

St. John's Law Review

Volume 9
Number 2 *Volume 9, May 1935, Number 2*

Article 36

June 2014

Restatement of the Law of Torts (Book Review)

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Recommended Citation

Gifford, James P. (1935) "Restatement of the Law of Torts (Book Review)," *St. John's Law Review*. Vol. 9 : No. 2 , Article 36.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol9/iss2/36>

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RESTATEMENT OF THE LAW OF TORTS. Vol. I, Intentional Harms; Vol. II, Negligence. St. Paul: American Law Institute Publishers, 1934, pp. xxxii, 1-730; xxxi, 731-1338.

Kenneth Burke in his "Permanence and Change" states that all animals react to experience and that, in so far as such reaction is a conditioning factor of their future conduct, they can be said to possess a criticism of experience. Furthermore, the human animal is, he states, unique in that he has developed a criticism of criticism; he has created a technique of appraising his appraisals of experience, of seeing how well his appraisals serve him in using proper means to secure desired ends. Burke shows that a criticism of criticism is possible because of our ability to verbalize our experience. Yet the danger in these verbalized abstractions is that the word becomes the reality and in dealing with words alone the critic moves further and further away from the experiences which formed the basis for the abstraction. Hence the scorn for the theologian who discusses the question of how many angels can dance on a needle point or any other problem too far divorced from experience.

But the criticism of experience embodied in that group of abstractions which we call the law is becoming so complex in the United States that the attempt of lawyers and judges to determine what the outcome of a particular case should be involves at times almost superhuman qualities of patience and industry. To discover what the legal rule is in a given instance, that is, to summarize in abstract form what judges have held in a long line of cases, requires so much search and frequently reveals so many inconsistencies, that something like a Restatement has long been a necessity. First-class text-books serve a similar purpose but text-books have no higher authority than is accorded by the respect felt by the courts for the intelligence and scholarly ability of their authors. What is needed is the authority of numbers, of the combined efforts of scholars, judges, and practicing attorneys whose final pronouncements will receive the sanction of a widely representative group of the bar. The whole technique of producing and promulgating the various sections of the Restatement of the Law has been the result of an imaginative realism which is comforting to see in a profession which by training and tradition is too frequently averse to change or innovation.

Although your reviewer is ranked among the academicians, he, either because of that fact or in spite of it, is constantly beset with an almost instinctive aversion to abstractions. He recognizes their utility in helping one to verbalize a conclusion, but he gropes continually for the facts of the decided cases as a guide in reaching a decision in the undecided case. How far he, or any other law-trained person, is conditioned by his training—by the abstractions which we call rules or principles—is difficult to say. This difficulty arises from an introspective blindness, from a wholesome refusal to regard ourselves as elaborate automata conditioned to react in definite, predictable ways. We like to think of ourselves as free, as beings endowed with reason who seek to do justice and, as such, capable of reaching an unbiased, impersonal conclusion on a given set of facts. Such a statement bears its own refutation, for it is not the question of whether a judicial opinion is or is not a perfect syllogism that is of major importance in the study of practice of the law. Far more

important is the attempt to discover what caused the judge to choose one major premise in preference to another. To put it less pedantically, why did the court decide as it did? Who can plumb such depths even in his closest friend? Yet we must study our justices to find the hidden springs which move men to dispense justice or to dispense with it. For each of us, justice itself is a complex or compound of desires for certain ends. We seek to attain justice or see it attained because we believe it to be an important factor in maintaining or securing a workable harmony among the conflicting desires of men. It is possible that such workable harmony is justice—at least, relative justice, which is the only kind we seem capable of knowing.

Toward the attainment of this workable harmony, the Restatement of Torts has its chief value as a labor-saving device to the lawyer and the judge. In the field of Contracts, in so far as the lawyer has a hand in the formation of a contract the need for prediction as to what the courts may do with the contract is paramount. Prediction shapes the language of the agreement and may shape the conduct of the parties in so far as they may refuse to seek extra-legal sanctions to enforce their bargains; as, for example, where one refuses to adopt racketeering methods to enforce an illegal agreement or refrains from using the powerful economic weapon of withholding trade to coerce the little business man. So much for Contracts. In most situations involving torts the need for prediction comes after the event. One does not go about one's ordinary affairs with a text-book of torts in hand or even in mind. Yet one insures oneself against the results of careless conduct. But one rarely thinks of asking one's lawyer what will happen if one punches his enemy in the nose. You punch and ask later. Nevertheless you insure yourself against liability for auto accidents, elevator accidents, compensation to workmen, injuries in extra-hazardous trades, against conversion by employees. To this extent the law of torts shapes conduct. Otherwise the abstractions of this branch of the law exert their influence remotely, very indirectly, at best. Dimly in the minds of most are memories, habits, perhaps, of being careful, knocked into us by parents, brothers, school-fellows, teachers, by the sight or experience of an accident—the myriad influences which teach us a way of safe living. But the event, the tort case, is usually the first moment when the individual feels the impact of this branch of the law.

For this reason, perhaps, your reviewer feels that the examples, the illustrations of the abstractions, in this section of the Restatement, will have more influence on the profession than the abstractions themselves and that the Torts section will reach its highest utility in its annotated form. Although our lawyers and judges are constantly using abstractions, the training and temper of our Anglo-American jurisprudence centers around the case as the source of our law. Perhaps it is more accurate to say that the case has a solid, real quality, it gives one a substantial footing; as a weapon in argument, it has a concrete, bludgeon-like quality which the abstraction lacks. I well know that cases as such are not hurled about; cases in argument and in opinions are presented as the embodiment of a principle. The ingenious lawyer or judge, as in *MacPherson v. Buick Motor Co.*,¹ finds in cases involving poisons,

¹217 N. Y. 382, 111 N. E. 1050 (1916).

defective scaffolding, and a carelessly made coffee urn, fortification for a decision which places the burden of inspecting an automobile on the persons who, in our present business structure, correspond to the one who, in a simpler society, was both manufacturer and vendor. Who can say what enabled the judge to move from one abstraction to another, from "non-liability to a sub-vendee" to "liability to a sub-vendee if failure to inspect carefully creates an instrument inherently dangerous to life and limb"? Something more than the cases; something more than abstractions; a something we might call imaginative statesmanship—a realism which recognizes that the industrial complexity of today has so far separated the manufacturer-vendor of former days from the consumer that the ancient rule no longer produces that workable harmony which we call justice.

Beside the above, there are many other points in which the Restatement of Torts becomes advocate for a new and undoubtedly, in the minds of the council, a better rule. In regard to the duty to retreat from murderous assault, the Restatement adopts the retreat as against the stand-your-ground rule although the latter is the rule in many jurisdictions. Such adoption is to some extent an act of faith, a faith that if the courts and juries of "stand-your-ground" states impose liability in such cases they will eventually deter those defending themselves against murderous attacks from using deadly force in defense unless retreat is dangerous. Personally, I lack such faith. I certainly know of no evidence that such changes in legal rules relative to situations of this type have such effects. Much of the evidence seems to the contrary. (Witness the refusal of juries to convict in cases involving violations of the late, unlamented prohibition law in New York.) A law which runs counter to the ethical standards of the community in which it is administered can be nullified by many devices—a lesson which our American legislators are slow to learn.

Another main point in which the Restatement of Torts takes a decided stand on a disputed point is in regard to liability for negligence. The conflict is illustrated in the majority and dissenting opinions in the famous *Palsgraf* case.² Here the position adopted by the Restatement may have considerable effect on the outcome of cases. In so far as questions of liability are left to juries, one cannot predict what effect a change in the formula will have. Probably very little. But if the position of the Restatement is adopted, the judge will have the initial problem of deciding whether reasonable men might differ as to whether the defendant's conduct created an unreasonable risk of harm to (a) the class of persons of which the plaintiff is a member, (b) the particular species of interest which was invaded. Thus the court has one more point on which to direct a verdict for the defendant than it has under the rule which involves only a consideration of whether the defendant's conduct created an unreasonable risk of harm to someone and, if so, was the conduct the proximate cause of the injury.

On this point your reviewer has no decided preference. The position of the Restatement would seem more favorable to defendants than to plaintiffs. Socially it seems of no great moment which position is taken. It is merely a problem of devising a formula for the distribution of loss. Once an injury

² *Palsgraf v. Long Island R. R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928).

occurs, the loss must fall somewhere. How it shall be divided is socially important in so far as either plaintiffs or defendants may become restive if they feel that the decision has been markedly unfair. We may come to recognize at some later day that, except in so far as liability for fault may have a deterrent effect on careless people, the risks of living may best be spread over society at large as today are spread part of the risks of industrial accident. Pending that time, I cannot feel that the attitude of the Restatement on this point, if generally adopted by the courts, will produce serious disturbances in the workable harmony of living.

In general the format, comments, examples, and precision of the language used are all worthy of high praise. Professor Bohlen, the reporter for this subject, should look upon these volumes with pride as the fine achievement of a life devoted wholeheartedly to the clarification of the most complex and troublesome of the major divisions of the common law. He would be the first to emphasize the cooperative nature of the work, and intelligently cooperative it has been, but without his own intelligence, patience, and profound knowledge of the subject, the labor of bringing this section to its present fruition would have been more painful and less effective.

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THE LIBERTY OF THE PRESS. By Harry Weinberger. Berkeley Heights: Oriole Press, 1934, p. 39.

In 1735, Andrew Hamilton, lawyer, then in his eighty-first year, came from Philadelphia to New York City to defend John Peter Zenger, who was accused of criminal libel. The cause of Zenger was not popular with the authorities. As a matter of fact, two lawyers who had dared in behalf of the defendant to challenge the jurisdiction of the court had been disbarred, before Hamilton, who served without fee, was induced to represent Zenger. In commemoration of the services rendered by the eminent lawyer from Philadelphia, in which he fearlessly espoused the cause of the freedom of the press and in which he "first established in North America the principle that in prosecution for libel the jury were the judges of both the law and the facts,"¹ two meetings were held in 1934, one at Independence Hall, Philadelphia, Pa., and one at the "Home of Law" of New York County Lawyers Association. At each of these meetings, an address was made on the liberty of the press by Harry Weinberger, of the New York Bar. These addresses are now printed in the book under review.

No orator should fail today when his theme is liberty. The humblest speaker need have no qualms as to his audience when they have attended to honor that divine concept, freedom. His result, therefore, should not be measured merely by the popularity of his subject, but rather by the depth of feeling that his words evince and his presentation manifests.

¹ P. 11.