CLARENCE MORRIS

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For many years, a substantial amount has been said and written about whether, after making some kind of a cost-benefit analysis, the large or the small law school can be said to be the more effective. Regardless of where one comes out on that issue, it is a fact that one of the significant attributes of the large law school is the presence on the faculty of at least two, and sometimes several, legal educators teaching, writing and talking about problems related to the same field of law. While few of us would admit to the intellectual superiority of others working in the same area, it is just as true that few of us would claim that others are not superior as to certain attributes related to legal scholarship and teaching, or that our colleagues have not made substantial contributions to whatever we are as legal scholars. It so happens that the University of Texas Law School, if not distinguished for any other reason, has had a wealth of talent represented by members of the faculty in the field of torts. I have therefore been most fortunate as a torts teacher to have had the benefit of the ideas of so many thoughtful and capable persons, including especially Leon Green and Clarence Morris. Whatever I am, it is not what I would have been but for Leon Green and Clarence Morris.

The point of all this is to say that one of my most satisfying experiences was that of being on the law faculty at the University of Texas with Clarence Morris. This association began in 1939 and each of us had a section of torts and equity. Each of us took the students in equity that the other had taught in torts. One of the minor side effects of this association was the article entitled "Notes On Balancing the Equities" which was published as being written by Clarence Morris and Page Keeton but which was written by Morris, with perhaps some minor contributions from Keeton.

Clarence Morris is, in the first place, a superb classroom teacher. As I have gone about the State of Texas, visting and talking to lawyers about the University of Texas Law School and personal injury litigation, former students frequently inquire about "Uncle Clarence" and in every instance they do so for the purpose of expressing a debt of gratitude to a great teacher. He is tough in the classroom, but he

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dephlegmatizes the students and they, in their excitement, learn to think, talk and act like a lawyer.

The subject of torts cannot be taught well or dealt with adequately unless due consideration is given to the practical problems related to the adversary system and the judicial process. No one has made this any clearer than has Leon Green.[1] Torts is a litigation course, and this characteristic of the field has been one that Clarence Morris has always emphasized in his teaching, conversations and writing about specific compensation problems. This can be clearly perceived from a reading of his essays that were collected quite some years ago.[2] This collection of essays was largely devoted to problems of advocacy related to proof of negligence. They are, to say the least, some of the best written on the subjects considered. Morris early adopted a functional approach to rules and precedents and to causes of action and thought a great deal about how they do function and should function in the process of disposing of tort cases and getting cases settled. The respective roles of legal advocate, trial judge and jury are emphasized in everything that he has written and said about torts, and this is also apparent in his book on torts, much of which I consider necessary reading for my students.

As just stated, Clarence Morris has customarily adopted a functional approach to a consideration of whether a tort action ought under a given set of circumstances to be available to an aggrieved person. This emphasis has been reflected as a consequence in the writings of others, so that in this respect I believe that he has made a significant contribution to the teaching of torts and to the legal literature in the torts field. It has been my practice for many years at the beginning of my torts course to use the following proposition from the first chapter of his book on torts:

> The central problem in most tort cases is: Should the plaintiff or the defendant bear a loss? My basic axiom in approaching such problems is: A loss should lie where it has happened to fall unless some affirmative public good will result from shifting it. This axiom is bottomed on a predilection against use of the power of government in the absence of some perceived likelihood of improving affairs by reordering them.[3]

In this connection observations that Morris has made from time to time on the admonitory function in the law of torts have been quite

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[1] L. GREEN, THE LITIGATION PROCESS IN TORT LAW (1965).

[2] C. MORRIS, STUDIES IN THE LAW OF TORTS (1952).

[3] C. MORRIS, MORRIS ON TORTS 9 (1953).

helpful. I would simply direct attention to a statement at the conclusion of one of his excellent articles on punitive damages:

> The underlying assumption of this paper is that there can be an admonitory function in the law of torts, and that there should be such a function if it will work well. The assumption is not made entirely out of the whole cloth of the writer's imagination; nor does it concern only a future, hypothetical law. It has been recognized in action and words by judges and jurists for centuries—not always clearly, but as long as courts have linked liability and fault it has pervaded the judicial climate.[4]

Finally, Clarence Morris is a generalist and a practical legal philosopher who has been able in his writing and teaching to transmit to others the importance of the role of law and legal doctrine in limiting the scope of judicial discretion and free choice in the disposition of legal controversies without minimizing the importance of an evaluation of the policy considerations related to a particular problem, such considerations being in reality a part of the law. As to policy matters, certainly no perceptive beginning student can read the introductory chapter to his book on torts[5] without gaining some initial realization that generalizations about the law are understandable and logically applicable to varying situations only after careful thought is given to the context in which they are employed. As to the role of legal doctrine, I would simply quote from another one of his books:

> The extent to which courts do in fact creatively make the law is a difficult and subtle question. Justification for pursuing the inquiry is at once simple and practical: an understanding of the limits within which courts move is a necessary part of a lawyer's professional equipment.[6]

It is a privilege to join with others in honoring such a distinguished legal educator as Clarence Morris, who has contributed so much to so many as a superb teacher, a practical philosopher and a legal writer of distinction.

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[4] Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1205 (1931), reprinted in C. MORRIS, STUDIES IN THE LAW OF TORTS 339, 377 (1952).

[5] C. MORRIS, MORRIS ON TORTS 1 (1953).

[6] P. MISHKIN & C. MORRIS, ON LAW IN COURTS 57 (1963).