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Ward: The Tort Cause of Action

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BOOK REVIEW

THE TORT CAUSE OF ACTION. By Peter Ward.¹ Published by the author. Lithographed by Edwards Brothers, Inc., Ann Arbor, Mich. 1974. Pp. xxviii, 496. \$10.00.

Professor Ward, a seasoned practitioner, teacher and scholar, in a casebook of 110 cases, 500 pages, with ample references to other cases, leading texts and law review writings, offers a "teaching device for training the student to handle, as a professional, the tort problems of loss distribution." (p. v) *The Tort Cause of Action* is a daring venture and a valid one. It "does not pretend to be a law of torts," (p. v) but scan the topic index pages 491-96 and see if anything is omitted. Its format is not based on a doctrinal classification of actions and defenses, nor on a grouping of factually kindred cases. Instead it is a synthesis of the common denominators of all tort actions as a basis of civil liability for damages legally caused by the violation of imposed duties.

Chapter I is devoted to a textual consideration of the synthesis. The entire chapter of 27 pages, beginning with the famous "Calf Path" authored by Sam Walter Foss, is widely informative and highly interesting. Professor Ward faces the difficulties of the teacher, the practitioner, and the judge courageously and makes a good case for the advantages of the synthesis. His discussion bristles with challenging ideas. The great reliance on the student's study and preparation is indicated by the "Instruction Suggestions and Selected Readings," (pp. xiii-xxviii), for the consideration of the problems presented by the cases and readings. The classroom time to be devoted to the problems is indicated, and if the students do their work the class hours will be greatly enriched for them and for the teacher.

Professor Ward's discussion of his synthesis can be better stated in his own words from which the following two paragraphs are borrowed:

Here and there, efforts are being made to solve some of the difficulties inherent in a plural torts system by analytical methods based on observed unitary principles. The only difference between the methods presently being employed and *The Tort Cause of Action* is one of degree. Denominators common to specific sections or groups have heretofore been sought. The methodology of *The Tort Cause of Action* takes the next and obvious step of identifying denominators common to the entire area of tort liability, and utilizing these common factors of Damages, Cause, Duty, and Violation to seek solutions to problems not easily solved by a plural concept.

Describing "torts" in terms of *The Tort Cause of Action* offers many pedagogical advantages. Fortunately for the teacher in this field, the law of "torts" is more than adequately documented. There is a rich abundance of texts, studies, and restatements. Unlike so many other fields, where the teacher has to utilize a rather large proportion of his

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class time just teaching what the routine law is, in the field of tort liability, that job has been done by recognized masters and presumably the students will read the suggested text. The classroom teacher can more properly apply himself to the questions raised by the routine situations covered in the students' reading and to the development of a background against which his students can learn to fit the pieces of that which today is the unusual, tomorrow the routine. This is not "ivory tower" stuff. It is the heart and soul of legal education. Of course, the "is-ness" of the law must be taught. But that includes not only what the law was when the professor went to law school, but also what it is right now, and what it may well be ten years from now when our quondam student is urging a position in the highest court in his jurisdiction. It is in this area of analysis that teaching tools are scarce. The numerous tort casebooks, as differentiated from texts, excellent as they all are, spend so much coverage on the routine and established "is-ness," devote so many cases to the teaching of the law, that very little time is left for the process that directs its focus primarily on the student rather than on the professor — the learning process, the creative process. (p. 21)

The format of the book follows the course set by chapter I, Statement of the Case, chapter II, Damages, chapter III, Cause, chapter IV, Duty, chapter V, Violation, each with subsections indicating the problems.

The study of the common denominators begins with Damages. This is calculated to raise the doubts of many tort teachers. One advantage, whether intended or not, is that the "pot of gold at the end of the litigation rainbow" is brought right up front for everyone to see. Even though damages are the payoff in practically all tort litigations successfully prosecuted, the damage issue is usually the most neglected issue in a torts course. This is also true of the office and the courtroom in many important cases. The courts can no longer be excused for the failure to develop the means for evaluating as their own function the items of injuries suffered by the litigants as found by the jury. If the damages problem can be taught successfully at the beginning of the first-year course in torts it will at least be given enough emphasis to keep it up front throughout the course and perhaps throughout the law school curriculum. It will also of necessity require attention to the equitable remedies that are frequently ancillary and sometimes a substitute for damages. The greatest difficulty I see in teaching the damage issues at the beginning is their dependency upon an earlier determination of the risks that fall within the scope of a defendant's duty.

The organization of a casebook is of course only important in providing an orderly treatment of the materials. If the teacher relates the problems so that each ties in with those that come before and those that follow, a particular arrangement offers no difficulty. This responsibility of steering the course cannot be shifted from the teacher whatever book may be used.

The cases selected by Professor Ward are excellent and for the most part exciting. The differences in subject matter, social climate, time and history, procedures, vocabulary, administrative and economic stresses usually differ widely from case to case. The first four or five cases seem representative of the arrangement. Each involves a damage problem and usually more, but the environments out of which they arise are very different. As an example to il-

illustrate the point made, they are named. *Hadley v. Baxendale* (Eng. 1853) mill; *Criaci v. Insurance Co.* (Cal. 1967) the failure of an insurance company to settle a claim within the limits of a policy that caused the insured to suffer great loss of property and severe emotional distress; *Stidham v. Wachtel* (Del. 1941) slander; *Wilson v. Oldroyd* (Utah 1954) alienation of the affections of wife; *Jones v. Jacobsen* (Wash. 1954) conversion of personal property. For vivid contrasts and unlimited interest a better selection would be difficult to make for a beginning first-year torts class. I regret that I cannot have the opportunity to witness Professor Ward and his class as they take off. It should be noted that these and other cases are frequently noted by reference in other areas of the book.

Given a class of able students in September who really want to become lawyers, armed with a book of good cases, and the opportunities to debate the problems raised by the cases and the variations stated by the teacher with their fellow students, the teacher will be astonished by the number of blue books they can fill with their new-found wisdom in three hours in December, and later he will be astounded by the good sense they can write in less time and in half the space in May.

P.S. In summary I should say that any review of his book falls far short in absence of a review of Peter Ward himself. He and his ideas rise from every page he writes and every lecture he gives to open new vistas in new directions.

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