* for misrepresentation. What kind of conduct should make *D* liable? Here, again, *D* would likely make no reply if he understood negligence would support liability. In this situation *D* ought to be able to act without fear of being sued for defamation or for misrepresentation if he acts honestly. Otherwise, whatever value there is in acting on gratuitous information would disappear because the information would not be forthcoming.

This book, as a whole, is an excellent production. It clearly presents the general principles of torts. It does not deal with detailed application to minor points. But the discussion of policy beneath the general principles furnishes a background for such detailed application. The book should be well received by students, teachers and practicing lawyers.

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16. Bohlen, *Misrepresentation As Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1929).

17. p. 265, 266.

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